IN THE SUPREME COURT OF THE STATE OF OREGON

LILLIAN FIGUEROA,

Plaintiff-Adverse Party,

vs.

BNSF RAILWAY COMPANY, a corporation,

Defendant-Relator.

Multnomah County Circuit Court
No. 15CV13390

SC No. S063929

MANDAMUS PROCEEDING

BRIEF ON THE MERITS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

Robyn Ridler Aoyagi, OSB #000168
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
(503) 221-1440
robyn.aoyagi@tonkon.com

Attorney for Amicus Curiae
Washington Legal Foundation

Noah Jarrett, OSB #994484
Aukjen Ingraham, OSB #023338
W. Michael Gillette, OSB #660458
Sara Kobak, OSB #023495
Schwabe, Williamson & Wyatt, PC
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204
(503) 222-9981
njarrett@schwabe.com
aingraham@schwabe.com
wmgillette@schwabe.com
skobak@schwabe.com

(Counsel continued on next page)

Stephen C. Thompson, OSB #763597
Kristen A. Chambers, OSB #130882
Kirkland Thompson & Pope
1000 SW Broadway, Suite 1616
Portland, OR 97205
(503) 222-1640
steve@ktp-law.com
kristen@ktp-law.com

Attorneys for Plaintiff-Adverse-Party

June 2016

Andrew S. Tulumello
(*pro hac vice* pending)
Michael R. Huston
(*pro hac vice* pending)
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5036
(202) 955-8657
atulumello@gibsondunn.com
mhuston@gibsondunn.com

Attorneys for Defendant-Relator

TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. The Outcome of This Case Will Have Far-Reaching Impact on Oregon's Economy and National Reputation 8

II. BNSF Did Not Consent to General Jurisdiction by Registering to Do Business in Oregon, and It Would Be Unconstitutional for Oregon to Condition Registration on Such Consent 11

III. FELA Does Not Expand the Personal Jurisdiction of Oregon Courts, Nor Could It 17

IV. This Court Should Not Reward Plaintiff's Brazen Forum-Shopping 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Federal Cases

Action Embroidery Corp. v. Atl. Embroidery Corp.,
368 F3d 1174 (2004) 17

Atl. Marine Constr. Co. v. U.S. Dist. Court for the Western Dist. of Texas,
--- U.S. ----, 134 S Ct 568, 187 L Ed 2d 487 (2013) 18

Brown v. Lockheed Martin Corp.,
814 F3d 619 (2d Cir 2016) 13, 16

Burger King Corp. v. Rudzewicz,
471 US 462, 105 S Ct 2174, 85 L Ed 2d 528 (1985) 9, 12

Daimler AG v. Bauman,
--- U.S. ----, 134 S Ct 746, 187 L Ed 2d 624 (2014) .....passim

Frost & Frost Trucking Co. v. R.R. Comm'n,
271 US 583, 46 S Ct 605, 70 L Ed 1101 (1926) 13

Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 US 915, 131 S Ct 2846, 180 L Ed 2d 796 (2011) 1

Hanna v. Plumer,
380 US 460, 85 S Ct 1136, 14 L Ed 2d 8 (1965) 22

Hanson v. Denckla,
357 US 235, 78 S Ct 1228, 2 L Ed 2d 1283 (1958) 19

Haywood v. Drown,
556 US 729, 129 S Ct 2108, 173 L Ed 2d 920 (2009) 20

Hertz Corp. v. Friend,
559 US 77, 130 S Ct 1181, 175 L Ed 2d 1029 (2010) 9

In re CSX Transp., Inc.,
151 F3d 164 (2d Cir 1998) 20

Keely v. Pfizer, Inc.,
No. 4:15-cv-0583, 2015 WL 3999488 (ED Mo July 1, 2015) 16

Koontz v. St. Johns River Water Mgmt. Dist.,
--- US ----, 133 S Ct 2586, 186 L Ed 2d 697 (2013) 13

Lanham v. Pilot Travel Ctrs., LLC,
No. 3:14-cv-1923-HZ, 2015 WL 5167268 (D Or Sept 2, 2015).....11

Leonard v. USA Petroleum Corp.,
829 F Supp 882 (SD Tex 1993).....16

Leroy v. Great Western United Corp.,
443 US 173, 99 S Ct 2710, 61 L Ed 2d 464 (1979) 17

Maresse v. Am. Acad. of Orthopaedic Surgeons,
470 US 373, 105 S Ct 1327, 84 L Ed 2d 274 (1985) 20

Martin v. D-Wave Sys. Inc.,
No. 09-cv-3602, 2009 WL 4572742 (ND Cal Dec 1, 2009).....12

