IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 18-0693

BNSF RAILWAY COMPANY, NANCY AHERN, and JOHN DOES 1-10,

PETITIONERS,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY and THE HONORABLE KATHERINE BIDEGARAY, PRESIDING JUDGE,

RESPONDENTS.

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

On Petition from the Eighth Judicial District, Cascade County, Montana
Cause No. BDV-14-001, Honorable Katherine Bidegaray

Erik B. Thueson
THUESON LAW OFFICE
213 5th Avenue
P.O. Box 280
Helena, MT 59624-0280
ethueson@gmail.com

Jeffrey Hedger
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
Ph: (406) 896-4100
Jhedger@hedgerlaw.com

Dennis Conner/Keith Marr
CONNER & MARR, PLLP
520 Third Ave. N., P.O. Box 3028
Great Fall, MT 59403-3028
Ph: (406) 727-3550
dennis@connermarr.com
keith@connermarr.com

Attorneys for Robert Dannels

Robert J. Phillips
GARLINGTON, LOHN & ROBINSON
350 Ryman St.
P.O. Box 7909
Missoula, MT 59807-7909
Ph: (406) 523-2500
rjphillips@garlington.com

Attorneys for Petitioners

Mark D. Parker
Samantha A. Howard
Parker, Heitz & Cosgrove, PLLC
401 N. 31st St., Ste. 805
P.O. Box 7212
Billings, MT 59103-7212
Ph: (406) 245-9991
Fax: (406) 245-0971
markdparker@parker-law.com
samanthahoward@parker-law.com

Attorneys for Amicus Curiae
Washington Legal Foundation

Anthony Michael Nicastro
401 North 31st Street, Suite 770
Billings MT 59101
nicastro@knightnicastro.com

Attorney for Amicus Curiae
Association of American Railroads

William W. Mercer
John D. Sullivan
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com
jdsullivan@hollandhart.com

Attorneys for Amicus Curiae
The Montana Chamber of Commerce

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes:

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (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. It regularly 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). 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 under state law. 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.

WLF is concerned that some Montana courts—including the court below—are interfering with the efficient, uniform compensation system established by FELA by overlaying a separate state-law compensation system on top of the one established by Congress. WLF is filing this brief to urge the Court to grant the petition for a writ of supervisory control, in order to rein in unwarranted state-law claims of this sort.

WLF writes in support of the fourth issue raised by Petitioners: the District Court erred in holding that Plaintiff Robert Dannels's claims are not preempted by FELA. WLF does not address other issues raised by the Petition.

STATEMENT OF THE CASE

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 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 course of district court proceedings, BNSF and Ahern have asserted (without success) that Dannels's claims are preempted by federal law. The parties repeatedly clashed over discovery issues. In an order dated November 18, 2018 (App. A, the "Sanctions Order"), the district court held that BNSF had committed discovery abuses. As a sanction, it entered a default judgment against Petitioners on liability and causation; the sole issue to be determined at trial is the measure of damages to which Dannels is entitled. The Sanctions Order also requires BNSF to disclose attorney-client privileged materials.

In December 2018, BNSF and Ahern filed with this Court a petition for writ of supervisory control and for an order staying further proceedings. Among Petitioners' claims: Dannels's underlying claims are preempted by FELA, and thus the district court lacked authority to enter the Sanctions Order.

SUMMARY OF ARGUMENT

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 U.S. Supreme 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, Plaintiff 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, FELA does not authorize punitive-damage awards, and 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, Dannels does not challenge that FELA preempts any effort by him to recover additional damages under Montana

law for injuries arising from his railroad injury. Rather, he contends that the emotional-distress claims he now asserts are not related to that injury but rather arose only after BNSF began its defense against his FELA claim.

That contention is without merit. Dannels's current state-law claims are closely bound up with his initial FELA claim; his litigation-related emotional-distress damages would not have arisen but for his initial on-the-job accident. Those damages, if recoverable at all, are only recoverable in a FELA proceeding. By attempting to recover them under state law, Dannels is attempting an end-run around the limitations on damages imposed by FELA.

Dannels's claims are also preempted because they conflict with Congress's purposes and objectives in adopting FELA. Congress adopted FELA for the purpose of creating a *uniform* nationwide system for injured railroad employees. By seeking additional compensation under state law for Petitioners' alleged bad faith in processing his injury claims, Dannels is undermining the uniformity that Congress sought to achieve.

