IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 19-0343

ROBERT DANNELS,
Plaintiff/Appellee,

v.

BNSF RAILWAY CO.,
Defendant/Appellant.

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, Cause No. BDV-14-001
Hon. Katherine Bidegaray

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT

Deepak Gupta
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 302
Washington, DC 20036
202-246-0572
deepak@guptawessler.com

Andrew S. Tulumello
GIBSON DUNN & CRUTCHER
1050 Connecticut Ave., NW
Washington, DC 20036
202-955-8500
atulumello@gibsondunn.com

Dennis Conner
Keith Marr
CONNER & MARR, PLLP
520 Third Avenue North
P.O. Box 3028
Great Falls, MT 59403-3028
406-727-3550
dennis@connermarr.com
keith@connermarr.com

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

Attorneys for Plaintiff/Appellee

Jeff Hedger
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
406-896-4100
jhedger@hedgerlaw.com

Attorneys for Defendant-Appellant

Mark D. Parker
Samantha A. Howard
401 North 31st Street
P.O. Box 7212
Billings, MT 59103
406-245-9991
markdparker@parker-law.com
samanthahoward@parker-law.com

Attorneys for Amicus Curiae
Washington Legal Foundation

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INTEREST 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 filed a brief in this matter in support of Appellant BNSF Railway Co.'s December 11, 2018 petition for a writ of supervisory control. *BNSF Railway Co. v. Montana Eighth Judicial District Court*, 2019 WL 1125342 (Mont., Mar. 12, 2019).

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 this Court's decision in *Reidelbach v. Burlington*

Northern and Santa Fe Ry. Co., 2002 MT 289, 312 Mont. 49, 60 P.3d 418, has prompted some Montana courts—including the court below—to interfere 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 reconsider its *Reidelbach* decision and reverse the judgment below, in order to rein in unwarranted state-law claims of this sort.

STATEMENT OF THE CASE

Appellee Robert Dannels suffered an injury in March 2010 while working for BNSF. 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 returned a verdict in Dannels's favor. After the district court denied BNSF's motion for a new trial, the parties settled the case for $1.7 million, the full amount of the verdict.

Dannels filed this second lawsuit in 2014, alleging that BNSF 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 alleged that BNSF's FELA-related misconduct caused

him to suffer emotional distress, entitling him to compensatory damages. Dannels also sought 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.

BNSF filed a motion for summary judgment, asserting among other things that Dannels's claims were preempted by federal law, under both field-preemption and conflict-preemption analyses. In a January 2018 order, the district court denied the motion. It stated, "This Court will not undertake the preemption analysis Defendants urge because the Montana Supreme Court has already done so and ruled against BNSF on the same arguments." Dkt. 176, at 3 (citing *Reidelbach*). It added, "This court is bound to follow *Reidelbach*. *Reidelbach* disposes the Defendants' preemption arguments in Dannels' favor." *Id.* at 5. BNSF sought review of the preemption decision by filing two separate petitions with this Court for a writ of supervisory control. The Court denied both petitions, reasoning that "preemption ... is an issue for which the normal appeals process is adequate." 2019 WL 11234342 at *4. Dissenting from the decision not to order full briefing on BNSF's preemption claim, Justice McKinnon stated that "the facts and circumstances of *Reidelbach* are distinguishable from those here," and added:

[T]here is ample federal authority, not discussed in *Reidelbach*, which

> appears to provide FELA is the exclusive remedy for injured railroad workers; that Congress intended FELA to "occupy the field"; and that FELA preempts state-law claims based on injuries arising from a railroad's conduct.

Ibid (McKinnon, J., dissenting).

In May 2019, the district court entered a stipulated final judgment for Dannels and against BNSF for $7.4 million. BNSF has paid $2.25 million of that amount. The judgment approved the parties' stipulations, including that: (1) BNSF preserved its right to appeal denial of its motion for summary judgment (which argued that FELA preempted Dannels's claims); and (2) if BNSF prevails on its preemption argument on appeal, BNSF will owe nothing further to Dannels.

