IN THE SUPREME COURT OF THE STATE OF MONTANA
Case Nos. DA 14-0825 & DA 14-0826

No. DA 14-0825

KELLY TYRRELL, as Special Administrator of the
Estate of BRENT T. TYRRELL (deceased)

Plaintiff and Appellee,

v.

BNSF RAILWAY CO., a Delaware Corporation,

Defendant and Appellant.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 14-699

Hon. Michael G. Moses

No. DA 14-0826

ROBERT M. NELSON

Plaintiff and Appellant,

v.

BNSF RAILWAY CO., a Delaware Corporation,

Defendant and Appellee.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 11-417

Hon. G. Todd Baugh

AMICUS BRIEF OF THE MONTANA CHAMBER OF COMMERCE

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INTEREST OF THE *AMICUS CURIAE*

The Montana Chamber of Commerce is the State's largest business federation, representing more than 1,500 business members ranging from small, mom-and-pop operations to large corporations. Member businesses participate in virtually every sector of the economy, including retail, manufacturing, tourism, and agriculture. Guided by business leaders, the Montana Chamber of Commerce works to improve the State's business climate.

As part of its mission, the Montana Chamber files briefs as *amicus curiae* in order to provide courts with the perspective of the broader business community on issues relevant to Montana's ability to attract private sector investment. Promoting legal rules that foster economic growth benefits all Montana residents.

The Montana Chamber has an extremely strong interest in the legal issue before the Court in these cases. Subjecting every company that does substantial business in Montana to lawsuits in Montana courts for *everything* done by the company *anywhere* in the world—the consequence of plaintiffs' position in this case—would create an enormous barrier to outside investment in this State.

Montana competes mightily to attract capital to this State because investment is crucial to creating new jobs and propelling the economy. Jobs are created when companies make capital investments in manufacturing and distribution facilities in Montana; open new service centers, like health care

facilities; and develop or expand agricultural and mineral operations. A large proportion of these investments are made by companies located outside Montana.

It is long-settled law that, when a non-Montana company invests in Montana, the company must answer in Montana courts for its actions *within Montana*. In plaintiffs' view, however, any company from outside Montana that invests in this State also must answer in Montana courts for its acts *everywhere in the United States*—indeed, claims may arise from the company's actions *anywhere in the world*.

Not only is that legal proposition plainly wrong in light of the Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S.Ct. 746, 754 (2014), but endorsement of that principle by this Court would greatly impede Montana's ongoing efforts to attract new capital to this State. Few companies would willingly invest capital here if doing so made Montana a forum for *any* claim anyone in the world might wish to assert.

Ensuring that Montana remains an attractive venue for investment—particularly in light of the substantial competition that States face in attracting new job-producing investment—is a core mission of the Montana Chamber. The Chamber therefore files this brief expressing its views regarding the issue of exceptional importance presented in these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief addresses whether BNSF is subject to general jurisdiction in courts within Montana. The Supreme Court's recent *Daimler* decision makes clear that the answer to that question is "no."

"The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2853 (2011). Under the "canonical opinion in this area," *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), a State may exercise personal jurisdiction over an out-of-state defendant "if the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler*, 134 S.Ct. at 754 (quotation omitted). This limitation on a court's authority "protects [the defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

Applying these due process principles, the Supreme Court has recognized "two categories of personal jurisdiction." *Daimler*, 134 S.Ct. at 754. The first is "general or all-purpose jurisdiction." *Goodyear*, 131 S.Ct. at 2851. Jurisdiction of this sort is permissible "where a foreign corporation's 'continuous corporate

operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings *entirely distinct from those activities*.'" *Daimler*, 134 S.Ct. at 754 (emphasis added) (quoting *Int'l Shoe*, 326 U.S. at 318). The second form of personal jurisdiction, "specific jurisdiction," may be exercised when "the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Id*. (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

This Court—like many other courts—had held prior to the Supreme Court's decision in *Daimler* that general jurisdiction is available when "[a] nonresident defendant that maintains 'substantial' or 'continuous and systematic' contacts with the forum state." *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83 (1990).

In *Daimler*, the Supreme Court expressly rejected this standard. It held that, except in the most extraordinary circumstances, general jurisdiction may be asserted over a corporate defendant only by its state of incorporation and the state in which it is headquartered. That ruling prohibits Montana from asserting general jurisdiction over BNSF.

