IN THE SUPREME COURT OF THE STATE OF OREGON

LILLIAN FIGUEROA, Plaintiff-Adverse Party, v. **BNSF RAILWAY COMPANY**, a corporation, Defendant-Relator.	Multnomah County Circuit Court Case No. 15cv13390 Supreme Court No. S063929 **MANDAMUS PROCEEDING**

BRIEF ON THE MERITS FOR DEFENDANT-RELATOR BNSF RAILWAY COMPANY

On Petition for Mandamus to the Circuit Court of Multnomah County,
Honorable Christopher Marshall, Circuit Court Judge

Circuit Court Order Entered on January 28, 2016
Alternative Writ of Mandamus Issued on April 21, 2016

Names and Addresses of Counsel on Next Page

June 2016

Noah Jarrett, OSB No. 994484
Aukjen Ingraham, OSB No. 023338
W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204
Telephone: 503-222-9981

Andrew S. Tulumello (*pro hac vice* pending)
Michael R. Huston (*pro hac vice* pending)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
Telephone: 202-955-8657

Attorneys for Defendant-Relator BNSF Railway Company

Robyn Ridler Aoyagi, OSB No. 000168
TONKON TORP LLP
888 SW 5th Avenue, Suite 1600
Portland, OR 97204
Telephone: 503-802-2158

Attorney for *Amicus Curiae* Washington Legal Foundation

Stephen C. Thompson, OSB No. 763597
Kristen A. Chambers, OSB No. 130882
KIRKLIN THOMPSON & POPE LLP
1000 SW Broadway, Suite 1616
Portland, OR 97205-3035
Telephone: 503-222-1640

Attorneys for Plaintiff-Adverse Party Lillian Figueroa

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STATEMENT OF THE CASE

I. Nature of the Action and Relief Sought

This mandamus proceeding concerns the authority of Oregon courts to exercise general personal jurisdiction over out-of-state defendants in cases with no connection to Oregon. Plaintiff-adverse party Lillian Figueroa ("plaintiff") filed this action against defendant-relator BNSF Railway Company ("BNSF") under the Federal Employers' Liability Act ("FELA"), 45 USC § 51, seeking damages for a workplace accident. Although she filed her complaint in Oregon, plaintiff is a Washington resident who works for BNSF in Washington, and she seeks to recover for injuries allegedly sustained in Washington. Because plaintiff's claim has no connection to Oregon, she never has disputed that Oregon courts lack *specific* jurisdiction in this case, and the only question is whether Oregon courts have *general* personal jurisdiction over BNSF.

BNSF is a railroad incorporated in Delaware, whose principal place of business is Texas. Virtually all of BNSF's corporate operations are centered in Texas, and BNSF's business in Oregon is only a tiny fraction of its operations across the United States and Canada. BNSF moved to dismiss plaintiff's complaint for lack of personal jurisdiction under ORCP 21 A, based on the recent decision of the Supreme Court of the United States in *Daimler AG v. Bauman*, __ US __, 134 S Ct 746, 187 L Ed 624 (2014). BNSF demonstrated that it is not "at home" in Oregon—as required by the Due Process Clause for the exercise of general personal jurisdiction—because *Daimler* held that a defendant ordinarily is "at home" only in its place of incorporation or principal

place of business. *Id.* at 760. BNSF noted the Supreme Court's instruction that, under the Due Process Clause, a defendant cannot be "at home" and subject to general personal jurisdiction in a state where its operations are small compared to its operations throughout the nation and internationally. *Id.* at 760–62, 762 n 20.

The trial court denied BNSF's motion. The trial court concluded that BNSF's "uniquely long history of extensive operations in Oregon" could qualify as an "exceptional" circumstance that allows Oregon courts to exercise general personal jurisdiction over BNSF on any and all claims, even claims arising across the world with no connection to Oregon. ER-79.

BNSF petitioned this Court for mandamus relief. This Court granted the petition and issued an alternative writ of mandamus, ordering the trial court to grant BNSF's motion to dismiss or to show cause for failing to do so. The trial court took no action in response to the writ. BNSF now asks this Court to issue a peremptory writ of mandamus ordering dismissal because, as *Daimler* makes clear, the trial court's assertion of general personal jurisdiction over BNSF does not comport with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

II. Nature of the Judgment Being Reviewed

The order on review is the trial court's order denying BNSF's motion to dismiss for lack of personal jurisdiction and *forum non conveniens*, entered on January 28, 2016. ER-79.

III. Basis for Mandamus Jurisdiction

This Court has original jurisdiction under Article VII (Amended), section 2, of the Oregon Constitution and ORS 34.120(2).

IV. Timeliness of Petition

BNSF timely filed its mandamus petition on February 26, 2016, which was within 30 days of the challenged order. *See State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) (stating rule for timeliness in mandamus).

V. Questions Presented

1. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit an Oregon court to exercise general personal jurisdiction over a defendant in a case with no connection to Oregon, when the defendant has its place of incorporation and its principal place of business outside of Oregon, and when the defendant conducts only a small part of its nationwide and international business in Oregon?

2. Does a foreign corporation expressly consent to being subject to general personal jurisdiction in Oregon, on any type of claim arising anywhere in the world, by registering to do business in Oregon and appointing an agent for service of process?

3. Is there any other basis for an Oregon trial court to exercise general personal jurisdiction without violating the Due Process Clause, including under the Federal Employers' Liability Act?

VI. Summary of Argument

1. BNSF is not subject to general personal jurisdiction in Oregon for

claims that have nothing to do with Oregon. In *Daimler*, the Supreme Court established new standards under the Due Process Clause that limit the exercise of general jurisdiction over corporate defendants. *Daimler* held that the Due Process Clause generally requires a plaintiff to bring suit in the place where her case arose (in this case, Washington). 134 S Ct at 754–55. Under *Daimler*, if plaintiff wants to sue BNSF in another state where her claim did not arise—that is, using general personal jurisdiction—then she can do so *only* where BNSF is "at home," which is where BNSF is incorporated (Delaware) or has its principal place of business (Texas). *Id.* at 760–62. *Daimler* expressly rejected the principle, adopted by the trial court below, that a state can exercise general personal jurisdiction over a corporate defendant because the defendant has extensive operations in the forum state. *Id.* at 760–62, 762 n 20.

The trial court's holding that this case is "exceptional" under *Daimler* because BNSF has a long history of extensive operations in Oregon was fundamental legal error. The defendant in *Daimler* also had a long history of extensive operations in the forum state (California). But the Supreme Court was emphatic that an exceptional case is extremely rare, as when a defendant moves its corporate nerve center to a different state. 134 S Ct at 756, 761 n 19. A case is not exceptional simply because the defendant has extensive operations in the forum state. *Id.* at 760–61. *Daimler* also clarified that any "exceptional" case would require a comparison of the defendant's business contacts in the forum to its contacts nationwide and internationally. *Id.* at 762 n 20.

Here, all of BNSF's corporate operations are in Texas; none is in Oregon. BNSF (like many other national companies) does business in Oregon and in many other states, but BNSF's operations in Oregon are small compared to its operations throughout the United States and Canada.

2. BNSF did not consent to general personal jurisdiction in Oregon when it registered to do business and appointed an agent for service of process. Oregon's business-registration statutes say nothing at all about personal jurisdiction, much less that a foreign corporation takes the extreme step of consenting to general personal jurisdiction in Oregon, on claims by non-residents arising anywhere in the world, by simply registering to do business and naming an agent for service. This Court has not interpreted Oregon law to require that consent.

Even if Oregon law did purport to compel that "consent" as a condition of doing business in the state—which it does not—*Daimler* shows that such a requirement would be unconstitutional. A state may not require a corporate defendant prospectively to give up its constitutional rights in every case simply for the privilege of doing business in the state. *S. Pac. Co. v. Denton*, 146 US 202, 207, 13 S Ct 44, 36 L Ed 942 (1892).

3. No other grounds would permit the trial court's exercise of general jurisdiction over BNSF without violating due process. Although plaintiff never made the point below, she may attempt to argue that FELA provides authorization for a trial court to exercise personal jurisdiction over a railroad

doing business in the state. That is wrong. FELA confirms that state courts have *subject-matter* jurisdiction to hear FELA claims; it does not purport to affect the *personal* jurisdiction of state courts. 45 USC § 56. No precedent of the Supreme Court has ever held that FELA confers personal jurisdiction on state courts. On the contrary, the Supreme Court has held that FELA did not "enlarge or regulate the jurisdiction of state courts." *Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 US 1, 59, 32 S Ct 169, 56 L Ed 327 (1912). Moreover, even without the Supreme Court's clear holding, the Due Process Clause does not permit the Oregon trial court to exercise general personal jurisdiction over BNSF, and no federal statute can authorize a state court to violate the constitution.