SUMMARY OF ARGUMENT

Congress adopted FELA in 1908 to provide railroad employees a right to recover for work-related injuries that were caused, in whole or in part, by 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. Plaintiff Dannels benefitted greatly from the statute; he has never suggested that his $1.7 million FELA judgment did not adequately compensate him for his on-the-job injuries.

But while FELA includes a comprehensive compensation scheme, Congress imposed some limits on the extent of railroad liability. For example, FELA does not authorizes 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 on-the-job 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 state-law claims are closely bound up with his initial FELA claim; his 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 to create a *uniform* nationwide system for injured railroad employees. By seeking additional compensation under state law for BNSF's alleged bad faith in processing his injury claims, Dannels is undermining the uniformity that Congress sought to achieve. Montana courts stand alone in permitting successful FELA claimants to seek a second recovery based on alleged bad-faith FELA litigation activity.

In light of Congress's broad preemptive intent, WLF urges the Court to reconsider *Reidelbach*. But Dannels's state-law claims are far broader than anything previously 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) together with his FELA claims. In contrast, Dannels has already obtained a $1.7 million judgment under FELA for injuries relating to his work-related injury yet now seeks a second judgment. Such "double-dipping" by FELA claimants effectively deprives railroads of their ability to defend against insubstantial FELA claims because they fear that an aggressive defense will be cited in subsequent litigation as evidence of bad faith.

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. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990) ("Pre-emption fundamentally is a question of congressional intent ..."). The Supreme Court "do[es] not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017).

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. (citations omitted).

FELA establishes a very pervasive regulatory framework. 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 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. *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

[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.

original). In other words, Congress adopted FELA to overturn the many conflicting state laws that had blocked compensation for injured railroad employees.

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 him in immediate risk of physical harm. *Gottshall*, 512 U.S. at 554-555.[2] An asymptomatic worker who has been exposed 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, *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987), or pre-judgment interest. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988).

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

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. The U.S. Supreme Court Recognizes that Congress, when It Adopted FELA, Established an Exclusive Federal Regime Governing Railroad Injuries

Numerous U.S. Supreme Court decisions establish 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 followed by courts across the country.

New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917) ["*Winfield*"], involved a railroad worker who sustained an eye injury while employed in interstate commerce. The employee sought compensation not under FELA, but under New York State's workers' compensation law. The 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 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) ["*Erie*"]. The Court held in *New York Central & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917), that FELA preempts state-law claims filed by relatives of the injured railroad worker. Holding that a father could not recover for medical expenses he incurred on behalf of his minor son and for the loss of his son's services, the Court explained that FELA "is comprehensive and also exclusive in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce." 244 U.S. at 361.

Reidelbach rejected the defendant's field-preemption claim without citing *any* Supreme Court FELA case law, simply stating (without citation), "We therefore conclude that the FELA does not so pervasively 'occupy the field' of

recovery for injured railroad employees as to preempt all supplemental state remedies." 312 Mont. 507, ¶ 26. It did not explain why state-law bad-faith claims do not fall within the field occupied by FELA even though numerous other similar "supplemental state remedies"—state no-fault workers' compensation remedies (*Winfield*), state no-fault employer-liability statutes (*Erie*), state remedies for damages incurred by relatives of injured railroad workers (*Tonsellito*)—*do* fall within that field and thus are preempted, even though preemption means that certain types of damages (*e.g.*, injuries not attributable to the railroad's negligence) cannot be recovered.

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

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

Dice, 342 U.S. at 361. Contrary to *Dice*, Montana's bad-faith cause of action restricts railroads' right to defend FELA actions vigorously (by, for example, requiring the employer in many instances to advance lost wages and medical

expenses while the issue of FELA liability is still being contested). Indeed, Dannels's complaint focuses almost exclusively on allegations that BNSF defended too vigorously against his claims for compensation under FELA. Complaint ¶¶ 17-26 (alleging that BNSF breached its state-law duties by failing to offer an adequate settlement amount or negotiate in good faith, and failing to advance Dannels his lost wages and retirement benefits during the pendency of his FELA suit). *Dice* held that such state-law rules are field preempted.