Miss. Univ. for Women v. Hogan,
458 US 718, 102 S Ct 3331, 73 L Ed 2d 1090 (1982) 20

Public Impact, LLC v. Boston Consulting Grp., Inc.,
117 F Supp 3d 732, 738-40 (MD NC 2015).....16

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 US 47, 126 S Ct 1297, 164 L Ed 2d 156 (2006) 14

S. Pacific Co. v. Denton,
146 US 202, 13 S Ct 44, 36 L Ed 942 (1892) 13, 14

United States v. Am. Library Ass'n, Inc.,
539 US 194, 123 S Ct 2297, 156 L Ed 2d 221 (2003) 14

World-Wide Volkswagen Corp. v. Woodson,
444 US 286, 100 S Ct 559, 62 L Ed 2d 490 (1980) 10, 19

Other Cases

Boise Cascade Corp. v. Bd. of Forestry,
325 Or 185, 935 P2d 411 (1997) 20

Bristol-Myers Squibb Co. v. Superior Court,
No. S221038 (Cal S Ct filed Sept. 5, 2014) 1

Genuine Parts Co. v. Cepec,
--- A3d ---, 2016 WL 1569077 (Del Apr 18, 2016) 16

State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.,
358 Or 501, 366 P3d 316 (2015) 21

Federal Statutes

45 USC §§ 51-60 3

45 USC § 56.....6, 17

Rules

ORCP 4 A(4).....4, 8

Other Authorities

Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF LEGAL OPINION LETTER (Apr 1, 2016) 1

James M. Beck, *Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after* Daimler AG v. Bauman, WLF WORKING PAPER (Nov 2015).....1, 15

Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L Rev 1507, 1507 (1995) 22

Mark Moller, *Contra Plaintiffs' Bar, Registering to Do Business Does Not Create General Jurisdiction*, WLF LEGAL OPINION LETTER (June 10, 2016) 1

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states, including Oregon. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF frequently appears in federal and state courts to urge diligent adherence to due-process constraints on the judiciary's exercise of personal jurisdiction. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 131 S Ct 2846, 180 L Ed 2d 796 (2011); *Bristol-Myers Squibb Co. v. Superior Court*, No. S221038 (Cal S Ct filed Sept. 5, 2014).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles concerning the constitutional scope of personal jurisdiction. *See, e.g.*, Mark Moller, *Contra Plaintiffs' Bar, Registering To Do Business Does Not Create General Jurisdiction*, WLF LEGAL OPINION LETTER (June 10, 2016); Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF LEGAL OPINION LETTER (Apr 1, 2016); James M. Beck, *Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after* Daimler AG v. Bauman, WLF WORKING PAPER (Nov 2015).[1]

[1] The articles are available on WLF's website. The Moller article is available at http://www.wlf.org/upload/legalstudies/legalopinionletter/061016LOL_Moller.

In its seminal decision in *Daimler AG v. Bauman*, --- U.S. ----, 134 S Ct 746, 187 L Ed 2d 624 (2014), the U.S. Supreme Court made clear that state and federal courts lack personal jurisdiction over a corporate defendant unless (1) its activities within the forum state give rise to the claims being asserted or (2) the corporation is "at home" in the forum state. In sharply curtailing its prior "continuous, substantial, and systematic" rationale for general personal jurisdiction, *Daimler* clarified that a corporation, even one that conducts "continuous, substantial, and systematic" business in all 50 states, can be deemed "at home" in no more than one or two states: its state of incorporation and its principal place of business.

WLF strongly supports the due-process limitations recognized in *Daimler* on state courts' exercise of personal jurisdiction over out-of-state defendants. WLF is concerned that the sweeping rationale for personal jurisdiction adopted by the trial court below—if embraced by this court—is contrary to *Daimler*. WLF thus urges the court to follow *Daimler* by holding unequivocally that the Due Process Clause of the Fourteenth Amendment bars the trial court from exercising personal jurisdiction over BNSF in this case. Such doctrinal clarity is necessary to ensure that out-of-state companies doing business in Oregon are

---

pdf. The Alexander article is available at http://www.wlf.org/upload/legalstudies/legalopinionletter/040116LOL_Alexander.pdf. The Beck article is available at http://www.wlf.org/upload/legalstudies/workingpaper/BeckWP.pdf.

able to structure their conduct with some minimum assurance as to where that conduct will render them liable to suit.