VII. Summary of Facts

The following facts are taken from plaintiff's complaint and the record before the trial court on BNSF's motion to dismiss. *See Willemsen v. Invacare Corp.*, 352 Or 191, 195 n 2, 282 P3d 867 (2012) (in reviewing a trial court's ruling on a motion to dismiss for lack of personal jurisdiction, this Court takes the facts from the allegations in the complaint and the record on the motion).

A. BNSF is a Texas-based railroad that operates in several states, one of which is Oregon.

BNSF is a rail carrier incorporated in Delaware. ER-16. Its principal place of business is Texas. *Id.* BNSF's corporate headquarters and corporate offices are located in Texas. *Id.* All of BNSF's corporate officers have their

offices in Texas. *Id.* BNSF's human resources, marketing, legal, engineering, finance, mechanical, and claims departments are all located in Texas. ER-17.

BNSF operates 32,500 miles of rail lines in 28 states and three Canadian provinces. ER-17. Although BNSF operates across the United States and Canada, its greatest operations are concentrated in Texas. BNSF has more track miles in Texas than any other state or province. *Id.* BNSF dispatches its trains and monitors its network from its Network Operations Center in Texas. ER16−17. Of its 48,000 total employees, BNSF employs more people in Texas—nearly 20 percent of its workforce—than in any other state. *Id.*

Oregon is one of many states where BNSF operates. BNSF registered to do business in Oregon in 1970. ER-22–45. But BNSF's operations in Oregon are very small relative to its national and international operations. Of its total system of 32,500 miles of rail lines, BNSF has 235 miles of track—less than one percent of its track miles—in Oregon. ER-17. BNSF has four facilities in Oregon, but it never has been incorporated in Oregon or maintained any kind of corporate offices or department headquarters in Oregon. ER-17–18. Less than one percent of BNSF's workforce—368 employees as of 2013—is employed in Oregon. *Id.* BNSF has 22 times the number of employees in Texas than it has in Oregon. *Id.* BNSF's operating revenues in Oregon constitute less than one-half of one percent (0.5%) of BNSF's overall revenues nationwide. *Id.* BNSF earns much higher revenues in many other states, especially Texas, where it earns 25 times the revenues that it earns in Oregon. *Id.*

B. Plaintiff is a Washington employee of BNSF who alleges that she was injured during work in Washington.

Plaintiff is a longtime resident of Washington who works for BNSF in Washington. ER-19. She allegedly injured her hand, arm, and shoulder while working on a locomotive engine at BNSF's facility in Pasco, Washington. ER-1–4. Plaintiff does not allege that BNSF was negligent in Oregon, that she received medical treatment in Oregon, or that her claim has any connection at all to Oregon. Instead, plaintiff has acknowledged that she chose this forum "for her convenience" and to avoid "litigating this case in Washington, where interrogatories and expert discovery are allowed." ER-36.

C. The trial court denied BNSF's motion to dismiss for lack of personal jurisdiction.

BNSF moved to dismiss plaintiff's complaint under ORCP 21 A for lack of personal jurisdiction. ER-5–20. BNSF argued that specific personal jurisdiction does not exist here because this case indisputably arose in Washington, not in Oregon. BNSF also argued that general personal jurisdiction does not exist because BNSF is not "at home" in Oregon under *Daimler*. Specifically, BNSF argued that it is not incorporated in Oregon and does not have its principal place of business here, and *Daimler* held that general jurisdiction is virtually never possible anywhere else. BNSF's motion also showed that this is not the "exceptional case" contemplated by *Daimler* because BNSF has not established a surrogate principal place of business in Oregon, and because BNSF's operations in Oregon are small compared to its operations across the United States and Canada. ER-9−11. In view of those facts, BNSF

argued that the Due Process Clause forbids the exercise of general jurisdiction over BNSF in Oregon. *Id.*

Plaintiff opposed BNSF's motion. ER-21–58. Plaintiff did not dispute that the trial court lacked specific jurisdiction over BNSF in this case. ER-21−36. Nor did she dispute any relevant jurisdictional facts. *Id.* Instead, plaintiff argued that BNSF had knowingly consented to personal jurisdiction in Oregon—even on claims having no connection to Oregon—when BNSF registered to do business and began operating in Oregon. ER-23−31. In the alternative, plaintiff argued that this qualifies as "an 'exceptional case' where general jurisdiction would be found outside of a company's place of incorporation and principal place of business" because BNSF has substantial operations in Oregon. ER-31.

After a hearing, the trial court denied BNSF's motion to dismiss, determining that it had authority to exercise general jurisdiction because "this case is the kind of 'exceptional' case where the defendant's systematic and continuous presence renders it 'essentially at home' in Oregon" within the meaning of *Daimler*. ER-79. The trial court based its conclusion on what it called BNSF's "uniquely long history of extensive operations in Oregon." *Id.* This mandamus proceeding followed.

ASSIGNMENTS OF ERROR

The trial court erred as a matter of law in denying BNSF's motion to dismiss for lack of personal jurisdiction under ORCP 21 A.

I. Preservation of Error

The issues on review were presented to the trial court in BNSF's timely motion to dismiss plaintiff's complaint under ORCP 21 A. *See* ER-5–20; ER-59–69; ER-75–78 (BNSF's motion to dismiss and related documents).

II. Standard for Issuing Writ of Mandamus

A plaintiff has the burden to allege and prove facts sufficient to establish personal jurisdiction over a defendant in a particular case. *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 576, 316 P3d 287 (2013). Whether the plaintiff has met her burden is a question of law that this Court reviews for legal error. *Id*. A writ of peremptory mandamus is proper "when the trial court's decision amounts to fundamental legal error or is outside the permissible range of discretionary choices available." *Longo v. Premo*, 355 Or 525, 531, 326 P3d 1152 (2014).

ARGUMENT

The trial court's conclusion that BNSF is subject to general personal jurisdiction in Oregon conflicts squarely with *Daimler*. The trial court based its jurisdictional ruling "solely on the magnitude of [BNSF's] in-state contacts" in Oregon, without using the analysis that *Daimler* requires: an "appraisal of [BNSF's] activities in their entirety, nationwide and worldwide." 134 S Ct at 762 n 20. The trial court's ruling was fundamental legal error, and no other grounds exist to support the exercise of general personal jurisdiction over BNSF in Oregon. This Court must grant mandamus relief in order to give effect to the Supreme Court's decision in *Daimler* and uphold the Due Process Clause of the

Fourteenth Amendment in Oregon's courts.

I. The federal constitution prohibits general personal jurisdiction over BNSF in this case because BNSF is not "at home" in Oregon.

The Due Process Clause of the Fourteenth Amendment "sets the outer boundary of a state tribunal's authority" to exercise personal jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915, 924, 131 S Ct 2846, 180 L Ed 2d 796 (2011); *see also Willemsen*, 352 Or at 197. That limitation protects defendants against being subjected to litigation in distant or inconvenient places. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 US 873, 881, 131 S Ct 2780, 180 L Ed 2d 765 (2011). The due process limitation also "ensure[s] 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 Corp. v. Woodson*, 444 US 286, 292, 100 S Ct 559, 62 L Ed 2d 490 (1980).

The Supreme Court held in *Daimler* that, when a case does not arise in the forum state (and thus specific jurisdiction does not apply), a court may exercise *general* personal jurisdiction only in the defendant's "place of incorporation or principal place of business," barring an "exceptional case" such as where the defendant has established a "surrogate" principal place of business somewhere else. 134 S Ct at 760–62. That clear constitutional rule prevents the exercise of general personal jurisdiction over BNSF in this case.

A. Oregon courts exercise personal jurisdiction only to the extent permitted by the Due Process Clause.

Subject to due process constraints, states have authority to decide to what extent to exercise personal jurisdiction over nonresident defendants. *See Myers v. Brickwedel*, 259 Or 457, 460, 486 P2d 1286 (1976) (the first inquiry for jurisdiction is whether it is authorized by state law). States may not, however, authorize their courts to exercise jurisdiction beyond the limits of due process. *Goodyear*, 564 US at 923-24. Thus, even if a state statute purports to authorize personal jurisdiction, the statute may not be enforced if it exceeds federal due process limits outlined by the Supreme Court.

ORCP 4 prescribes the authority of Oregon courts to exercise personal jurisdiction in civil cases. *State ex rel Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 153, 854 P2d 461 (1993). The rule is designed to incorporate the Supreme Court's due process precedents by distinguishing two different categories of personal jurisdiction. ORCP 4 A describes bases for general or "all-purpose" jurisdiction, which is the exercise of "jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum[.]" *Circus Circus*, 317 Or at 153 (quoting *Helicopteros Nacional de Columbia v. Hall*, 466 US 408, 414 n 9, 104 S Ct 1868, 80 L Ed 2d 404 (1984)). ORCP 4 B describes bases for specific or "case-linked" jurisdiction, which "depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Willemsen*, 352 Or at 197–98 (quoting

Goodyear, 564 US at 919). ORCP 4 L also provides a "catchall" provision for personal jurisdiction "in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States." *Sutherland v. Brennan*, 321 Or 520, 528–29, 901 P2d 240 (1995). Because "Oregon does not have a due process clause in its constitution that would impose a state constitutional limit on jurisdiction," the constitutionality of personal jurisdiction in Oregon is solely a question of federal law. *Robinson*, 354 Or at 576–77.