In light of Congress's broad preemptive intent, WLF urges the Court to reconsider its decision in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 49, 60 P.3d 418. But the state-law claims asserted here by Dannels are far broader than anything authorized by this Court. *Reidelbach* held

that an injured railroad employer could pursue a state-law claim (for injuries arising during the claims-handling process) at the same time that he continued to pursue FELA claims. Dannels, on the other hand, has already obtained a $1.7 million judgment under FELA for injuries relating to his work-related injury, yet now is seeking a second judgment. The proceedings in which that questionable claim is being considered have spun out of control, with the result that Petitioners face a default judgment and an order to produce large numbers of attorney-client protected materials. Given the current posture of the case, the Court ought to consider the preemption issue as part of its overall consideration of the petition for a writ of supervisory control.

ARGUMENT

I. DANNELS'S STATE-LAW CLAIMS ARE PREEMPTED BECAUSE FEDERAL LAW HAS FULLY OCCUPIED THE FIELD

Whether the federal government has preempted an assertion of regulatory authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause of the U.S. Constitution. As the U.S. Supreme Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent ...." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). *See also, Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("The purpose of Congress is the ultimate

touchstone of preemption analysis").

One method by which courts discern a congressional intent to preempt state law is to examine the scope of the federal statute at issue. When federal regulation of a field is sufficiently broad, courts may appropriately infer that Congress "has determined [that the field] must be regulated by its exclusive governance" and that "States are precluded from regulating conduct in [that] field." *Arizona v. United States*, 567 U.S. 387, 399 (2012). The U.S. Supreme Court has explained such "field preemption" as follows:

> The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Id. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The pervasiveness of the regulatory framework established by FELA cannot seriously be contested. Congress adopted FELA in 1908 to ensure that railroad workers nationwide had legal recourse against their employers for on-the-job injuries.[1] The legislation established detailed rules governing such claims, for the purpose of nullifying common-law rules that previously prevented recovery. For

[1] FELA provides in pertinent part, "Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51.

example, FELA abolished contributory negligence as a defense to liability (45 U.S.C. § 53), later (in a 1939 amendment) abolished the assumption-of-risk defense (45 U.S.C. § 54), barred enforcement of any contract exempting railroads from liability for injuries (45 U.S.C. § 55), and provided that plaintiffs need not demonstrate proximate cause in order to recover. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703-04 (2011) ("If negligence is proved ... and is shown to have *played any part, even the slightest, in producing the injury*, then the carrier is answerable in damages even if the extent of the injury or the manner in which it occurred was not probable or foreseeable.") (emphasis in original) (citations omitted). In other words, Congress adopted FELA in order to overturn the many conflicting state laws that had deprived injured railroad employees of compensation.

Congress also included within FELA detailed common-law rules that *limited* employees' right to compensation for certain kinds of injuries. For example, 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 them in immediate risk of physical harm. *Gottshall*, 512 U.S. at 554-555.[2] An asymptomatic worker who has been exposed

[2] The Court explained that a rule authorizing broader recovery of emotional distress damages "can lead to unpredictable and nearly infinite liability for

to carcinogens such as asbestos may not 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). Nor does FELA permit injured employees to recover punitive damages or pre-judgment interest. *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988).

Given the comprehensiveness of FELA's compensation regime and Congress's expressed desire that that regime would replace pre-existing compensation schemes available under state law, the most reasonable conclusion is that Congress intended to preempt alternative compensation schemes.

A. Case Law from the U.S. Supreme Court and Courts Outside Montana Unanimously Recognizes that Congress, when It Adopted FELA, Intended to Establish an Exclusive Federal Regime Governing Railroad Injuries

Very soon after FELA's adoption, a series of U.S. Supreme 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

---

defendants." *Id.* at 552. The Court's limitation on recovery was "based upon the recognized possibility of *genuine* claims from 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).

country.

New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917), 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 Supreme 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.).

Similarly, the Supreme Court held 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). 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.[3]

Winfield, *Erie*, and *Tonsellito* continue to be cited on a regular basis by other courts in support of their findings 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*, 825 F.2d at 1395; *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,

[3] The Supreme 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.

2014).

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). So for purposes of determining whether Dannels's emotional-distress and punitive-damages claims are preempted, it is irrelevant that he likely would not have been permitted to recover those damages in connection with his FELA action.

BNSF does not contend, of course, that railroad employees can *never* recover from their employers under state law. The relevant statute, 45 U.S.C. § 51, limits the FELA "field" to employment-related injuries involving employees of railroads engaged in interstate commerce. So the employees of a railroad that operates solely in one State may utilize state-law remedies for their injuries. FELA is also inapplicable if the injury is unrelated to events that occurred while the plaintiff is working for the railroad. Thus, if a railroad company hires thugs to assault one of its employees while she is sleeping at home, the employee may seek

compensation under state tort law.