ARGUMENT

I. The U.S. Constitution Bars Montana From Exercising General Personal Jurisdiction Over BNSF.

Daimler establishes a clear and unambiguous rule: a State may exercise general jurisdiction over a corporation only if the corporation is incorporated or

headquartered within the State, or, in the "exceptional" circumstance in which the State has become a "surrogate" for the company's place of incorporation or headquarters. *Daimler*, 134 S.Ct. at 756 & n.8. Under this clear rule, which has been recognized and applied by courts across the country, a mere showing that a company maintains "substantial," "continuous," or "systematic" contacts with the forum state is insufficient to satisfy the requirements for general jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.

Montana therefore cannot exercise general jurisdiction over BNSF. First, *Daimler*'s clear rule limiting the assertion of general jurisdiction displaces the "continuous and systematic" test formerly applied by this and other courts. Second, because there are no "exceptional" circumstances making Montana BNSF's "surrogate domicile," this is not the unusual case in which Montana may assert general jurisdiction even though it is neither BNSF's place of incorporation nor the State in which its headquarters is located. Third, plaintiffs' suggestion that general jurisdiction is available in any State in which a corporation is obligated to register to do business is barred by the doctrine of unconstitutional conditions. Fourth, nothing in the Federal Employers Liability Act ("FELA") authorizes Montana to exercise general jurisdiction in violation of the limits imposed by the federal Constitution. Fifth, the assertion of general jurisdiction by Montana would trigger

the precise adverse practical consequences that the Supreme Court sought to avoid by adopting the *Daimler* rule.

A. *Daimler* holds that the exercise of general jurisdiction is virtually always limited to a corporation's principal place of business and place of incorporation.

Daimler's holding is unambiguous: general jurisdiction over a corporation is virtually always restricted to its "place of incorporation and principal place of business." 134 S.Ct. at 760. The Supreme Court's conclusion is based on the broad reach of general jurisdiction, which empowers a court to adjudicate "any and all claims against" a defendant, "wherever in the world the claims may arise." *Id*. at 751. General jurisdiction for that reason is available only where a defendant "'is fairly regarded as at home.'" *Id.* at 760 (quoting *Goodyear*, 131 S.Ct. at 2853-54). Individuals are "at home" in their place of "domicile." *Id*. And corporations are "at home" in their place of incorporation and principal place of business. *Id*.

The *Daimler* plaintiffs asserted that general jurisdiction should be available "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" 134 S.Ct. at 761 (citation omitted). The Supreme Court squarely rejected that rule: "That formulation, we hold, is unacceptably grasping." *Id*. As the Court explained, "[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide.

A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n.20.

Plaintiffs' argument that an out-of-state corporation is subject to general jurisdiction in Montana if it has "continuous and systematic contacts" with the State (Pls.' Br. 28-29) is the precise argument that the Supreme Court rejected in *Daimler*. The "contacts" that plaintiffs invoke, *id.* 29-30, are simply irrelevant under *Daimler*.

The proof is in *Daimler*'s reasoning. The question was whether Daimler AG was subject to general jurisdiction in California. The *Daimler* plaintiffs argued that general jurisdiction was available based on the contacts between Daimler's subsidiary Mercedes Benz USA ("MBUSA") and California, which the Court assumed were properly attributable to Daimler. 134 S.Ct. at 760. MBUSA had a regional headquarters in that State, had multiple other facilities there, was "the largest supplier of luxury vehicles to the California market," and made ten percent of its total nationwide sales of vehicles there. *Id.* at 752.

In rejecting the exercise of general jurisdiction, the Supreme Court did *not* address whether these factors amounted to "continuous and systematic contacts;" instead, the Court found these factors irrelevant. The dispositive consideration was

that "neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there." *Daimler*, 134 S.Ct. at 761.[1]

The Court adopted that bright-line rule for two principal reasons. First, a corporation's place of incorporation and principal place of business are "affiliations" that "have the virtue of being unique." *Daimler*, 134 S.Ct. at 760. "[T]hat is, each ordinarily indicates only one place," and that location is "easily ascertainable." *Id*. A rule focusing on these locations therefore both prevents confusion and "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.*

A broader rule—in particular, one that permitted the exercise of general jurisdiction by any State in which the defendant conducts continuous business—"would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S.Ct. at 761-62 (quoting *Burger King*, 471 U.S. at 472). *Daimler*'s "'[s]imple jurisdictional rule[],'" *id*. at 760 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)), thus provides the "predictability" (*Burger King*,

[1] Post-*Daimler* decisions have uniformly interpreted the Supreme Court's ruling to limit the assertion of general jurisdiction to the state of incorporation or principal place of business in the absence of "exceptional" circumstances. *See, e.g.*, *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014). We explain below (at pages 11-14) why the "exceptional" standard is not satisfied here.