Historically, ORCP 4 A(4) has attempted to confer general personal jurisdiction in Oregon whenever the defendant does substantial business here. *See, e.g.*, *Bachman v. Med. Eng'g Corp*., 81 Or App 85, 724 P2d 858 (1986). Enacted as part of the Oregon Rules of Civil Procedure in 1979, that provision purports to authorize general jurisdiction over any defendant that is "engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise[.]" ORCP 4 A(4). As this Court has previously noted, ORCP 4 A(4) was based on "early cases" from the Supreme Court that were interpreted as "holding that foreign corporations were impliedly 'consenting' to jurisdiction or were 'present' within the state" based on "'doing' or 'transacting' business in the state." *Circus Circus*, 317 Or at 154 (quoting from Merrill, *Jurisdiction and Summons in Oregon*, at 8 (1986)).

Until *Daimler*, the "doing business" standard for general jurisdiction under ORCP 4 A(4) was understood to be constitutional. *E.g.*, *Circus Circus*,

317 Or at 154. In *Daimler*, however, the Supreme Court explicitly rejected that standard because it violates federal due process. After *Daimler*, general jurisdiction *cannot* be based on the fact that the corporate defendant has a history of "continuous and systematic" operations in the forum state, or even that it has very extensive operations there. 134 S Ct at 761. Instead, a company is subject to general personal jurisdiction in Oregon *only* if the defendant is "fairly regarded as at home" in Oregon because it is incorporated here or has its principal place of business here. *Id.*

B. The federal law of personal jurisdiction has evolved to narrow the reach of general personal jurisdiction.

In *Pennoyer v. Neff*, 95 US 714, 24 L Ed 565 (1878)—the Supreme Court's first case addressing personal jurisdiction under the Fourteenth Amendment—the Court held that a "tribunal's jurisdiction over persons reache[d] no farther than the geographic bounds of the forum." *Daimler*, 134 S Ct at 753. This strict territorial approach created a problem, though, for exercising personal jurisdiction over corporations, which at the time were treated as legal persons that could not exist outside their state of incorporation. *See, e.g.*, *Bank of Augusta v. Earle*, 38 US 519, 588, 10 L 3d 274 (1839) (a corporation "must dwell in the place of its creation"). *Pennoyer*'s understanding of jurisdiction potentially meant that corporations could not be sued anywhere else, even when a corporation began operating (and causing injury) outside its home state. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*,

308 US 165, 169–70, 60 S Ct 153, 84 L Ed 167 (1939).[1]

Over time, however, and with the steady growth of interstate business activity, the law of personal jurisdiction moved away from *Pennoyer*'s territorial test. *See Daimler*, 134 S Ct at 753. The "canonical opinion" is *International Shoe Co. v. Washington*, 326 US 310, 66 S Ct 154, 90 L Ed 95 (1945), which held that due process allows a state court to exercise personal jurisdiction over a foreign defendant if the defendant has "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler*, 134 S Ct at 754 (internal quotation marks and citations omitted). The key insight of *International Shoe*—and the solution to the problem for suing corporations that had existed under *Pennoyer*—was the creation of specific personal jurisdiction: A defendant is subject to suit in a state when its activities in that state have been "continuous and systematic" and "also g[a]ve rise to the liabilities sued on." *Daimler*, 134 S Ct at 754 (quoting *Int'l Shoe*, 326 US at 317).

In addition to defining the due process requirements for specific personal jurisdiction, *International Shoe* preserved the possibility of certain courts exercising *general* personal jurisdiction over a defendant in cases that do not

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[1] By long-standing common law tradition, state courts also had the power—and still have the power today—to exercise personal jurisdiction over natural persons who are served with process in the state. *See Burnham v. Superior Court of Cal., County of Marin*, 495 US 604, 610–11, 110 S Ct 2105, 109 L Ed 2d 631 (1990). But this form of "tag" jurisdiction "does not apply to corporations." *Martinez v. Aero Caribbean*, 764 F3d 1062, 1066 (9th Cir 2014).

arise in the forum state. But (as the Supreme Court recently made clear) because this form of personal jurisdiction is more powerful and consequential, it is also much more limited: It applies only in a state where the defendant's operations are "so substantial *and of such a nature*" that the defendant is "essentially *at home* in the forum state." *Daimler*, 134 S Ct at 754 (emphasis added, internal quotations marks omitted). In other words, if the plaintiff's claim arises in the forum, then continuous and systematic contacts between the defendant and the forum will be good enough. But if the claim does *not* arise in the forum, then the plaintiff must show that the defendant is "at home" in the forum state, as opposed to in another state.

Since *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Daimler*, 134 S Ct at 755 (quoting *Goodyear*, 564 US at 924). That is so because cases generally should be brought where they arise. Over the years, both the Supreme Court and this Court created various tests in order to apply specific jurisdiction—that is, to determine whether personal jurisdiction was reasonable in light of the connection between the claim and the forum state. *See, e.g.*, *World-Wide Volkswagen*, 444 US at 291; *Circus Circus*, 317 Or at 154–56. Less attention was paid to the due process requirements for general personal jurisdiction, and the Supreme Court decided only two cases involving general jurisdiction between *International Shoe* and its recent decisions in *Goodyear* and *Daimler*. *See Perkins v. Benguet Consolidated*

Mining Co., 342 US 437, 72 S Ct 413, 96 L Ed 485 (1952); *Helicopteros Nacional de Columbia v. Hall*, 466 US 408 (1984).

The Supreme Court's cases were not always careful to distinguish the requirements for specific jurisdiction from those for general jurisdiction. As a result, many courts read the Supreme Court to mean that general personal jurisdiction was permitted so long as the defendant was engaged in substantial business in the forum state. *See, e.g.*, *Circus Circus*, 317 Or at 154 ("Where a defendant has 'substantial' or 'continuous and systematic' contacts with the state, a state court may have general personal jurisdiction, even if the cause of action is unrelated to the defendant's forum activities." (quoting *Helicopteros*, 466 US at 414 n 9)). And that rule made its way into ORCP 4 A(4). But *Daimler* ended this confusion by holding that the reasonableness test based on continuous and systematic contacts is to be used only "when *specific* jurisdiction is at issue." 134 S Ct at 762 n 20.

1. *Daimler* and *Goodyear* held that general jurisdiction may not be based on the defendant's extensive operations in the forum state.

In *Goodyear* and *Daimler*, the Supreme Court dramatically clarified the law of personal jurisdiction in a way that is different from how many courts and legislatures previously understood it. *Daimler* and *Goodyear* show that ORCP 4 A(4), as written, is not consistent with the Due Process Clause. That is because, when a suit arises "without this state," *it is not enough* for personal jurisdiction that the defendant is "engaged in substantial and not isolated

activities within the state." ORCP 4 A(4). A corporation's "continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits *unrelated to that activity*." *Goodyear*, 564 US at 927-28 (emphasis added) (quoting *Int'l Shoe*, 326 US at 318).

In *Goodyear*, the Supreme Court held that "a court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations" to hear claims arising outside the state *only* "when their affiliations with the State are so continuous and systematic as to render them essentially *at home* in the forum State." 564 US at 919 (emphasis added). Applying this test, the Court held that the defendants in *Goodyear* (three Goodyear USA subsidiaries organized and operating in Turkey, France, and Luxembourg) were not at home in North Carolina. *Id.* at 918-19.

After *Goodyear*, some commentators questioned whether the Supreme Court had really meant for its "at home" test to impose a more stringent test for general personal jurisdiction. *See, e.g.*, Peterson, *The Timing of Minimum Contacts after Goodyear and McIntyre*, 80 Geo Wash L Rev 202, 214–15 (2011) (arguing that *Goodyear*'s "at home" standard for general jurisdiction should be dismissed as loose language). In *Daimler*, however, the Supreme Court made clear that the Due Process Clause does impose just such a stringent limit. The Supreme Court explained that "only a limited set of affiliations with a forum" will render a defendant "at home" in that state, and thus subject to general jurisdiction. *Daimler*, 134 S Ct at 760. "With respect to a corporation,

the place of incorporation and principal place of business are 'paradig[m]... bases for general jurisdiction.'" *Id.* (quoting *Goodyear*, 564 US at 924). "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* And those virtues matter because "[s]imple jurisdictional rules ... promote greater predictability," which is a cornerstone of due process. *Id.* (quoting *Hertz Corp. v. Friend*, 559 US 77, 94, 130 S Ct 1181, 175 L Ed 2d 1029 (2010)). The Supreme Court's bright-line rule means that very little discovery should be "needed to determine where a corporation is at home." *Id.* at 762 n 20.