STATEMENT OF THE CASE

BNSF Railway Company ("BNSF") is one of the leading freight railway carriers in the United States. Incorporated in Delaware, BNSF's principal place of business is in Ft. Worth, Texas. ER-16. The plaintiff in this case, Lillian Figueroa, is a longtime resident of Washington. ER-19. Plaintiff brought suit against BNSF in Oregon state court under the Federal Employers' Liability Act (FELA), 45 USC §§ 51-60, alleging that BNSF's negligence caused her to sustain injury while performing repairs to a locomotive engine at BNSF's facility in Pasco, Washington. ER-1-4.

As a purported basis for the trial court's exercise of personal jurisdiction over BNSF, Plaintiff's complaint alleges that BNSF is a "foreign corporation authorized to transact business in the State of Oregon" and that BNSF either owns or operates "trackage, property, rolling stock and vehicles" in Oregon. ER-1. Plaintiff does *not* allege that she was injured in Oregon, that BNSF was negligent in Oregon, or that her suit has any connection to Oregon whatsoever.

In response to the complaint's bare jurisdictional allegations, BNSF moved to dismiss for lack of personal jurisdiction. ER-5-20. In addition to the trial court obviously lacking specific jurisdiction over it (because Plaintiff's claim has no connection to Oregon), BNSF explained that Oregon courts lack

authority to exercise general jurisdiction over it under the new standard for general jurisdiction announced by the U.S. Supreme Court in *Daimler*. ER-9-11. Under *Daimler*, because BNSF is neither incorporated in Oregon nor headquartered in Oregon, it is not "at home" here for jurisdictional purposes and simply cannot be sued here for claims arising outside Oregon. *Daimler*, 134 S Ct at 760-62.

In response to BNSF's motion, Plaintiff freely admitted that she elected to file suit in Oregon "for her convenience" and to avoid "litigating this case in Washington, where interrogatories and expert discovery are allowed." ER-36; ER-21. Conceding that the trial court lacked specific jurisdiction over BNSF, Plaintiff argued that Oregon courts possess general jurisdiction over BNSF under ORCP 4 A(4), which authorizes Oregon courts to exercise general jurisdiction over any defendant "engaged in substantial and not isolated activities within this state." ORCP 4 A(4); ER 21-36. As for *Daimler*, Plaintiff contended that BNSF's "substantial business activities" in Oregon make it an "exceptional case" under *Daimler* and thus permit the exercise of general personal jurisdiction under Rule 4 A(4). ER-31-32. Alternatively, Plaintiff argued that BNSF knowingly consented to being subject to general jurisdiction in Oregon courts by merely registering to do business in Oregon. ER-23-31.

Following a hearing, the trial court denied BNSF's motion to dismiss. ER-79. Because Plaintiff's injury did not "arise out of or relate to" BNSF's

activities in Oregon, the trial court agreed that specific jurisdiction did not exist. APP-2. The trial court accepted, however, Plaintiff's argument that BNSF is subject to general jurisdiction. Specifically, the trial court held that this is an "exceptional case" under *Daimler* because BNSF has a "systematic and continuous" presence in Oregon, having maintained operations here for over 100 years. APP-3. The trial court did not address Plaintiff's "consent by registration" argument.

SUMMARY OF ARGUMENT

Among the bedrock freedoms protected by the Due Process Clause is the freedom not to be haled into court indiscriminately. This case arises from injuries Plaintiff allegedly sustained in Washington while working for BNSF—a railway company incorporated in Delaware and headquartered in Texas. None of the events giving rise to this suit occurred in Oregon, and neither of the parties to this suit is a citizen or resident of Oregon. Nonetheless, Plaintiff seeks to hale BNSF into an Oregon court for her own "convenience" and to avoid her own state's discovery rules.

The outcome of this case will have important wide-ranging impact far beyond the particular parties to this case. To exercise general jurisdiction over BNSF based solely on its modest business operations in Oregon would be to send a message to all non-resident companies doing business in Oregon that their constitutional rights will not be protected here. Were this court to embrace

the trial court's sweeping theory of general jurisdiction, it would undoubtedly make it far less attractive for out-of-state corporations to continue to do business in Oregon. A real potential consequence of such a ruling would be an exodus of investment capital and jobs away from Oregon and indefinite postponement of any new business investments in the state.

BNSF did not "consent" to general jurisdiction in Oregon courts by simply registering to do business (and appointing a registered agent for service of process) in Oregon. This court has *never* held that mere business registration and designation of an agent can suffice to confer personal jurisdiction over a foreign corporation in Oregon for any and all claims arising anywhere in the world. Regardless, even if it wanted to, Oregon could not unconstitutionally condition the privilege of doing business within its borders on a corporate defendant's waiver of its due-process rights. *Daimler* is explicit that courts cannot claim general personal jurisdiction over a foreign corporation even if it engages in a "substantial, continuous, and systematic course of business" in the forum state.