But Dannels cannot plausibly argue that his state-law claims are unrelated to his March 2010 on-the-job injury. In the absence of that injury, there would have been no subsequent FELA claim, BNSF would not be alleged to have owed any fiduciary duties to Dannels, and Dannels would not have suffered the emotional distress allegedly caused by BNSF's breach of a duty of good faith in handling and defending against Dannels's FELA claim. The fact that an individual incurs additional damages after he ceases working for the railroad does not remove those damages claims from FELA's purview. Otherwise, for example, an individual who develops mesothelioma some years after his retirement as a result of on-the-job exposure to asbestos would not be permitted to seek recovery under FELA for post-retirement medical expenses incurred in treating the disease.

Thus, a former employee who claims that the railroad injured him by fraudulently inducing him to settle a FELA claim may *not* seek relief under state tort law. *Counts v. Burlington Northern R.R. Co.*, 896 F.2d 424, 425 (9th Cir. 1990); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952). Such claims are preempted by FELA; the former employee may obtain fraud compensation, if at all, only in a FELA action. *Id.*

Dannels's March 2010 injury, which a jury determined to have been caused

by BNSF's negligence, occurred "while he [wa]s employed by [BNSF]," 45 U.S.C. § 51, and all his subsequent claims for damages flow directly from that injury. Accordingly, Dannels's state-law claim that he suffered additional emotional distress due to BNSF's response to his initial FELA claim is located within the field preempted by FELA. A Montana federal district court reached precisely that conclusion in dismissing state-law claims that a railroad acted in bad faith in its handling of an employee's FELA claim. *Toscano v. Burlington Northern R.R. Co.*, 678 F. Supp. 1477, 1479 (D. Mont. 1987) (holding that "FELA presents the exclusive remedy in all actions falling within the ambit of the Act, to the exclusion of the common and statutory law of the several states"). The Court should follow *Toscano*'s lead and order dismissal of Dannels's claims.

B. This Court Also Recognizes that FELA Preempts a Broad Field

This Court has similarly recognized that Congress intended to preempt all state law within the field occupied by FELA. While the Court has expressed some doubts about the precise scope of that field, its decisions are fully consistent with BNSF's assertion that FELA preempts all of Dannels's state-law claims.

In *Sinclair v. Burlington Northern and Santa Fe Railway Co*, 2008 MT 424, 347 Mont. 395, 200 P.3d 46, the Court held that field-preemption principles barred a railroad employee's state-law claim that he suffered damages when his employer

fraudulently induced him to settle FELA claims. The Court explained that claims for damages incurred when a railroad fraudulently induces settlement of a FELA claim fall within the field over which Congress has asserted exclusive control, and thus such claims may only be raised in a FELA lawsuit challenging the FELA settlement. 347 Mont. at 404-07. Permitting fraudulent-inducement claims to be litigated under state law would inappropriately "lead to results that would vary from state to state." *Id.* at ¶ 32.

The Court also recognized FELA's field-preemptive effect in *Reidelbach*. It stated that FELA provides the "sole remedy for physical injuries sustained by a railroad employee, any part of whose duties further interstate commerce, who is injured on-the-job as a result of negligence of an employer" —without regard to whether the FELA remedy permits compensation for the types of damages allegedly incurred as a result of the physical injury. *Reidelbach*, at ¶ 16. The Court went on to conclude that the employee's state-law claims for emotional-distress damages arising from the defendant's bad-faith handling of a FELA lawsuit were *not* federally preempted.

Importantly, however, *Reidelbach* relied heavily on the fact that the state-law claims were being asserted in tandem with the employees' FELA claims, which had been neither settled nor tried. *Id.* at ¶ 44 (deeming that fact a "critical

distinction" from cases finding FELA preemption). The Court has never upheld an employee's right to assert a state-law bad-faith claim even *after* FELA claims have been fully adjudicated. When, as here, the employee files his state-law bad-faith claim after obtaining a FELA judgment that compensates him to the full extent permitted by federal law, he can legitimately be accused of inappropriate double-dipping. The Court should not countenance such litigation tactics. If an employee believes that the railroad is conducting FELA litigation in an inappropriate manner, he should raise that issue with the judge hearing his FELA claim (as the plaintiff did in *Reidelbach*) and request appropriate damages/ sanctions from that court.