The Supreme Court recognized in *Daimler* that this newly clarified rule means that general jurisdiction is possible only in a very small number of places. 134 S Ct at 760, 761 n 9. That is because, the Supreme Court explained, specific jurisdiction must be the norm: A case generally must be brought in the place where it arises. *Id.* at 755. General jurisdiction exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n 9 (internal quotation marks and citations omitted). It merely "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.* at 760.

But there is no reason why a human resources dispute about an employee working in Texas, or a lease dispute about rental property in California, or a regulatory dispute over a Canadian regulation should be litigated in Oregon just

because the defendant does business in Oregon. "It is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n 19.

2. *Daimler* holds that general jurisdiction cannot be based on a defendant's extensive operation in the forum state.

The Supreme Court in *Daimler* expressly rejected the argument that a corporate defendant is at home "in every State in which [it] engages in a substantial, continuous, and systematic course of business." 134 S Ct at 761. That formulation, the Court held, is "unacceptably grasping." *Id.* "[T]he words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate"—those words are not a test for general jurisdiction. *Id.* (quoting *Int'l Shoe*, 326 US at 317). To the extent that some older cases had approved general jurisdiction on the ground that a foreign corporation was engaged in extensive business in the state—the same rule codified in ORCP 4 A(4) and embraced by the trial court below—*Daimler* overruled those opinions as relics of an earlier era of thinking. 134 S Ct at 761 n 18.

The *Daimler* case itself involved a foreign defendant that was sued in California for injuries allegedly inflicted in Argentina. *See* 134 S Ct at 750–51. Although the defendant was based overseas, it had a United States subsidiary with a long history of very extensive operations in California: The defendant "ha[d] multiple California-based facilities" and was "the largest supplier of

luxury vehicles to the California market." *Id.* at 752. Over 10 percent of all of the defendant's sales in the United States were made in California—which surely represented hundreds of millions of dollars—and those sales accounted for 2.4 percent of the defendant's worldwide business. *Id.*

The Supreme Court assumed that all of these contacts by the subsidiary could be attributed to the *Daimler* defendant itself. 134 S Ct at 758. Yet even then, applying the newly clarified constitutional test, the Supreme Court held that the Due Process Clause forbade the exercise of general personal jurisdiction over that defendant in California. The defendant's California contacts, extensive as they were, "hardly render[ed] [the defendant] at home there." *Id.* at 760. For if millions of dollars in sales and ownership of facilities were enough to allow general jurisdiction in California, then general jurisdiction "would presumably be available in every other State in which [the defendant's] sales are sizeable." *Id.* at 761. But that rule—which the Supreme Court called an "exorbitant exercis[e]" of general jurisdiction—"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.'" *Id.* at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 US 462, 472, 105 S Ct 2174, 85 L Ed 2d 528 (1985)). By contrast, the bright-line rule of *Daimler*—general jurisdiction is possible only where a defendant is "at home"—provides clarity and certainty for both defendants and plaintiffs. *Id.* at 760.

3. Only an "exceptional" case can justify general jurisdiction outside the defendant's place of incorporation or principal place of business.

Although *Daimler* did not foreclose "the possibility" that a corporation could be subject to general jurisdiction outside its place of incorporation or principal place of business, the Court was careful to limit such possibilities to "an exceptional case." 134 S Ct at 761 n 19. As the only example of that exceptional case, *Daimler* pointed to the 1952 case of *Perkins v. Benguet Consolidated Mining Co.*, 342 US 437. *See Daimler*, 134 S Ct at 761 n 19.

Perkins involved a company incorporated in the Philippines, where it operated gold and silver mines. 342 US at 447. The company ceased its mining operations during the Japanese occupation of the Philippines in World War II and its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Id.* at 447–48. When a plaintiff sued the company in Ohio on a claim that did not relate to the company's contacts with Ohio, the Supreme Court held that general jurisdiction in Ohio was consistent with due process. *Id.* This was so, the Court later explained in *Daimler*, because "Ohio was the corporation's principal, if temporary, place of business." 134 S Ct at 756 (internal quotation marks omitted). Ohio had become "the center of the corporation's wartime activities," and as such, that state "could be considered a surrogate for the place of incorporation or head office." *Id.* at 756 n 8 (internal quotation marks omitted). Again, *Daimler* made it clear that *Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of

general jurisdiction based on nothing more than a corporation's doing business in a forum." *Id.* (internal quotation marks and citation omitted).

Daimler contrasted the exceptional case of *Perkins* with *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408, which involved a suit in Texas that arose from a helicopter crash in Peru. *See Daimler*, 134 S Ct at 756−57. Although the defendant in *Helicopteros* did regular business in Texas—it sent its CEO to Texas to negotiate contracts; it accepted account checks drawn on a Texas bank; it made substantial purchases of helicopters, equipment, and training services from a Texas-based helicopter company; and it sent personnel to Texas for training—those contacts were not enough for general personal jurisdiction. 466 US at 416.

Daimler went out of its way to reiterate why a case is *not* exceptional—and general jurisdiction is *not* permitted—on the ground that the defendant has a long history of extensive operations in the forum state. The "exceptional case" rule for general jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, 134 S Ct at 762 n 20. This comparative assessment is mandatory because "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* The "at home" test of *Goodyear* and *Daimler*—including a possible exceptional case like *Perkins* where the defendant creates a surrogate principal place of business by moving its nerve center into the forum—is *not*

"synonymous with 'doing business' tests" that were accepted in the past and that are codified in statutes like ORCP 4 A(4). *Daimler*, 134 S Ct at 762 n 20.

When a plaintiff is injured by a company's operations *in Oregon*, she can sue the defendant in Oregon. But some "local activity" by a defendant in Oregon—even a long history of extensive activity—does not give Oregon "authority over a far larger quantum of activity having no connection" to Oregon. *Daimler*, 134 S Ct at 762 n 20 (internal quotations marks omitted).

C. BNSF is not at home in Oregon under *Daimler*.

Applying *Daimler*, BNSF is not subject to general personal jurisdiction in this case. There is no dispute that Oregon is not BNSF's place of incorporation or principal place of business. Those facts leave plaintiff with no other choice but to contend that this is the "exceptional case" hypothesized by *Daimler*. It is not. After *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F3d 429, 432 (5th Cir 2014). This is an entirely *un-exceptional* workplace injury suit against a company that happens to operate in several states.

The facts here bear no resemblance to *Perkins*—the only case where the Supreme Court has ever approved general jurisdiction outside the defendant's place of incorporation or principal place of business—in which a war caused the defendant to move its corporate office, all of its files, and all of its operations to Ohio. *Cf.* 342 US at 447–48. The Supreme Court emphasized

that *Perkins* "turned" on the fact that "[a]ll of [the defendant's] activities were directed by the company's president from within Ohio." *Daimler*, 134 S Ct at 756 n 8. But BNSF does not direct its corporate activities from Oregon (or anywhere else outside of Texas). Oregon has not become "the center" of BNSF's corporate operations, and it is not a "surrogate for the place of incorporation or head office." *Id.* No surrogate is needed: BNSF has a place of incorporation (in Delaware) and a head office (in Texas), and plaintiff can be afforded complete relief in those states. Or she can select the most convenient and natural forum—Washington—which is both her home state and the place where virtually all of the evidence and witnesses relevant to this dispute are located. But she may not select Oregon, because personal jurisdiction is foreclosed by the federal constitution.

The trial court held that this case is "exceptional" under *Daimler* because BNSF has a "uniquely long history of extensive operations in Oregon." ER-79. That was fundamental legal error. Presumably the trial court referred to plaintiff's submissions that BNSF (or its corporate predecessors) has operated in Oregon for 100 years; that it operates a railroad 24 hours a day, 7 days a week; that it owns four rail yards in Oregon; that it has employees here; and that it generated $100 million in revenue in Oregon in 2014. *See* ER-21–22. But to base general jurisdiction on those contacts is exactly the analysis that the Supreme Court in *Daimler* held "unacceptably grasping" and wrong. 134 S Ct at 761. BNSF's business activities in Oregon—no matter how extensive and

long-standing—do not give Oregon courts "authority over a far larger quantum of activity having no connection" to Oregon, including operations in Washington that allegedly led to an injury in Washington. *Id.* at 762 n 20 (internal quotation marks omitted).

In fact, none of plaintiff's allegations about BNSF's business contacts distinguishes this case from *Daimler*. The defendant in *Daimler* had a history of extensive operations in California: The company was the largest luxury auto retailer in the state, with multiple facilities and millions of dollars in sales. 134 S Ct at 752. Yet those extensive operations were not enough to make the defendant subject to general personal jurisdiction in California. *Id.* at 760.