Nor does FELA's venue provision, 45 USC § 56, somehow provide an independent basis for personal jurisdiction in this case. On its face, section 56 applies only to "court[s] of the United States," not to state courts, and nothing in FELA purports to define the jurisdictional reach of *state* courts. FELA provides for concurrent subject-matter jurisdiction for state and federal

courts, but FELA does not dictate the authority of state courts to exercise personal jurisdiction. Under the Supremacy Clause, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse Oregon courts from their duty to accord every defendant haled before them with due process of law. Indeed, serious constitutional concerns would arise if this court were to interpret FELA as somehow permitting Oregon courts to exercise general personal jurisdiction over BNSF in this case.

Lastly, this court should not further incentivize forum-shopping. Permitting a plaintiff who brazenly admits that her suit has no relationship to Oregon to subject a foreign defendant to suit here—simply to avoid her own state's discovery rules—not only rewards improper forum-shopping but invites further abuse. Ultimately, welcoming disputes into Oregon that lack any connection to Oregon would distort and impair Oregon's civil justice system, slowing the wheels of justice for those litigants properly present. Likewise, extending the jurisdictional reach of Oregon courts to cover all American companies that have "done business" here over many years would unduly burden Oregon's judiciary and drain already scarce judicial resources.

ARGUMENT

I. The Outcome of This Case Will Have Far-Reaching Impact on Oregon's Economy and National Reputation

This is an important constitutional case with far-reaching implications that go well beyond the parties and claims at issue in this litigation. It is of concern to *all* out-of-state companies that do business in Oregon. It is therefore vitally important that this court corrects the trial court's manifest error and formally recognizes and applies *Daimler*'s bright-line rule in a decision that all Oregon courts must follow.

Among other things, this case makes clear that ORCP 4 A(4), which purports to authorize Oregon courts to exercise general jurisdiction over any defendant "engaged in substantial and not isolated activities within this state," is a relic of the pre-*Daimler* era, in which many state courts permitted large corporations to be sued in any state in which they maintained a substantial presence. By authorizing defendants to be sued in Oregon without regard to whether the defendant is "at home," and without regard to whether a plaintiff's claim bears any relationship to Oregon, Rule 4 A(4) collides with the due-process limitations on personal jurisdiction recognized by the U.S. Supreme Court in *Daimler*.

Due-process limitations on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure

their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 US 462, 472, 105 S Ct 2174, 85 L Ed 2d 528 (1985). A corporation's place of incorporation and principal place of business—the only jurisdictions in which it is subject to general jurisdiction under *Daimler*—"have the virtue of being unique." *Daimler*, 134 S Ct at 760. That is, "each ordinarily indicates only one place"—a forum that is "easily ascertainable." *See id. Daimler*'s bright-line rule thus provides corporations with the predictable assurance that they will be subject to general jurisdiction in only one or two well-defined jurisdictions. Such "[p]redictability * * * is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 US 77, 94, 130 S Ct 1181, 175 L Ed 2d 1029 (2010).

The trial court's decision unconstitutionally expands the scope of general personal jurisdiction in Oregon, making it far less attractive for out-of-state companies to do business here. Allowing general jurisdiction based on the trial court's expansive notion of "systematic and continuous" activities is unconstitutional and would destroy the very predictability that *Daimler* provides, making it impossible for corporations to structure their affairs to limit the number of jurisdictions in which they can be haled into court. Because many large corporations have long enjoyed "systematic and continuous" activities in any number of states, permitting those activities to suffice for

general jurisdiction would allow a corporation to be sued in Oregon by *any* plaintiff on *any* claim arising *anywhere*, in violation of *Daimler*. Corporations would be completely unable to predict where any particular claim might be brought.

If companies are required to face all-purpose jurisdiction simply by virtue of their Oregon activities, any rational business would have little choice but to reconsider the benefits of investing in Oregon—and creating Oregon jobs—when balanced against the substantial risk of being forced to litigate here any and all claims arising anywhere in the world. *See, e.g., World-Wide Volkswagen Corp. v. Woodson,* 444 US 286, 291, 100 S Ct 559, 62 L Ed 2d 490 (1980) (emphasizing the "burdens of litigating in a distant or inconvenient forum"). If this court were to adopt the trial court's position, nonresident companies operating in Oregon would need to reexamine their continued operations and sales here, while companies planning or considering new investment in Oregon would need to reconsider such investment given the jurisdictional implications. And even those companies that choose to remain in Oregon would inevitably be forced to pass their increased litigation costs on to their consumers, imposing additional burdens on Oregon residents.