471 U.S. at 471-72) and "foreseeability" (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) that is necessary for an assertion of jurisdiction to satisfy the basic due process requirement of "fair play and substantial justice." 134 S.Ct. at 754.

Second, the *Daimler* rule reflects the reality that, with respect to out-of-forum defendants, "'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" 134 S.Ct. at 755 (quoting *Goodyear*, 131 S.Ct. at 2854). As the "Court has increasingly trained on the 'relationship among the defendant, the forum, and the litigation'" (*i.e.*, "specific jurisdiction"), "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id*. at 758. It "is one thing to hold a corporation answerable for operations in the forum State, [and] quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n.19.

Plaintiffs argue at some length (Pls.' Br. 32-36) that *Daimler* should be restricted to assertions of general jurisdiction over non-U.S. companies, because the defendant in that case, Daimler AG, was domiciled in Germany. That is simply wrong.

The *Daimler* Court did cite the international comity concerns implicated in transnational cases, 134 S.Ct. 762-63; but its constitutional law holding rests on the

due process principles that restrict the exercise of personal jurisdiction over all defendants. *See id.* at 753. Nothing in *Daimler*—and none of plaintiffs' arguments—provide any reasoned basis for concluding that jurisdictional limits apply differently to U.S. companies domiciled in other States than they do to companies domiciled in other countries.

Indeed, courts have consistently held that *Daimler*'s rule applies to *all* assertions of general jurisdiction, including those involving U.S. companies. *See, e.g., Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 689 (9th Cir. 2014) (rejecting general jurisdiction over Fannie Mae, a U.S. entity); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 800 (7th Cir. 2014); *Fulbright & Jaworski v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 5 (2015) (Texas-based law firm); *Catholic Diocese of Green Bay v. Doe 119*, 131 Nev. Adv. Op. 29 (2015); *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, 2014 WL 4964506 (D. Mass. Sept. 30, 2014); *Neeley v. Wyeth LLC*, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015).

Indeed, a California appellate court applied *Daimler* to conclude that BNSF is not subject to general jurisdiction in that state. *BNSF Ry. Co. v. Superior Court*, 235 Cal. App. 4th 591, 605 (2015). *Daimler* compels the same conclusion here.

B. BNSF's relationship to Montana does not qualify as "exceptional" and therefore does not permit the exercise of general jurisdiction.

A State that is not a corporation's place of incorporation or its principal place of business may assert general jurisdiction over the corporation only if its relationship with the corporation is "exceptional." *Daimler*, 134 S.Ct. at 761 n.19. That standard is satisfied when facts demonstrate that the forum has become "a surrogate" for the defendant's "place of incorporation or head office." *Id*. at 756 n.8 (quotation omitted). Plaintiffs' assertion that BNSF is subject to general jurisdiction following *Daimler* (Pls.' Br. 30-32) does not come anywhere close to satisfying this standard.

The Supreme Court cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Daimler*, 134 S.Ct. at 755-56 (quotation omitted).

Perkins involved truly "exceptional facts." *Daimler*, 134 S.Ct. at 756 n.8. After the corporate defendant's home forum, the Philippines, was occupied by the Japanese army during World War II, the company moved its headquarters and corporate records to Ohio. *Id.* At the time of suit, Ohio was the company's "principal, if temporary, place of business.'" *Id*. at 756 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984)). "[T]he point on which that opinion turned" was that "[a]ll of [the corporation's] activities were directed by the

company's president from within Ohio." *Id*. at 756 n.8. "No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities." *Id*. Unsurprisingly, the Supreme Court has never again upheld general jurisdiction on this basis; its subsequent decisions all have rejected the assertion of general jurisdiction by States other than a corporation's state of incorporation or state of principal place of business. *See id.* at 756-58 (discussing cases).