Nor does it matter that BNSF has operated in Oregon for decades. The trial court cited no authority that would support general jurisdiction on that basis. On the contrary, the Second Circuit recently held that a company could not be subject to general personal jurisdiction in Connecticut, even though it had maintained a physical presence in Connecticut for over 30 years. *Brown v. Lockheed Martin Corp.*, 814 F3d 619, 628–29 (2d Cir 2016); *see also Senne v. Kansas City Royals Baseball Corp.*, 105 F Supp 3d 981, 1001 (ND Cal 2015) (rejecting plaintiff's argument that the defendant was subject to general jurisdiction in California in light of its "longstanding presence in California"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526, at *26–27 (SDNY Oct 20, 2015) (rejecting plaintiff's argument that the defendant was at home in the forum based on very extensive operations there, "regardless

of whether measured in money, personnel, space, *or time*" (emphasis added)).

By relying on the fact that BNSF has a "long history of extensive operations" in Oregon, the trial court impermissibly focused "solely on the magnitude of [BNSF's] in-state contacts," rather than appraising BNSF's activities "in their entirety, nationwide and worldwide." *Daimler*, 134 S Ct at 762 n 20. But under the comparative analysis that *Daimler* requires, BNSF's contacts with Oregon are far too slim to make Oregon BNSF's home. If the defendant in *Daimler* was not at home in California with 10 percent of its domestic sales in the state, *see id.* at 752, then BNSF certainly is not at home in Oregon when less than one percent of its track miles, less than one percent of its workforce, and less than one-half of one percent of its revenues are in Oregon. BNSF does much more business in several other states than in Oregon, whether measured in track miles, employees, revenues, or longevity.

Plaintiff suggested below that it ought to be relevant to general personal jurisdiction that BNSF has previously litigated in Oregon as a plaintiff and a defendant, and because BNSF has a registered agent for service of process in Oregon. But neither of those facts make any difference at all. *Daimler* did not mention those contacts as being relevant to general jurisdiction; what matters is the comparative assessment of the company's in-state versus out-of-state business. The fact that BNSF has litigated in Oregon in the past does not diminish its ability to assert its constitutional due process rights here after *Daimler* clarified the law.

The trial court's approval of general personal jurisdiction also conflicts directly with the reasoning that supports *Daimler*'s bright-line rule. There is nothing "exceptional" about a company based out-of-state that registers to do business in Oregon, appoints an agent for service, acquires property and does business here, and then litigates here on claims that arise here. Those facts are all true for many airlines, restaurants, financial institutions, and consumer electronics companies, among many others, that do business in Oregon and several other states. Some of those businesses, like hotel chains and travel centers, also operate around the clock. "[G]iven that it is common for corporations to have presences in multiple states exceeding that of" BNSF's presence in Oregon, "general jurisdiction would be quite the *opposite* of 'exceptional' if [BNSF's contacts in Oregon] were held sufficient to render the corporation 'at home' in the state." *Brown*, 814 F3d at 630. If the trial court is not overruled here, then presumably the same general jurisdiction would be available in every other state where a corporate defendant's business is sizeable. But that is *exactly* the outcome that the Due Process Clause forbids, because a defendant's home state must be "unique." *Daimler*, 134 S Ct at 760–61.

Nor would the trial court's test for general jurisdiction produce results that are "easily ascertainable," as *Daimler* requires. 134 S Ct at 760. If the trial court were affirmed here, then parties would be required in every case to submit detailed affidavits regarding the scope and duration of the defendant's business activities in Oregon, and the defendant's litigation history in Oregon—just as

plaintiff submitted affidavits about those issues below. ER 37–49. Yet *Daimler* held that it is "hard to see why much in the way of discovery would be needed to determine where a corporation is at home." 134 S Ct at 762 n 20.

It bears emphasis that any plaintiff whose suit arises in Oregon (unlike plaintiff in this case) can sue BNSF in Oregon. As a result, there is no danger that properly applying *Daimler* will leave Oregon residents injured without a place to seek redress. A ruling for BNSF will simply prevent out-of-state plaintiffs from suing here on claims that properly belong to courts and juries in other states. The trial court's rule, on the other hand, would mean that any defendant who does substantial business in Oregon can be sued here on any type of claim arising anywhere in the world. That is not the law.

D. Multiple federal courts of appeals, including the Ninth Circuit, and many other courts, have interpreted *Daimler* to prohibit general personal jurisdiction in a case like this one.

At least five federal courts of appeals and multiple state courts have interpreted *Daimler* to foreclose general jurisdiction on facts like those here. In particular, numerous courts have relied on *Daimler* to reject the trial court's conclusion that general jurisdiction is possible on the ground that the defendant corporation "'engages in a substantial, continuous, and systematic course of business' in a state." *Martinez v. Aero Caribbean*, 764 F3d 1062, 1070 (9th Cir 2014) (quoting *Daimler*, 134 S Ct at 761). In *Martinez*, the Ninth Circuit concluded that general jurisdiction could not exist in California over a French airplane manufacturer, even though the company did business in California that

was "worth between $225 and $450 million." *Id.* Although the defendant's California operations were extensive, the court noted that the manufacturer's "California contacts are minor compared to its other worldwide contacts," and thus, the case could not be "exceptional" under *Daimler*. *Id.*

Similarly, the Second Circuit recently rejected the argument that *Daimler* allows general personal jurisdiction based on the "duration" of a corporation's existence in a state or the "substance" of a corporation's contacts with the state. *Brown*, 814 F3d at 629 (noting that *Daimler* "left little room for [such] arguments"). In *Brown*, the court found that due process foreclosed general jurisdiction in Connecticut over a major aerospace corporation, despite the corporation's continued physical presence in the state for "over three decades" and the fact that it earned "about $160 million in revenue for its Connecticut-based work" from 2008 through 2012. *Id.* at 628. As the court noted, "mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case.'" *Id.* at 629. What matters is whether the corporation's contacts are of such a nature that they show a "surrogate principal place of business." *Id.*

The Fifth, Seventh, and Eleventh Circuits have also held that *Daimler* "require[s] more than the 'substantial, continuous, and systematic course of business' that was once thought to suffice." *Kipp v. Ski Enter. Corp. of Wisc., Inc.*, 783 F3d 695, 698–99 (7th Cir 2015) (rejecting general jurisdiction in Illinois over a Wisconsin corporation that attended an annual trade show in

Chicago, marketed its ski resort to Illinois residents, and successfully attracted a large number of customers from Illinois). Finding general jurisdiction outside the state of incorporation or principal place of business is a "rare situation," *id.*, that is "incredibly difficult," *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F3d 429, 432 (5th Cir 2014). A foreign corporation can be subject to general jurisdiction in a forum only if "the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business"—that is, when the defendant relocates its corporate nerve center. *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F3d 1201, 1205 (11th Cir 2015). Applying this rule, the Eleventh Circuit rejected general jurisdiction over a Panama corporation that had maintained a Florida bank account and two Florida addresses, purchased insurance policies from Florida companies, filed a financial statement with the Florida Secretary of State, joined a nonprofit trade organization based in Florida, and consented to the jurisdiction of the Southern District of Florida for all lawsuits arising out of its agreement with Carnival Corporation. *Id.*

Other state supreme courts also have interpreted *Daimler* contrary to the trial court below. For example, the Tennessee Supreme Court has held that general personal jurisdiction did not extend to three out-of-state rating agencies, even though the defendants had "longstanding business" in Tennessee that went back decades and was worth up to $60 million per year, because those defendants—like BNSF here—derived less than one percent of their national

revenue from Tennessee and had less than one percent of their employees in the state. *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, ___ SW3d ___, 2015 WL 9025241, at *8–9 & n 4 (Tenn Dec 14, 2015). The Nevada Supreme Court has likewise held that *Daimler* prohibits general personal jurisdiction over the National Football League, even though the league has a long history of extensive operations in Nevada worth millions of dollars per year. *Urbanksi v. Nat'l Football League*, 2015 WL 134795 (Nev Jan 8, 2015).

Literally dozens of other lower federal and state court decisions are in accord. *See, e.g.*, *Lanham v. Pilot Travel Ctrs., LLC*, 2015 WL 5167268, at *1 (D Or Sept 2, 2015) (holding that Oregon lacks general personal jurisdiction over an out-of-state company that owns 10 travel centers in Oregon operating 24/7 and generating $423.7 million per year).

Against this overwhelming tide of precedent, only three cases stand as outliers. In both *Barriere v. Juluca*, 2014 WL 652831, at *4 (SD Fla Feb 19, 2014), and *Waite v. All Acquisition Corp.*, 2015 WL 9595222, at *2 (SD Fla Dec 29, 2015), the courts refused to apply *Daimler*'s comparative analysis and instead mistakenly applied the multifactor reasonableness test of *World-Wide Volkswagen*, holding that the defendants' "'continuous and systematic' contact[s] ... render[ed the defendants] at home in Florida." *Waite*, 2015 WL 9595222, at *5. The Supreme Court has held, however, that *World-Wide Volkswagen* involved *specific* jurisdiction, *see Daimler*, 134 S Ct at 755 n 7, and "the words 'continuous and systematic' were used in *International Shoe* to

describe instances in which the exercise of *specific* jurisdiction would be appropriate," *id.* at 761. *Barriere* and *Waite* are also inconsistent with controlling precedent of the Eleventh Circuit in *Carmouche*.