II. BNSF Did Not Consent to General Jurisdiction by Registering to Do Business in Oregon, and It Would Be Unconstitutional for Oregon to Condition Registration on Such Consent

Although the trial court correctly declined to adopt it, Plaintiff has previously argued that BNSF somehow waived any objection to jurisdiction merely by complying with Oregon's mandatory business-registration requirements. In other words, Plaintiff contended that BNSF consented to all-purpose, general jurisdiction in Oregon—for claims arising anywhere in the world—simply by registering to do business and appointing a local agent for service of process in Oregon. This argument has no merit.

At the outset, Plaintiff's consent argument is entirely foreclosed by Oregon law, which has *never* viewed a defendant's mere compliance with Oregon's business-registration requirement as consent to personal jurisdiction for any and all claims arising outside of Oregon. As the federal district court recently held, "nothing in Oregon law supports a conclusion that compliance with these statutes confers general personal jurisdiction over a nonresident defendant for conduct occurring outside Oregon." *Lanham v. Pilot Travel Ctrs., LLC*, No. 3:14-cv-1923-HZ, 2015 WL 5167268, *11 (D Or Sept 2, 2015) (comprehensively surveying Oregon statutes and case law). Even before *Daimler*, Oregon law never stood for "the proposition that Oregon's business-registration statutes imply consent by a foreign corporation to the jurisdiction of Oregon courts for conduct occurring outside of Oregon." *Id.* at *9.

It would be fundamentally unfair for this court to hold—for the first time in this case—that merely registering to do business in Oregon constitutes consent to *general* personal jurisdiction in Oregon courts. Such an unprecedented expansion of Oregon's personal jurisdiction law 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 762 (quoting *Burger King Corp.*, 471 US at 472). To the contrary, "[c]reating and applying a novel rule to find that [a defendant] 'consented' to jurisdiction would be contrary to the basic due process principle of foreseeability." *Martin v. D-Wave Sys. Inc.*, No. 09-cv-3602, 2009 WL 4572742, *3 (ND Cal Dec 1, 2009).

The notion that a registered corporate defendant consents to personal jurisdiction for any and all claims that occur anywhere in the world is inconsistent with *Daimler*, which expressly rejected—as "unacceptably grasping"—any "formulation" of general jurisdiction that would "approve the exercise of general jurisdiction in every State." 134 S Ct at 760. Yet since every state requires nonresident corporations to register to do business (and appoint a local agent for service of process), allowing these ubiquitous registration requirements to justify all-purpose, general personal jurisdiction would be every bit as "grasping" as the jurisdictional theory rejected by *Daimler*. Plaintiff's position, if accepted by the states, would render *Daimler* a dead letter, exposing

most corporate defendants to general jurisdiction in all 50 states. As the Second Circuit has cogently explained:

> If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief.

Brown v. Lockheed Martin Corp., 814 F3d 619, 640 (2d Cir 2016). Plaintiff's proposed reading of Oregon's business-registration laws should be rejected on similar grounds.

Regardless, even if it wanted to, Oregon cannot condition the privilege of doing business within its borders on a corporate defendant's waiver of its constitutional rights. "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 US 583, 593-94, 46 S Ct 605, 70 L Ed 1101 (1926). As articulated by the U.S. Supreme Court, the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, --- US ----, 133 S Ct 2586, 2594, 186 L Ed 2d 697 (2013).

The case of *Southern Pacific Co. v. Denton*, 146 US 202, 207, 13 S Ct 44, 36 L Ed 942 (1892), illustrates this point well. In *Southern Pacific*, the U.S.

Supreme Court considered a Texas statute that required foreign corporations—as a condition of doing business in Texas—to register with the state, appoint an agent for service of process, and waive the right to remove cases brought in Texas courts to federal court. *Id.* at 206-07. Because the statute required the defendant railroad company "as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the [C]onstitution and laws of the United States," the U.S. Supreme Court held that the Texas law "was unconstitutional and void." *Id.* at 207.