Nothing about Montana renders it a "surrogate" for BNSF's principal place of business or place of incorporation. BNSF's operations in Montana, though extensive, do not differ materially from BNSF's operations in dozens of other states. Texas, where BNSF is headquartered, and Delaware, where BNSF is incorporated, are available as venues for general jurisdiction; in those forums, BNSF may be sued on claims arising anywhere in the United States. In every other venue, BNSF is subject to suit only with respect to claims arising out of conduct tied to the forum state. If BNSF were subject to general jurisdiction in Montana based on the operations it conducts in the State, it would be subject to general jurisdiction in *every* other State in which it has comparable operations. But *Daimler* expressly foreclosed that result, because "[a] corporation that operates in many places can scarcely be deemed at home in all of them." 134 S.Ct. at 762 n.20. Such "exorbitant exercises of all-purpose jurisdiction would," the Court explained,

"scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id*. at 761-62. The "exceptional case" exception cannot eviscerate *Daimler*'s limited rule and is therefore limited to "surrogate" states of incorporation or principal place of business.

That is how post-*Daimler* courts have construed the "exceptional case" exception. *Carmouche v. Tamborlee Mgmt., Inc.*, ---F.3d---, 2015 WL 3651521, at *4 (11th Cir. June 15, 2015) ("[a] foreign corporation cannot be subject to general jurisdiction in a forum unless the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business"); *Monkton Ins. Servs.*, 768 F.3d at 432; *Presby Patent Trust v. Infiltrator Sys., Inc.*, 2015 WL 3506517, at *6 (D.N.H. June 3, 2015) (general jurisdiction available only where the forum is "a surrogate for [the defendant's] principal place of business"; "several and continuous contacts with the [forum] state" not sufficient); *Bulwer v. Mass. Coll. of Pharmacy & Health Scis.*, 2014 WL 3818689, at *6 (D.N.H. Aug. 4, 2014) (the "standard" is whether the forum state is "a surrogate place of incorporation or head office"); *GoldenTree Asset Mgmt. LP v. BNP Paribas S.A.*, 64 F. Supp. 3d 1179, 1191 (N.D. Ill. 2014).

Because nothing renders Montana a "surrogate" for BNSF's principal place of business or place of incorporation in the manner that Ohio served as a surrogate for Benguet Consolidated Mining in *Perkins*, general jurisdiction is unavailable in this State.

C. The Constitution prohibits a court from deeming a company's registration to do business within a State as "consent" to the exercise of general jurisdiction by that State.

Plaintiffs' principal argument is that BNSF has "consented to the jurisdiction of the Montana courts for all purposes" by "obtaining a certificate of authority and appointing an in-state agent for service of process." Pls.' Br. 16. Plaintiffs acknowledge that "research has not revealed any Montana cases specifically holding that a foreign corporation's compliance" with the State's registration requirements "operates to establish its consent to all purpose general jurisdiction" (*id*. at 13), but assert that "[n]othing in the Supreme Court's *Daimler* decision compels a different result" (*id*. at 16).

That assertion is flatly wrong. The federal Constitution bars a state from conditioning the right to do business upon a company's waiver of its due process right not to be subject to general jurisdiction.

The doctrine of "unconstitutional conditions" holds that "'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2594 (2013) (citation

omitted). The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id*.

The Supreme Court has long recognized that a state may not "require[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Koontz*, 133 S.Ct. at 2596 (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)); *see also id*. at 2594 ("[T]he government may not deny a benefit to a person because he exercises a constitutional right.") (quotation omitted).

In *Denton*, the Supreme Court invalidated a Texas law that, as a condition of doing business in Texas, barred a company from removing to federal court a suit filed in state court. 146 U.S. at 206-07 (citing Gen. Laws Tex. 1887, pp. 116-17). The statute required a nonresident corporation "requesting the issuance to such corporation of a permit to transact business in th[e] state," to stipulate that if it were sued in Texas and sought to remove to federal court, the corporation would "forfeit and render null and void any permit issued or granted to such corporation to transact business in this state." *Id*. at 207 (quotation omitted). Describing the statute's "attempt to prevent removals" as "vain," the Court concluded that the law "was unconstitutional and void," and that there would be "no validity or effect to any agreement or action of the corporation in obedience to its provisions." *Id*.