The only other outlier is the decision of the Montana Supreme Court in *Tyrrell v. BNSF Railway Co.*, ___ P3d ___, 2016 WL 3067430 (Mont May 31, 2016), which suggested that *Daimler* is limited to cases "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Tyrrell*, ¶ 16 (quoting *Daimler*, 134 S Ct at 750). That is wrong, and directly contradicts both *Daimler* and *Goodyear* themselves. The Supreme Court was explicit that, for purposes of personal jurisdiction, a "foreign" corporation refers to a corporation based *either* in a "sister-state" or a "foreign-country." *Daimler*, 134 S Ct at 754 (quoting *Goodyear*, 564 US at 919). In other words, a corporation like BNSF that is incorporated in Delaware and based in Texas is "foreign" to Oregon, just as much as the Germany-based defendant in *Daimler* was foreign to California. The Supreme Court addressed the "transnational context" of *Daimler* in an entirely separate portion of the opinion from its discussion of principles of due process that apply in every case. *Id.* at 762–63. Justice Sotomayor's separate opinion taking issue with the Court's analysis confirmed that "the principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State." *Id.* at 773 n 12 (Sotomayor, J., concurring in judgment).

Every other court to confront a similar argument has rejected the contention that *Daimler* and *Goodyear* are limited to cases involving overseas events or foreign-country corporations. The Second Circuit recently held that *Daimler* "made explicit reference to 'sister-state' corporations and drew no distinction in its reasoning between those and foreign-country corporations." *Brown*, 814 F3d at 630; *see also, e.g.*, *Elec. Payment Sys., LLC v. Elec. Payment Solutions of Am., Inc.*, 2015 WL 5444278, at *4 (D Colo Sept 16, 2015) (finding "no merit" in the argument "that *Daimler* is distinguishable from the present case because it dealt with a foreign (outside the U.S.) company"); *Hid Global Corp. v. Isonas, Inc.*, 2014 WL 10988340, at *4 (CD Cal Apr 21, 2014) ("Although [the plaintiff] argues that *Daimler* is inapposite because it refers to an international corporation being sued in the United States, this distinction is immaterial."). And many other courts discussed above applied *Daimler* in full to cases where all of the parties and events are American.

There is simply "no sound basis for restricting *Daimler*'s (or *Goodyear*'s) teachings to suits brought by international plaintiffs against international corporate defendants." *Brown*, 814 F3d at 630. The Supreme Court in *Daimler* clarified the due process requirements for *any* court attempting to exercise general personal jurisdiction. That decision cannot be dismissed or ignored based on its transnational facts. *Daimler* is controlling, and it is dispositive.

II. BNSF did not consent to personal jurisdiction in this case.

Plaintiff also cannot avoid *Daimler* by arguing that BNSF intentionally

consented to general personal jurisdiction here. Oregon, like every other state in the nation, requires a foreign corporation that does business in Oregon to register and appoint an agent to accept service of process. *See* ORS 60.714, 60.721, 60.731. In the trial court, plaintiff argued that, as the price for BNSF doing business in Oregon, these statutes required BNSF to consent to general personal jurisdiction in Oregon—that is, to consent to be sued in Oregon on any claim arising anywhere in the world, even if those claims have no connection to this state. *See* ER-23–27.

The trial court did not accept that argument, and for good reason: Oregon's business-registration statutes say nothing at all about personal jurisdiction. Personal jurisdiction in Oregon is governed, not by the registration statutes, but by ORCP 4 subject to the limits of the Due Process Clause. ORCP 4 A(5) provides for personal jurisdiction by consent only when the defendant "expressly consents." And a corporation does not "expressly" consent to general personal jurisdiction by following a business-registration protocol that nowhere mentions jurisdiction.

This Court has not interpreted Oregon's registration statutes as plaintiff suggests. Instead, the Court has adopted a much more sensible rule: Compliance with Oregon's business-registration statutes (including appointment of an agent to accept service of process in Oregon) establishes personal jurisdiction *only* on claims that are related to the company's activities in this state. That is because, as this Court repeatedly has said for over a

century, the Oregon registration and appointment statutes were enacted so that a foreign corporation can be located, served, and sued on claims that arise "*in the state*." *Farrel v. Or. Gold-Mining Co.*, 31 Or 463, 467–68, 49 P 876 (1897) (emphasis added).

Moreover, even if this Court had interpreted Oregon law to compel the "consent" to general jurisdiction that plaintiff suggests—which it has not—that interpretation would be flatly unconstitutional after Daimler. A state may not force foreign corporations to surrender their constitutional rights under the Due Process Clause as a condition of doing business in the state.

A. Personal jurisdiction by consent evolved alongside the due process limits of personal jurisdiction.

Personal jurisdiction, like other constitutional rights, can be waived by a defendant. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 US 694, 703−04, 102 S Ct 2099, 72 L Ed 2d 492 (1982). But only if the consent was *intentional*, *id.*, such as when the defendant enters a contract with a forum-selection clause. *See, e.g.*, *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 US 311, 316, 84 S Ct 411, 11 L Ed 2d 354 (1964). Consent cannot be presumed. *Cf. Waterway Terminals v. P. S. Lord Mech. Contractors*, 242 Or 1, 26, 406 P2d 556 (1965) (waiver must be an "intentional relinquishment of a known right").

Business registration and appointment statutes like those in Oregon were enacted in a different era when, under *Pennoyer*, personal jurisdiction was based on "presence" and state courts lacked the power to exercise personal

jurisdiction over foreign corporations for the injuries that the corporations caused in the state. *See St. Clair v. Cox*, 106 US 350, 355, 1 S Ct 354, 27 L Ed 222 (1882). But it was "intolerable" for foreign corporations to have "immunity from suit in the states of their activities." *Neirbo*, 308 US at 170. These registration-and-appointment statutes conferred on foreign corporations a legal presence, and thus the company would be subject "to the jurisdiction of local courts in controversies growing out of transactions *within the state*." *Morris & Co. v. Skandinavia Ins. Co.*, 279 US 405, 408–09, 49 S Ct 360, 73 L Ed 762 (1929); *see also Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 US 213, 215–16, 42 S Ct 84, 66 L Ed 201 (1921) ("The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted *within the state*." (emphasis added)). The statutes were not designed to subject a defendant operating in the state to jurisdiction over claims arising anywhere in the world. For that reason, the Supreme Court has long held that, "in the absence of language compelling it," a state's business-registration statutes "ought not to be construed" to "give [a state] power to take cases arising out of transactions so foreign to its interests." *Morris*, 279 US at 409.

B. Oregon law does not treat an out-of-state corporation's registration to do business as consent to general personal jurisdiction on claims arising anywhere in the world.

Oregon has never required foreign corporations to consent to general personal jurisdiction as the price for doing business in Oregon. Oregon does

not have a statute like the one in Pennsylvania, which provides that a foreign corporation intending to do business in Pennsylvania must consent to general personal jurisdiction. *See* 42 Pa Cons Stat Ann § 5301(a)(2)(i) ("qualification as a foreign corporation under the laws of this Commonwealth" shall "enable the tribunals of this Commonwealth to exercise general personal jurisdiction").

In fact, none of Oregon's corporate registration provisions mentions personal jurisdiction at all (either specific or general jurisdiction). ORS 60.714 and 60.721 require a foreign corporation to maintain a "registered office" and a "registered agent," which can be the foreign corporation itself. And ORS 60.731 simply provides that "any process, notice or demand required or permitted by law to be served upon the corporation" may be served upon the corporation's registered agent.

Requiring a foreign corporation to designate an agent *for service* implies nothing about consent to general personal jurisdiction. The two concepts are wholly distinct under Oregon law. *See* ORCP 21 A (distinguishing the defenses of "lack of jurisdiction over the person" and "insufficiency of service of summons or process"). They are likewise distinct under federal law. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 US 97, 104, 108 S Ct 404, 98 L Ed 2d 415 (1987) (distinguishing "a constitutionally sufficient relationship between the defendant and the forum" from "a basis for the defendant's amenability to service"). As the Supreme Court repeatedly has explained, due process requires that the defendant *both* "be given adequate notice of the suit"

via service of process, *and* "be subject to the personal jurisdiction of the court." *World-Wide Volkswagen*, 444 US at 291. These are independent constitutional requirements, and the presence of one does not establish the other.

The silence of Oregon's registration statutes on personal jurisdiction is especially telling because, unlike some other states, Oregon law specifically provides that personal jurisdiction can be based on a defendant's consent only if the defendant has "expressly consented." ORCP 4 A(5). If the legislature had wanted Oregon courts to assert personal jurisdiction over foreign corporations by their *implied* consent, then it would not have made *express* consent the touchstone of personal jurisdiction in this state. *See Lanham*, 2015 WL 5167268, at *11 ("[T]he Oregon Legislature can explicitly address jurisdiction in its statutes if it desires to do so.").