Reidelbach stated that field preemption is inapplicable because injuries caused by a railroad's bad-faith handling of a FELA claim are not part of any preempted field—they are distinct from the on-the-job injuries that gave rise to the initial FELA claim and often occur after the claimant's railroad employment has ceased. 312 Mont. at 506-07, ¶ 26. But that rationale cannot be reconciled with *Winfield*, *Erie*, *Tonsellito*, and *Dice*, which held that Congress intended FELA "to be very comprehensive" and "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws." *Winfield*, 244 U.S. at 150.

Reidelbach's rationale—that any FELA preemption does not cover damages incurred after the worker's employment by the railroad ends—would permit workers to seek compensation under state law for virtually all of their damages.

For example, if (as often occurs) a railroad worker's injuries prevent further employment, *any* medical bills incurred by a former employee in the years following his retirement could be recovered under state law, even when the bills are for treatment of the lingering effects of his on-the-job injury. Emotional distress damages incurred post-retirement in connection with the worker's FELA claims cannot be meaningfully distinguished from other post-retirement damages. Both types of damages would not have arisen but for the worker's on-the-job accident; the field-preemption principles set out in U.S. Supreme Court FELA case law require that both types of damages are recoverable, if at all, only in a FELA proceeding.

B. Courts Outside Montana Uniformly Apply Field Preemption to Bar Claims of the Sort Asserted by Dannels

Winfield, *Erie*, *Tonsellito*, and *Dice* are cited regularly 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, 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.

Dannels cannot plausibly argue that his state-law claims are unrelated to his March 2010 on-the-job injury. Without 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 responding to Dannels's FELA claim. 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 his injuries.

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 law. *Counts v. Burlington Northern R.R. Co.*, 896 F.2d 424, 425 (9th Cir. 1990); *Dice*, 342 U.S. at 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 was caused by BNSF's negligence, occurred "while he [wa]s employed by [BNSF]," 45 U.S.C. § 51, and all his later damages claims 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 falls within the field pervasively occupied by FELA. A Montana federal district court reached precisely that conclusion in dismissing state-law claims that a railroad acted in bad faith in handling 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. The Court should overrule *Reidelbach* to the extent that it is inconsistent with *Toscano*.

C. 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 largely consistent with BNSF's assertion that FELA preempts all of Dannels's state-law claims.

In *Sinclair v. Burlington Northern and Santa Fe Ry. 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.

Reidelbach also recognized FELA's field-preemptive effect. 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" —regardless whether FELA

permits compensation for the types of damages allegedly incurred as a result of the physical injury. *Reidelbach*, at ¶ 16.

Reidelbach ultimately concluded 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, the Court repeatedly noted 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 *after* FELA claims have been settled or fully adjudicated. When, as here, a FELA judgment compensates an employee to the full extent permitted by FELA, federal law does not permit a second recovery. If an employee believes that the railroad is responding to his FELA claims inappropriately, he should raise that issue with the judge hearing the claims (as the plaintiff did in *Reidelbach*) and request appropriate damages/sanctions from that court.[3]

Sinclair explained that when a FELA lawsuit results in either settlement or a

[3] To be clear, WLF believes that *Reidelbach* erred by permitting the injured railroad employee to proceed under state law in addition to FELA. But nothing in that decision supports Dannels's claim: that he should be permitted to collect a judgment under FELA and then file a separate state-law bad-faith claim against the railroad.

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.*

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. Conflict preemption applies whenever "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. at 399.

Dannels's state-law claims create just such an obstacle and thus are preempted. Congress adopted FELA to create uniform liability standards governing compensation claims submitted by injured railroad workers. Courts have repeatedly recognized that uniformity objective. *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 also recognizes that a principal goal of FELA is creation of a uniform national standard for compensating injured railroad workers. *Sinclair* barred railroad workers from filing state-law fraud claims 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. This we cannot allow." *Id.* at ¶ 32.

By seeking additional compensation under state law for BNSF's alleged bad faith, Dannels is undermining the uniformity that Congress sought to achieve. If Dannels's state-law causes of action 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 elsewhere.