That analysis controls here. Montana requires certain out-of-state companies to register to do business in the State in order to "transact business in this state." Mont. Code § 35-1-1030(1). If, as plaintiffs suggest, a registration forces a company to waive its constitutional right to assert a jurisdictional defense, the company would be forced to choose between abstaining from doing business in the state and giving up its constitutional rights. That is precisely what the doctrine of unconstitutional conditions forbids.

Indeed, if the compelled consent here were effective, states could add numerous other "consents" to their foreign corporation registration statutes. For example:

- "The Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values,'" *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 19 (2008), but a state could require foreign companies to waive those protections as a prerequisite to being permitted to do business within the state;
- The Due Process Clause requires states to provide pre-attachment process in certain situations, *Conn. v. Doehr*, 501 U.S. 1, 13-14 (1991), but corporations could be required to waive those protections;

- The Seventh Amendment provides a jury trial right in certain cases, *e.g.*, *Tull v. United States*, 481 U.S. 412, 417-18 (1987), but corporations could be required to waive that right.

The unconstitutional condition doctrine plainly forecloses plaintiffs' suggestion that Montana may adopt a brand new judicial rule under which registration in the State equates to an implicit consent to general jurisdiction.

Even prior to *Daimler*, courts recognized that it would be "constitutionally suspect" to subject a corporation to general jurisdiction as a consequence of registering to do business in the state. *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990); *see also Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) ("[A] foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible."); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

Plaintiffs, in urging a contrary result, point to *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 2015 WL 186833 (D. Del. Mar. 17, 2015). But they fail to mention that another court in the same federal district reached the contrary result, holding that general jurisdiction by compelled consent violates the Constitution (*see AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549 (D.

Del. 2014)), and that these decisions are now on appeal before the Federal Circuit. *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, No. 15-1456 (Fed. Cir.); *AstraZeneca AB v. Mylan Pharm. Inc.*, No. 15-1460 (Fed. Cir.).[2]

Acorda, moreover, does not address the Supreme Court's decisions in *Koontz* and *Denton* or otherwise explain why general jurisdiction based on compelled consent does not violate the unconstitutional conditions doctrine. Those precedents and that settled principle preclude the assertion of general jurisdiction based on registration to do business.

D. FELA does not expand the personal jurisdiction of Montana courts beyond the limits imposed by due process.

Plaintiffs' argument that FELA's venue provision, 45 U.S.C. § 56, provides a basis for the state court's assertion of general personal jurisdiction also fails. *Daimler* holds that the due process clause of the federal Constitution forbids Montana from exercising personal jurisdiction over BNSF, and Congress cannot, via statute, abrogate the due process rights secured by the federal Constitution.

But the Court need not address that constitutional question, because plaintiffs' argument fails on the threshold issue of statutory interpretation: they cite no authority suggesting that FELA authorizes state courts to exercise personal

[2] The Chamber of Commerce of the United States filed amicus briefs in these cases explaining in detail why the U.S. Constitution prohibits a State from conditioning a corporation's right to do business within the State on the corporation's willingness to consent to general personal jurisdiction. See http://goo.gl/rifCJQ and http://goo.gl/InYq6d.

jurisdiction beyond the bounds permitted in other cases. Indeed, the case that plaintiffs trumpet (*see* Pls.' Br. 22-24), *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 55 (1912)), recognized the established principle that the rights created by FELA may "be enforced … in the courts of the states when their jurisdiction, *as prescribed by local laws*, is adequate to the occasion." (Emphasis added). Nothing in *Mondou* suggests that FELA *expands* the jurisdiction of a Montana state court.

Plaintiffs focus on *Mondou*'s conclusion that FELA's special treatment of railroads does not, in and of itself, violate equal protection or due process. Pls.' Br. 24 (quoting *Mondou*, 223 U.S. at 51-53). But the question here is whether *Mondou* interprets FELA to *abrogate* generally-applicable due process rights held by defendants in all cases—and nothing in the Supreme Court's decision supports that proposition.