Plaintiff's interpretation of Oregon law would also produce the bizarre outcome that all of the other provisions of ORCP 4, which establish the standards for when companies are subject to personal jurisdiction in Oregon, would be meaningless except as to *un*registered corporations. *Cf. Brown*, 814 F3d at 636. That is because, according to plaintiff, every registered corporation is already automatically subject to personal jurisdiction.

In the trial court below, plaintiff cited a handful of cases that supposedly support her consent theory. But plaintiff misunderstands this Court's precedents, which "have not held ... that compliance with [business registration] statutes implies consent to general personal jurisdiction by a foreign defendant

concerning an action arising outside of Oregon." *Lanham*, 2015 WL 5167268, at *11.

On the contrary, as far back as *Aldrich v. Anchor Coal & Development Co.*, 24 Or 32, 35, 32 P 756 (1893), this Court stated that "where a corporation created in one jurisdiction is permitted, either by express enactment or by acquiescence, to do business in another, it is to be deemed a resident, and subject to the jurisdiction of the courts of the latter in all matters founded upon contracts made or causes of action *arising there*[.]" (Emphasis added.) In *Farrell*, the Court similarly stated that, "when a corporation migrates into another state, and engages in business there," it becomes "liable to suit upon a cause of action *arising in the state* of its adoption by service of process in the manner provided for the service of domestic corporations." 31 Or at 467–68 (emphasis added). More recently, this Court stated that "there is no unfairness" in subjecting a foreign corporation to the jurisdiction of an Oregon court based upon service of process on "an authorized representative," *so long as* the "cause of action aris[es] out of the corporation's activities within the state of the forum." *Enco, Inc. v. F.C. Russell Co.*, 210 Or 324, 337, 311 P2d 737 (1957) (citing *Perkins*, 342 US at 444)).

Against these authorities, plaintiff attempted below to draw support from *dicta* in *Ramaswamy v. Hammon Lumber Co.*, 78 Or 407, 419, 152 P 223 (1915). But *Ramaswamy* involved an accident in Oregon and a defendant whose principal place of business was Oregon. *See id.* at 410. So that case had

no occasion to determine whether an *out-of-state* company had consented to suit in Oregon on claims arising *outside* Oregon.

C. Oregon is not like other states that have attempted to require consent to general personal jurisdiction based on registration to do business in the state.

Because plaintiff's argument lacks any support in Oregon's statutory text, she asks this Court to follow a few other states that have interpreted their state laws to require a foreign corporation to consent to general personal jurisdiction. Those interpretations derive from two New York courts sitting one hundred years ago. *See Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F 148, 150–51 (SDNY 1915); *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 111 NE 1075, 1077 (NY 1916). Their reasoning—which was suspect even under the corporate law of the day—was that by designating agents for service, the companies had intentionally authorized the agents to accept service on any type of claim arising anywhere in the world. One year later, the Supreme Court seemingly held that it was constitutional for a state to require foreign corporations to consent to general personal jurisdiction. *See Pa. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 US 93, 95, 37 S Ct 344, 61 L Ed 610 (1917). In the ensuing decades, a handful of state courts followed New York and interpreted their own registration statutes to require consent to general jurisdiction, while other states refused to do so. *See* Benish, Note, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction*

After Daimler AG v. Bauman, 90 NYU L Rev 1609, 1647–61 (2015) (mapping every state on this issue).

Critically, the decision in *Pennsylvania Fire*—like the interpretations of New York law in *Smolik* and *Badgon*—predated *International Shoe* by decades. *Smolik* and *Badgon* also were closely related to the then-emerging doctrine that due process allowed a corporation to be subject to general jurisdiction anywhere it was doing business. *See Barrow S.S. Co. v. Kane*, 170 US 100, 101, 18 S Ct 526, 42 L Ed 964 (1898) (cited in *Bagdon*); *Tauza v. Susquehanna Coal Co.,* 115 NE 915, 918 (NY 1917) (citing *Barrow* and *Bagdon*).

Following *International Shoe*, the federal circuits divided on whether it was constitutional to require a foreign corporation to consent to general personal jurisdiction as a condition of doing business in the state. *See* Benish, *supra* at 1611–12 (mapping the circuit split). But *Daimler* now has vindicated those circuits that rejected as unconstitutional the attempt to extract consent to general jurisdiction as the price for doing business in a state. *Daimler* clarified that *International Shoe* overruled the "doing business" test on which *Pennsylvania Fire* rested. *See Daimler*, 134 S Ct at 761 n 18. The Supreme Court explicitly overruled *Barrow* and *Tauza*, and in doing so, stated that other cases "decided in the era dominated by *Pennoyer*'s territorial thinking"—cases like *Pennsylvania Fire*—"should not attract heavy reliance today." *Id.* *Pennsylvania Fire* "cannot be divorced from the outdated jurisprudential assumptions of its era," and has "yielded to the doctrinal refinement reflected in

Goodyear and *Daimler* and the Court's 21st century approach to general and specific jurisdiction." *Brown*, 814 F3d at 639.

D. *Daimler* forbids a state from conditioning the privilege of doing business on consent to general personal jurisdiction.

Even if this Court were inclined to interpret Oregon law to require foreign defendants to consent to general personal jurisdiction in exchange for the privilege of doing business here, that requirement would be flatly unconstitutional. *Daimler* holds that *any* state law that attempts to subject all foreign corporations doing business in the state to general personal jurisdiction violates due process. A state may not circumvent the constitutional limit on general jurisdiction by forcing foreign corporations to "consent."

The Supreme Court long has held that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, __ US __, 133 S Ct 2586, 2594, 186 L Ed 2d 697 (2013) (quotation marks omitted). This doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* This right applies as much for corporations as for natural persons: A state may not "requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Id.* at 2596 (quoting *S. Pac. Co. v. Denton*, 146 US 202, 207, 13 S Ct 44, 36 L Ed 942 (1892)).

Denton invalidated a Texas law that barred foreign corporations registering to do business in Texas from removing cases from state court to

federal court. 146 US at 206–07. The state's attempt to require corporations, "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 constitution and laws of the United States, was unconstitutional and void." *Id.* at 207.

The same reasoning applies here. A state could not require a foreign corporation, as a condition of doing business in the state, to give up its constitutional right to an unbiased judge. *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 US 868, 129 S Ct 2252, 173 L Ed 2d 1208 (2009). Any attempt to coerce a defendant into giving up its right to limited general personal jurisdiction, just to do business in Oregon, would be equally unconstitutional.

More than one court has recently explained that, after *Daimler*, it would raise grave constitutional questions for a state to interpret its business-registration statutes to require consent to general personal jurisdiction. *See Brown*, 814 F3d at 639−41; *Genuine Parts Co. v. Cepec*, ___ A3d ___, 2016 WL 1569077, at *1 (Del Apr 18, 2016). To accept plaintiff's argument for "consent" jurisdiction here "would risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely." *Brown*, 814 F3d at 639. Today, all 50 states have some form of registration-and-appointment statute. *See* Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343, 1363 (2015). So "[i]f 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*, 814 F3d at 640.

Plaintiff's consent argument is so directly in tension with *Daimler* that the Delaware Supreme Court recently overruled its long-standing precedent of 30 years, which had held that registration to do business in Delaware constituted consent to general personal jurisdiction. *Genuine Parts*, 2016 WL 1569077, at *1. The Delaware Supreme Court discussed why earlier cases interpreting business-registration statutes to require consent to general jurisdiction were not based on sound analysis. *Id.* at *7–9. "[M]ost important of all," though, "after *Goodyear* and *Daimler*, this narrower reading of [the business-registration statute] has the intuitively sensible effect of not subjecting properly registered foreign corporations to an 'unacceptably grasping' and 'exorbitant' exercise of jurisdiction[.]" *Id.* at *13.

BNSF did not consent to be subject to general jurisdiction in Oregon by doing business in Oregon, and any such state-law requirement would be flatly unconstitutional.

III. The Federal Employers' Liability Act is not relevant to the question of personal jurisdiction in this case.

Because plaintiff has no other basis to support general personal jurisdiction in this case, she may attempt to rely on the Montana Supreme

Court's decision in *Tyrrell*, which held that state courts "have general personal jurisdiction over BNSF under the FELA[.]" *Tyrrell*, ¶ 2. That decision is flat-out wrong for multiple reasons.

Most fundamentally, *Tyrrell* is wrong because it is the Due Process Clause of the Fourteenth Amendment that prevents state courts from exercising general personal jurisdiction where the defendant is not "at home." When the federal constitution guarantees an individual right—including a defendant's right to due process in a state court—"Congress [has] no power to restrict, abrogate, or dilute" that guarantee. *Miss. Univ. for Women v. Hogan*, 458 US 718, 719, 102 S Ct 3331, 73 L Ed 2d 1090 (1982). Congress cannot authorize state courts to exercise personal jurisdiction contrary to due process any more than Congress could authorize a state to take railroad property without just compensation. *See, e.g.*, *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 US 226, 17 S Ct 581, 41 L Ed 979 (1897). "Neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Hogan*, 458 US at 732–33.