Precisely the same reasoning applies here. Because "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected [rights], even if he has no entitlement to that benefit," *United States v. Am. Library Ass'n, Inc.*, 539 US 194, 210, 123 S Ct 2297, 156 L Ed 2d 221 (2003), the key issue in every unconstitutional-conditions case is whether the condition imposed by the government would violate the Constitution if imposed directly by the government and not simply as a condition for receipt of a government benefit. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 US 47, 59-60, 126 S Ct 1297, 164 L Ed 2d 156 (2006) (holding that a federal statute requiring universities receiving federal funding to permit on-campus military recruiting was not an unconstitutional condition because the Constitution did not prohibit the federal government from directly requiring all universities to permit on-campus military recruiting). In

other words, Oregon cannot do indirectly that which it could not accomplish directly because of the Constitution.

Daimler leaves no doubt that Oregon cannot, without violating due process, subject a nonresident defendant to suit in its courts for claims that have no connection at all to Oregon. When specific jurisdiction does not exist, general jurisdiction may be exercised only if a corporation's contacts with Oregon are so extensive as to render it "at home" here, *i.e.*, it must be incorporated here or have its principal place of business here. The act of registering to do business and appointing an agent for service of process does not even come close to satisfying the narrow "at home" test. *See Daimler*, 134 S Ct at 762 n 20 ("A corporation that operates in many places can scarcely be deemed at home in all of them.").

Bootstrapping a company's mandatory registration to do business into a waiver of general personal jurisdiction is nothing more than a form of coerced consent. Indeed, "it is questionable whether 'consent' extracted as the price of doing business in a state is really 'consent' under modern due-process principles." James M. Beck, *Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after* Daimler AG v. Bauman, WLF WORKING PAPER, at 6 (Nov 2015). As one federal court has observed:

> The idea that a foreign corporation consents to jurisdiction * * * by completing a state-required form, without having contact with [the State], is entirely fictional. Due process is central to

> consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. "Extorted actual consent" and "equally unwilling implied consent" are not the stuff of due process.

Leonard v. USA Petroleum Corp., 829 F Supp 882, 889 (SD Tex 1993) (internal citation omitted).

This court should join the numerous courts that have, in the wake of *Daimler*, squarely rejected the untenable claim that registration and designation of a registered agent constitutes consent to general personal jurisdiction. *See, e.g., Brown*, 814 F3d at 633-41 (holding that complying with Connecticut's business registration statutes does not amount to consent to personal jurisdiction); *Genuine Parts Co. v. Cepec*, --- A3d ---, 2016 WL 1569077, *1 (Del Apr 18, 2016) (overruling previous Delaware Supreme Court precedent and clarifying that "consent by registration" is no longer valid in light of *Daimler*); *Keely v. Pfizer, Inc.*, No. 4:15-cv-0583, 2015 WL 3999488, *1 (ED Mo July 1, 2015) (rejecting a line of older cases that found "consent by registration" because that approach is "contrary to the holding in *Daimler* that merely doing business in a State is not enough to establish general jurisdiction"); *Public Impact, LLC v. Boston Consulting Grp., Inc.*, 117 F Supp 3d 732, 738-40 (MD NC 2015) (holding that a foreign corporation is not subject to general jurisdiction in North Carolina for merely registering to do business in North Carolina).

III. FELA Does Not Expand the Personal Jurisdiction of Oregon Courts, Nor Could It

WLF anticipates that Plaintiff may argue to this court—for the first time in this litigation—that FELA's venue provision, 45 USC § 56, independently supplies the trial court with personal jurisdiction in this case.[2] Not so.

As a preliminary matter, the court need not address whether, in enacting FELA, Congress could permissibly extend the bounds of Oregon courts' personal jurisdiction—because Congress clearly did not do so. To the extent that section 56 delineates possible venues for a FELA action, that delineation has nothing whatsoever to do with personal jurisdiction. "The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great Western United Corp.*, 443 US 173, 180, 99 S Ct 2710, 61 L Ed 2d 464 (1979); *see also Action Embroidery Corp. v. Atl. Embroidery Corp.*, 368 F3d 1174, 1181 (2004) (explaining that "the analyses of personal jurisdiction and venue * * * are distinct"). In other words, because proper venue is merely a necessary—but not sufficient—condition to the exercise of personal jurisdiction, the creation of venue assumes

[2] 45 U.S.C. § 56 provides: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

nothing about the existence of personal jurisdiction.

More fundamentally, the mere fact that this case is pending in *state* court rather than *federal* court is entirely dispositive of the question. On its face, section 56's authorization to bring an action wherever a defendant is "doing business" applies only "in a district court of the United States," not any court located *within* the United States. As the U.S. Supreme Court has recognized, "the venue statutes reflect Congress'[s] intent that venue should always lie in *some federal court* whenever *federal courts have personal jurisdiction over the defendant*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the Western Dist. of Texas*, --- U.S. ----, 134 S Ct 568, 578, 187 L Ed 2d 487 (2013) (second emphasis added). Nothing in FELA purports to define the jurisdictional reach of *state* courts, and the fact that "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons," *Daimler*, 134 S Ct at 753, further undermines any contention that section 56 provides a basis for an Oregon court to exercise personal jurisdiction over BNSF in this case.