Nor does plaintiffs' citation to *Denver & R. G. W. R. Co. v. Terte*, 284 U.S. 284, 287 (1932), alter the calculus. *Terte*, decided prior to the Supreme Court's seminal personal jurisdiction decision in *International Shoe*, says absolutely nothing about the *due process* limits on personal jurisdiction. It turned, instead, on antiquated jurisdictional analysis stemming from the Commerce Clause.[3]

[3] Prior to *International Shoe*, jurisdiction turned on "strict territorial approach" to personal jurisdiction that rested on *Pennoyer v. Neff*, 95 U.S. 714 (1877). *See Daimler*, 134 S.Ct. at 753. Under *Pennoyer*, a tribunal's personal jurisdiction "reache[d] no farther

Section 56 of FELA does, of course, have substantial effect: it gives a plaintiff the choice of a state or federal forum. A FELA plaintiff may elect to file suit in any forum, state or federal, that may exercise personal jurisdiction over the defendant—which will generally include, at minimum, the forum(s) in which the plaintiffs' asserted injury occurred, the forum where the defendant is incorporated, and the forum in which the defendant is headquartered. But a FELA plaintiff's substantial discretion in venue does not trump a defendant's fundamental due process rights under the federal Constitution.

E. Endorsing plaintiffs' expansive definition of general jurisdiction will harm Montana's economy and impose heavy burdens on Montana's courts.

Plaintiffs' effort to expand general jurisdiction beyond the bounds permitted by *Daimler* is not simply impermissible under the Constitution. It is also bad policy, which would impose substantial costs on Montana's economy and on Montana's courts.

First, if out-of-state companies doing business in Montana were subject to general jurisdiction in this State for claims that arise *anywhere in the world*, many companies will simply choose not to invest here. This is especially true of non-U.S. companies. With such an expansive rule, "[o]verseas firms * * * could be

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than the geographic bounds of the forum," but *Pennoyer* was overturned by the "canonical" 1945 decision in *International Shoe*. *Id*. at 753-54. As the *Daimler* Court explained, cases "decided in the era dominated by *Pennoyer*'s territorial thinking * * * should not attract heavy reliance today." *Id*. at 761 n.18.

deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); *see also Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Investment in the state, by both non-Montana and non-U.S. companies, is critical to continued economic growth. An October 2013 study found that foreign direct investment "supports a host of benefits in the United States, notably good jobs and innovation led by research and development investment." *Foreign Direct Investment in the United States*, at 11 (Oct. 2013), *available at* https://goo.gl/E0hDHi; *see also* Statement by President Obama on U.S. Commitment to Open Investment Policy (June 20, 2011) (foreign direct investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities"), *available at* https://goo.gl/cHqfX9.

In particular, one 2012 study determined that 7,200 Montana employees work for foreign-controlled companies. Department of Commerce, International Trade Administration, *Montana Exports, Jobs, and Foreign Investment*, *available at* http://goo.gl/1Ca40v. And this says nothing of the thousands more Montanans employed by U.S. companies based outside the State.

Vastly expanding the reach of personal jurisdiction, such that these companies may be sued in Montana on any claim arising anywhere in the world,

will provide a substantial incentive for these companies to locate their operations elsewhere. And it will therefore undermine Montana's efforts to attract investment from out-of-state businesses.

Second, plaintiffs' effort to permit the assertion of general jurisdiction over companies doing business in the State would have a predictable effect on the State's judiciary: Montana courts would be burdened with cases that have nothing to do with Montana and are filed here as the result of forum-shopping. That would require Montana courts to expend substantial resources adjudicating claims that have no connection to incidents occurring in Montana or to Montana residents.

Third, there are no countervailing benefits from imposing these significant costs on Montana's economy and its legal system. Nothing about this case protects Montana residents—plaintiffs acknowledge that they are not residents of this State and that their injuries did not occur here. Of course, out-of-state companies are subject to specific jurisdiction when their "suit-related conduct … create[s] a substantial connection with the forum State." *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014). Unjustified expansion of general jurisdiction therefore is not necessary to ensure that nonresident corporations may be held accountable for their in-forum conduct. Plaintiffs' expansive theory of general jurisdiction will significantly burden Montana without providing any benefits to our State.

CONCLUSION

The Court should conclude that BNSF is not subject to general jurisdiction in Montana.

Dated this 30th day of July, 2015.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: _____
J. Daniel Hoven

Attorneys for the Montana Chamber of Commerce

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that ***AMICUS*** **BRIEF OF THE MONTANA CHAMBER OF COMMERCE**, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 4,991 words.

_____
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of July, 2015, I mailed a true and correct copy of the above and fore going ***AMICUS*** **BRIEF OF THE MONTANA CHAMBER OF COMMERCE**, by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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