In fact, Congress has no power *at all* to authorize personal jurisdiction in state courts, which are created and governed by state law. The Supreme Court has held that "a state court *of competent jurisdiction*" may not discriminate against federal law by refusing to hear federal causes of action, but states "have great latitude to establish the structure and jurisdiction of their own courts."

Howlett v. Rose, 496 US 356, 372, 110 S Ct 2430, 110 L Ed 2d 332 (1990) (emphasis added).

The Montana Supreme Court also misread FELA and the Supreme Court precedents applying it. FELA's jurisdictional section provides, in relevant part:

> Under this chapter an action may be brought in a district court of the United States, in a 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.

45 USC § 56. That section does two things. The first sentence determines which *federal courts* are an appropriate venue for a FELA claim. *See Baltimore & Ohio R.R. Co. v. Kepner*, 314 US 44, 52, 62 S Ct 6, 86 L Ed 28 (1941) ("Section [56] establishes venue for an action in the federal courts."). But this case was not brought in federal court, and venue is not at issue.

The second sentence recognizes "concurrent jurisdiction" between the state and federal courts. But "concurrent" jurisdiction refers exclusively to *subject-matter* jurisdiction, not personal jurisdiction. *See S. Pac. Transp. Co. v. Fox*, 609 So 2d 357, 362–63 (Miss 1992); *Tyrrell*, ¶ 49 (McKinnon, J., dissenting) (showing that Congress and the courts have *always* used "concurrent jurisdiction" to refer exclusively to subject-matter jurisdiction). "State courts have concurrent jurisdiction" over federal causes of action whenever, by their own constitution, *they are competent to take it*." *Claflin v. Houseman*, 93 US 130, 136, 23 L Ed 833 (1876) (emphasis added). FELA

simply makes explicit that Congress did not mean to bar state courts from exercising subject-matter jurisdiction over FELA claims. Thus, state courts have *authority* to hear FELA cases where they are competent, but the Oregon state courts are not competent to exercise personal jurisdiction in this case, because the Due Process Clause forbids it.

In fact, the Supreme Court has specifically said that FELA gives state courts authority to hear FELA cases only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 US 1, 59, 32 S Ct 169, 56 L Ed 327 (1912). The Montana Supreme Court's conclusion that FELA conferred personal jurisdiction on state courts is directly contrary to the Supreme Court's explicit statement that FELA did not "enlarge or regulate the jurisdiction of state courts." *Id.* at 56.

Multiple other state supreme courts have disagreed with the Montana Supreme Court's reasoning and applied a full due process analysis to assess personal jurisdiction in FELA cases, rather than accept that FELA itself confers personal jurisdiction on state courts. *See, e.g.*, *Norfolk S. Ry. Co. v. Maynard*, 437 SE2d 277 (W Va 1993); *Fox*, 609 So 2d at 362–63; *Baltimore & Ohio R.R. Co. v. Mosele*, 368 NE2d 88 (Ill 1977); *Hayman v. S. Pac. Co.*, 278 SW2d 749, 751−52 (Mo 1955).

The Montana Supreme Court also misread precedent when it said that the Supreme Court has interpreted FELA "to allow state courts to hear cases

brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." *Tyrrell*, ¶ 12. That is not accurate. Not one of the cited cases so much as *mentioned* personal jurisdiction. *See Tyrrell*, ¶ 45 (McKinnon, J., dissenting) ("[The cases cited by the majority] do not so much as mention the Due Process Clause or general jurisdiction. Nor have the cases ever been cited by the United States Supreme Court or any other court—until now—for any proposition remotely related to general jurisdiction.").

The railroad defendant in *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 US 284, 52 S Ct 152, 76 L Ed 295 (1932), contended that hearing a FELA case in a state court far away from the evidence and witnesses would impose an undue burden on interstate commerce, in violation of the dormant commerce clause. *See, e.g.*, *Davis v. Farmers Coop. Co.*, 262 US 312, 43 S Ct 556, 67 L Ed 996 (1923) (holding that a FELA case would impermissibly burden interstate commerce where the defendant did not do any business in the forum state). *Terte* held that this dormant-commerce-clause defense was not available to a railroad doing business in the forum state, because Congress had abrogated that defense in FELA. 284 US at 287–88.

The Montana Supreme Court in *Tyrrell* completely missed the fact that *Terte* involved a constitutional limitation very different from due process. In *Terte*, it was the dormant commerce clause that arguably prevented the out-of-state court from hearing the FELA case; here, it is the Due Process Clause. The

critically important distinction is that, while Congress *can* authorize states to burden interstate commerce (and *Terte* held that FELA conferred that authority in certain cases), Congress *does not* have the power to authorize states to violate the Fourteenth Amendment, and FELA did *not* confer that authority on states.

Similarly, neither *Baltimore & Ohio Railroad v. Kepner* nor *Miles v. Illinois Central Railroad Co.*, 315 US 698, 704, 62 S Ct 827, 86 L Ed 1129 (1942) involved personal jurisdiction. Both cases dealt with the power of a state court to equitably enjoin one of its citizens from suing in another state, where the litigation was vexatious and harassing. The Supreme Court held that, while state courts do generally have that equitable power, Congress abrogated state courts' authority to enjoin FELA plaintiffs against filing in both federal court (*Kepner*, 314 US at 52) and state court (*Miles*, 315 US at 704). The Court in *Pope v. Atlantic Coast Line Railroad Co.*, 345 US 379, 383−84, 73 S Ct 749, 97 L Ed 1094 (1953), then held that Congress did not restore state courts' authority to enjoin citizens against filing out-of-state FELA suits when it passed the federal transfer-of-venue statute.

Once again, there is no relevant comparison between *Kepner*, *Miles*, and *Pope* versus the case here. The Due Process Clause does not restrict state courts' equitable injunction authority over citizens, but it *does* restrict their personal jurisdiction. Under the Supremacy Clause of the constitution, Congress can regulate interstate commerce by preempting a state court's equitable authority to enjoin certain lawsuits. But Congress does not have the

power to preempt a provision of the Constitution of the United States—here, the Fourteenth Amendment.

To summarize all of these cases: Before *International Shoe*, at a time when a defendant could be subject to general personal jurisdiction in state court anywhere it was doing business, the Supreme Court held that FELA eliminated *other* defenses of railroads (those based in the dormant commerce clause, or based on the litigation being harassing). But the Supreme Court has *never* held that FELA authorizes a state court to exercise personal jurisdiction where the constitution would bar it. In fact, the Supreme Court has said exactly the opposite: FELA did not affect state courts' jurisdiction. *Second Employers' Liability Cases*, 223 US at 56.

Finally, even if these precedents had held, decades ago, that personal jurisdiction in this FELA action was possible in state court, those cases would have been overruled as relics of an earlier era of thinking. *See Daimler*, 134 S Ct at 761 n 18. *Daimler* thus confirms that nothing about FELA is relevant to the constitutional issue that is before this Court.

CONCLUSION

Daimler controls this case and defeats every argument for personal jurisdiction. This Court should issue a preemptory writ of mandamus directing the trial court to grant BNSF's motion to dismiss for lack of personal jurisdiction.

DATED this 16th day of June, 2016.

SCHWABE, WILLIAMSON & WYATT, P.C.

/s/ Sara Kobak

Noah Jarrett, OSB No. 994484
Aukjen Ingraham, OSB No. 023338
W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981

GIBSON, DUNN & CRUTCHER LLP

Andrew S. Tulumello (*pro hac vice* pending)
Michael R. Huston (*pro hac vice* pending)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
Telephone: 202-955-8657

Attorneys for Defendant-Relator
BNSF Railway Company

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 13,298 words. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 16th day of June, 2016.

/s/ Sara Kobak
Sara Kobak, OSB No. 023495
Attorneys for Defendant-Relator
BNSF Railway Company

CERTIFICATE OF FILING AND SERVICE

I certify that on June 16, 2016, I filed this BRIEF ON THE MERITS FOR BNSF RAILWAY COMPANY with the State Court Administrator by the eFiling 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***
Email: steve@ktp-law.com
Kristen A. Chambers, OSB #130882
Email: Kristen@ktp-law.com
Kirklin Thompson & Pope
1000 SW Broadway, Suite 1616
Portland, OR 97205-3035
Telephone: 503-222-1640

Of Attorneys for Lillian Figueroa

Robyn RidlerAoyagi ***via eFiling System and email***
Email: robyn.aoyagi@tonkon.com
Tonkon Torp LLP
888 SW 5th Ave Ste 1600
Portland OR 97204
Telephone: 503-802-2158

Of Attorneys for *Amicus Curiae* Washington Legal Foundation

Judge Christopher J. Marshall ***via U.S. First-Class Mail***
Multnomah County Circuit Court Judge
1021 SW 4th Avenue
Portland, OR 97204

/s/ Sara Kobak
Sara Kobak, OSB No. 023495