Sinclair explained that when a FELA lawsuit results in either settlement or a pro-plaintiff judgment, "it establishes negligent liability and assigns a monetary value to the work-related claim." *Id.* at ¶ 34. Once that value is assigned, *Sinclair* reasoned, any additional damage claims arising in connection with the initial injury are preempted by FELA because they are "linked inextricably to the FELA claim." *Id.*

In his opposition brief, Dannels urges the Court not to consider Petitioners' preemption claim because that claim could be asserted later in connection with an appeal from the final verdict. Response at 2. But if the Court is inclined to

consider the other issues raised in the Petition, it would be wholly appropriate to review the preemption issue at the same time. Indeed, a ruling that Dannels's claims are preempted by federal law would eliminate any need to address the thorny sanctions issues raised by the petition.

Supervisory control is also warranted because double-dipping of the sort on display here has become the norm in FELA litigation filed in Montana's court. Such litigation imposes severe burdens on railroads and taxes the courts' resources to an unwarranted degree.

II. DANNELS'S STATE-LAW CLAIMS ARE PREEMPTED BECAUSE THEY STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT OF CONGRESS'S OBJECTIVES

State laws are also preempted when they conflict with federal law. A conflict exists whenever "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. at 399 (internal citations omitted).

Dannels's state-law claims create just such an obstacle and thus are preempted. One of Congress's major objectives in adopting FELA was to create uniform liability standards governing compensation claims submitted by injured railroad workers. That uniformity objective has been repeatedly recognized by both the U.S. Supreme 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."); *Counts*, 896 F.2d at 425 ("uniform 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 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.").

This Court has similarly recognized that one of Congress's principal goals in adopting FELA was to create a uniform national standard for compensating injured railroad workers. *Sinclair* refused to permit railroad workers to file state-law fraud claims as a means of challenging FELA releases, explaining that "[t]o permit independent state-law actions for fraud in inducing FELA releases would lead to results that would vary from state to state. That we cannot allow." *Id.* at ¶ 32.

By seeking additional compensation under state law for Petitioners' alleged bad faith in processing his injury claims, Dannels is undermining the uniformity that Congress sought to achieve. If Dannels's state-law cause of actions are

recognized, the compensation claims submitted by railroad employees in Montana will receive more favorable treatment than the compensation claims submitted by similarly situated employees injured in other States.

Such non-uniformity is particularly unwarranted when one considers that railroad employees often work in more that 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 Dannels's anti-preemption arguments are 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.

///

///

///

CONCLUSION

WLF requests that the Court grant the petition.

DATED this 25th day of January 2019.

Respectfully submitted,

/s/ *Mark D. Parker*
Mark D. Parker
Samantha A. Howard
401 North 31st Street, Suite 805
P.O. Box 7212
Billings, MT 59103-7212

Attorneys for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is proportionately spaced, with a Times New Roman text typeface of 14 points; is double spaced; and is 4,312 words, excluding certificate of service and certificate of compliance.

/s/ Mark D. Parker

Mark D. Parker
Attorneys for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2019, I filed true and correct copies of the foregoing BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, with the Clerk of the Montana Supreme Court by e-mail at the instruction of the Clerk of the Supreme Court due to technical problems with the e-filing system on this matter; and that I have served true and accurate copies on each attorney of record with interests in this matter, as follows:

Eric B. Thueson
P.O. Box 280
213 Fifth Avenue
Helena MT 59624
ethueson@gmail.com
Representing: Robert Dannnels
Service Method: E-mail Delivery

Robert J. Phillips
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
rjphillips@garlington.com
Representing: Nancy Ahern, BNSF Railway Co.
Service Method: E-mail Delivery

Katherine M. Bidegaray (Respondent)
300 12th Ave. NW, Suite 2
Sidney MT 59270
Service Method: Conventional

Jeffrey Hedger
2800 Central Ave., Suite C
Billings MT 59102
jhedger@hedgerlaw.com
Representing: Nancy Ahern, BNSF Railway Co.
Service Method: E-mail Delivery

Dennis P. Conner
520 3rd Ave. N.
P.O. Box 3028
Great Falls MT 59403-3028
dennis@connermarr.com
keith@connermarr.com
Representing: Robert Dannels
Service Method: E-mail Delivery

Anthony Michael Nicastro
401 North 31st Street, Suite 770
Billings MT 59101
nicastro@knightnicastro.com
Representing: Association of American Railroads
Service Method: E-mail delivery

William W. Mercer
John D. Sullivan
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com
jdsullivan@hollandhart.com
Representing: The Montana Chamber of Commerce
Service Method: E-Mail Delivery

/s/ Mark D. Parker