Such non-uniformity is particularly unwarranted when one considers that

railroad employees often work in more than one State. Consider an engineer injured while driving a locomotive from Minnesota to Washington State. Due-process limitations on personal jurisdiction mean that a lawsuit seeking compensation for damages arising out of that injury will likely need to be filed in the State in which the injury occurred. *See Tyrrell*, 137 S. Ct. at 1559-60. If the district court's anti-preemption holding is upheld, then the engineer's compensation claims will be on far stronger footing if his injury occurs while the train is traveling through Montana than when the train later reaches Idaho. Basing liability standards on where a fast-moving train happens to be located at the moment of injury stands as a significant obstacle to accomplishment of Congress's goal of creating a uniform liability standard governing FELA compensation claims.

III. THE DECISION BELOW IMPAIRS EMPLOYERS' ABILITY TO DEFEND AGAINST FELA CLAIMS

Montana's bad-faith cause of action is problematic not only for BNSF but for the entire railroad industry. It permits "double dipping" by FELA claimants. They can sue their employers for work-related injuries under FELA and then sue again alleging bad faith if the employers do not concede the validity of their claims. Congress could not have had a compensation system of that sort in mind when it adopted FELA.

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

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

Moreover, as this case illustrates, Montana's bad-faith cause of action frequently leads to protracted and expensive litigation disputes involving attempted discovery of the defendant railroad's nationwide FELA settlement practices. BNSF's reluctance to produce documents involving FELA settlement practices

outside Montana led the district court to enter a default judgment against BNSF on the issues of liability and causation. It also led the district court to threaten a default judgment on compensatory and punitive damages unless BNSF produced documents containing confidential assessments of thousands of individual FELA claims, and to issue an order to show cause why BNSF's General Counsel should not be held in contempt of court when BNSF resisted production of those confidential documents. Congress adopted FELA to establish a uniform and efficient means by which railroad employees could obtain compensation for on-the-job injuries, not a system designed to permit the plaintiffs' bar to double dip and undertake invasive discovery of confidential material.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders denying summary judgment and entering final judgment, and should direct entry of judgment in favor of BNSF.

DATED this 25th day of September 2019.

Respectfully submitted,

/s/ Mark D. Parker
Mark D. Parker
Samantha A. Howard
401 North 31st Street
P.O. Box 7212
Billings, MT 59103
(406) 245-9991
markdparker@parker-law.com
samanthahoward@parker-law.com

Attorneys for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Brief of the Washington Legal Foundation as *amicus curiae* in support of Appellant is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and according to the word processing system used to prepare this brief (Microsoft Word), the word count of the brief is 4,921, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance.

DATED this 25th day of September, 2019.

/s/ Mark Parker
Mark Parker

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 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; and that I have served true and accurate copies on each attorney of record with interests in this matter, as follows:

Deepak Gupta (Attorney)
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 302
Washington, DC 20036
deepak@guptawessler.com
Representing: Robert Dannels
Service Method: eService

Dennis Conner (Attorney)
Keith Marr (Attorney)
CONNER & MARR, PLLP
520 Third Avenue North
P.O. Box 3028
Great Falls, MT 59403-3028
dennis@connermarr.com
keith@connermarr.com
Representing: Robert Dannels
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620
Representing: State of Montana
Service Method: eService

Andrew S. Tulumello (Attorney)
GIBSON DUNN & CRUTCHER
1050 Connecticut Ave., NW
Washington, DC 20036
atulumello@gibsondunn.com
Representing: BNSF Railway Co.
Service Method: eService

Robert J. Phillips (Attorney)
GARLINGTON, LOHN & ROBINSON, PLLP
P.O. Box 7909
Missoula MT 59807
rjphillips@garlington.com
Representing: BNSF Railway Co.
Service Method: eService

Jeffrey Wayne Hedger (Attorney)
HEDGER FRIEND, P.L.L.C.
2800 Central Ave., Suite C
Billings MT 59102
jhedger@hedgerlaw.com
Representing: BNSF Railway Co.
Service Method: eService

/s/ Mark Parker
Mark Parker