Even assuming what cannot be shown and what is hardly intuitive—that section 56 somehow expands the constitutional bounds of personal jurisdiction for *federal* courts—it surely does not expand the jurisdictional reach of *state* courts. This distinction is significant. Although due process constrains the authority of both federal and state courts to reach across geographic borders to exercise personal jurisdiction over defendants and controversies arising outside

their borders, the geographic boundaries of the United States are vastly larger than those of any one state.

Thus, while as a practical matter due process imposes only fairness limitations on Congress's authority to expand personal jurisdiction in federal courts (*e.g.*, defendants should not be forced to litigate in inconvenient or distant forums), it imposes both fairness *and* geographic limitations on state courts. Indeed, the U.S. Supreme Court has made clear that the Constitution imposes *territorial* constraints on the jurisdiction of state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. Personal jurisdiction also "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 US at 292. "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293. Those federalism principles "are more than an immunity from inconvenient or distant litigation. They are a consequence of *territorial limitations on the power of the respective States*." *Hanson v. Denckla*, 357 US 235, 251, 78 S Ct 1228, 2 L Ed 2d 1283 (1958) (emphasis added).[3]

[3] Nor does section 56's perfunctory grant of "concurrent jurisdiction" to the "courts of the several States" alter the personal jurisdiction analysis in any way.

In all events, *Daimler* makes clear that the due-process constraints of the U.S. Constitution preclude state and federal courts from exercising personal jurisdiction over BNSF. Simply put, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse state and federal courts from their duty to accord defendants appearing before them with due process of law. Even if FELA explicitly provided for personal jurisdiction in this case, which it obviously does not, that would not dispose of the constitutional limits recognized by *Daimler*. Like all federal statutes, FELA is "subject to the requirements of * * * the Due Process Clause," *Maresse v. Am. Acad. of Orthopaedic Surgeons*, 470 US 373, 380, 105 S Ct 1327, 84 L Ed 2d 274 (1985), and the Constitution "grants Congress no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 US 718, 732, 102 S Ct 3331, 73 L Ed 2d 1090 (1982).

The concept of "concurrent jurisdiction" extends to claims, not parties, and has always been understood to refer to *subject-matter* jurisdiction, not *personal* jurisdiction. *See, e.g., Haywood v. Drown*, 556 US 729, 747, 129 S Ct 2108, 173 L Ed 2d 920 (2009) ("'[T]he state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter.'" (quoting 1 James Kent, *Commentaries on American Law* 374-75 (1826)); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 191 n 8, 935 P2d 411 (1997) (construing "concurrent jurisdiction" as "[a]uthority * * * to deal with the same subject matter"). For that reason, courts have consistently interpreted section 56's grant of "concurrent jurisdiction" to the States as a grant of subject-matter jurisdiction over FELA *claims*, not a grant of personal jurisdiction over out-of-state *defendants*. *See, e.g., In re CSX Transp., Inc.*, 151 F3d 164, 166 (2d Cir 1998) (explaining that section 56 "confers concurrent federal and state jurisdiction over FELA *claims*") (emphasis added).

Indeed, serious constitutional concerns would arise if this court were to interpret FELA as permitting Oregon courts to exercise general personal jurisdiction over BNSF in this case. To avoid any entanglement with these constitutional questions, the court should apply the doctrine of constitutional avoidance to interpret FELA consistent with the bright-line rule *Daimler* announced: Oregon lacks general personal jurisdiction over a corporate defendant unless that defendant is "at home" in Oregon. *Cf. State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 526, 366 P3d 316 (2015) ("[G]enerally we will not decide constitutional issues when there is an adequate statutory basis for decision.").

IV. This Court Should Not Reward Plaintiff's Brazen Forum-Shopping

In the trial court, Plaintiff candidly admitted that she "has chosen this forum for her convenience" to avoid "litigating this case in Washington, where interrogatories and expert discovery are allowed." ER-36; ER-21. But considerations of convenience are never permitted to trump due-process constraints. "Convenience," such as it is, becomes relevant in forum selection if, and only if, a court first determines that personal jurisdiction (and due process) have already been satisfied. Plaintiff's convenience, therefore, is simply not a relevant factor in determining whether an Oregon court may constitutionally exercise general personal jurisdiction over BNSF.

More importantly, permitting a foreign plaintiff who admits that her suit has no relationship to Oregon to compel a nonresident defendant to suit here—simply to avoid her own state's discovery rules—not only rewards forum-shopping, but invites further abuse. Plaintiff's strikingly candid admission that she filed suit in Oregon to evade Washington's discovery rules makes it all the more urgent that this court not create additional incentives for future plaintiffs to engage in similar behavior.

As the U.S. Supreme Court has long recognized, forum-shopping serves no useful purpose and is deeply unfair to defendants. *See Hanna v. Plumer*, 380 US 460, 466, 85 S Ct 1136, 14 L Ed 2d 8 (1965) (recognizing that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in" a particular court). And empirical research confirms that forum-shopping can affect the substantive outcome of cases because the forum in which a case proceeds impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L Rev 1507, 1507 (1995) (analyzing three million cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases"—an effect which "prevails over the range of substantively different types of cases").

Many states have discovery rules similar to those in Washington that Plaintiff seeks to avoid here. If the plaintiff in this case finds it advantageous to

avoid expert discovery and interrogatories, chances are good that other plaintiffs contemplating suits in other states will too. Adopting the trial court's elastic approach to general jurisdiction would doubtlessly invite and encourage plaintiffs from across the country to come to Oregon to pursue the same harmful forum-shopping strategy. But *Daimler* has significantly cabined the exercise of personal jurisdiction over nonresident defendants, and the U.S. Supreme Court would surely look askance at state courts that permit forum-shopping and force nonresident defendants into forums unrelated to a plaintiff's claims. Plaintiff's flagrant forum-shopping in this case thus provides yet another reason for this court to reject the trial court's sweeping theory of personal jurisdiction.

Inviting disputes into Oregon that lack any connection to Oregon would also distort and impair Oregon's civil justice system. Expanding general jurisdiction to all American companies that "do business" in Oregon would undoubtedly impose significant burdens on Oregon's judiciary and drain already scarce judicial resources. Faced with an overwhelming influx of out-of-state plaintiffs pressing out-of-state claims, the Oregon courts would be less able to deliver efficient and effective justice, both to its own residents whose claims are properly brought here and to defendants who never should have been sued here in the first place.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the court issue the peremptory writ of mandamus.

DATED this 16th day of June, 2016.

Respectfully submitted,

TONKON TORP LLP

By: s/ *Robyn Ridler Aoyagi*
Robyn Ridler Aoyagi, OSB #000168

Attorney for *Amicus Curiae*
Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that Brief on the Merits of *Amicus* Curiae Washington Legal Foundation is proportionately spaced, has a typeface of 14 points or more and contains 5,477 words.

s/ Robyn Ridler Aoyagi
Robyn Ridler Aoyagi

CERTIFICATE OF E-FILING AND SERVICE

I certify that on June 16, 2016, I filed this **BRIEF ON THE MERITS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION** with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system. I also certify that on June 16, 2016, I served the same on the following parties by the following means:

Stephen C. Thompson, OSB #763597 — ***via eFiling System and email***
steve@ktp-law.com
Kristen A. Chambers, OSB #130882 — ***via email***
kristen@ktp-law.com
Kirklin Thompson & Pope
1000 SW Broadway, Suite 1616
Portland, OR 97205-3035
Attorneys for Plaintiff-Adverse-Party
Lillian Figueroa

Noah Jarrett, OSB #994484 — ***via email***
njarrett@schwabe.com
Aukjen Ingraham, OSB #023338 — ***via email***
aingraham@schwabe.com
W. Michael Gillette, OSB #660458 — ***via email***
wmgillette@schwabe.com
Sara Kobak, OSB #023495 — ***via eFiling System and email***
skobak@schwabe.com
Schwabe, Williamson & Wyatt P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204

Andrew S. Tulumello — ***via email***
(*pro hac vice* pending)
Michael R. Huston — ***via email***
(*pro hac vice* pending)
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW

Washington DC 20036-5036
(202) 955-8657
atulumello@gibsondunn.com
mhuston@gibsondunn.com
Attorneys for Defendant-Relator
BNSF Railway Company

Judge Christopher J. Marshall
Multnomah County Circuit Court Judge
1021 SW 4th Avenue
Portland, OR 97204

via U.S. First-Class Mail

DATED this 16th day of June, 2016.

TONKON TORP LLP

By: s/ *Robyn Ridler Aoyagi*
Robyn Ridler Aoyagi, OSB #000168

Attorney for *Amicus Curiae*
Washington Legal Foundation

097204/00001/7321050v1