

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BNSF RAILWAY CO., :

4 Petitioner : No. 16-405

5 v. :

6 KELLI TYRRELL, SPECIAL :

7 ADMINISTRATOR FOR THE ESTATE OF :

8 BRENT T. TYRRELL, DECEASED, ET AL., :

9 Respondents. :

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11 Washington, D.C.

12 Tuesday, April 25, 2017

13

14 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 11:10 a.m.

17 APPEARANCES:

18 ANDREW S. TULUMELLO, ESQ., Washington, D.C.; on behalf  
19 of the Petitioner.

20 NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor  
21 General, Department of Justice, Washington, D.C.;  
22 for United States, as amicus curiae, supporting the  
23 Petitioner

24 JULIE A. MURRAY, ESQ., Washington, D.C.; on behalf  
25 of the Respondents.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 16-405, BNSF Railway v. Tyrrell.

Mr. Tulumello.

ORAL ARGUMENT OF ANDREW S. TULUMELLO

ON BEHALF OF THE PETITIONER

MR. TULUMELLO: Mr. Chief Justice, and may it please the Court:

The Montana Supreme Court concluded that BNSF is subject to general personal jurisdiction in Montana for two reasons:

First, it held that Montana State courts exercise general all-purpose jurisdiction over BNSF because BNSF does systematic and continuous business activity in the State.

Second, it held that Section 56 of the Federal Employers' Liability Act confers personal jurisdiction on State courts.

Both conclusions were wrong.

First, under this Court's decision in Daimler, BNSF is not subject to general personal jurisdiction in Montana because it is not at home in Montana. Montana is not BNSF's principal place of

1 business, nor its place of incorporation, and there is  
2 nothing exceptional about BNSF's activities --

3 JUSTICE SOTOMAYOR: I'm sorry. Didn't it  
4 register in Montana?

5 MR. TULUMELLO: It did --

6 JUSTICE SOTOMAYOR: To do business, doesn't  
7 it -- isn't it required to register?

8 MR. TULUMELLO: It -- it is required and it  
9 has registered to --

10 JUSTICE SOTOMAYOR: Now, I thought the --

11 MR. TULUMELLO: -- to do business.

12 JUSTICE SOTOMAYOR: -- Court below didn't  
13 reach that question, but does the registration in  
14 Montana change this discussion?

15 MR. TULUMELLO: It -- it doesn't, Your  
16 Honor. It -- it doesn't.

17 JUSTICE SOTOMAYOR: Then if I, as an  
18 individual, establish residency in multiple places, I  
19 can be sued for all of my activities there, correct?

20 So why can't a corporation?

21 MR. TULUMELLO: Your Honor, so the -- the  
22 holding in Daimler was that even doing systematic,  
23 continuous, sizable business would not be sufficient to  
24 confer general personal jurisdiction. I understand --

25 JUSTICE SOTOMAYOR: So if you treat a

1 corporation like a person, which we seem to be doing,  
2 why isn't their registration of an agent for purposes of  
3 accepting service enough?

4 MR. TULUMELLO: Well, if you treat the  
5 corporation as a person, I think what this Court's due  
6 process cases say is that you look for where the  
7 corporation could be fairly regarded as at home. That  
8 would be equivalent to the personal domicile.

9 And in Daimler and Goodyear, this Court  
10 suggested that the paradigmatic places would be the  
11 principal place of business and the place of  
12 incorporation. Registering to do business is simply one  
13 part of a company's business activities, but it does  
14 not, in and of itself, come anywhere close to subjecting  
15 a corporation to general personal jurisdiction.

16 JUSTICE GINSBURG: Well, there's an  
17 argument -- there was an argument in the case we just  
18 heard that -- that by registering, you effectively  
19 consent to jurisdiction and consent is always a good  
20 basis for.

21 MR. TULUMELLO: It is -- it -- Your Honor,  
22 I -- I think as -- I think with respect to consent, the  
23 argument especially in this case that by registering to  
24 business -- to do business in Montana law, BNSF  
25 consented to any kind of jurisdiction is expressly

1 negated by the text of the Montana statute, which says  
2 registering to do business in and of itself does not  
3 confer personal jurisdiction in this State.

4 CHIEF JUSTICE ROBERTS: Of course, the --  
5 the issue, I guess, was not addressed below and is not  
6 before us.

7 MR. TULUMELLO: Correct.

8 CHIEF JUSTICE ROBERTS: I'm looking at  
9 footnote 1 in the government's brief.

10 MR. TULUMELLO: Your Honor, so I -- I would  
11 draw -- I would draw a distinction about how the  
12 registration issue can play in this case. One is, is  
13 registration as part of the overall level of activity  
14 engaged in by the company, is that enough to make it at  
15 home. Clearly we think it cannot. Registration, you  
16 know, running trains through the State, that's not  
17 enough to make it at home in Montana.

18 There's a separate issue of whether  
19 registration in and -- in and of itself is some sort of  
20 implied consent to -- to be subject to general personal  
21 jurisdiction, and the Montana Supreme Court didn't reach  
22 that issue. So with respect to Section 56, the Montana  
23 Supreme Court reached the truly unique and unprecedented  
24 conclusion that Congress, in confirming the concurrent  
25 subject matter of the State courts, meant for the first

1 time to confer personal jurisdiction.

2 As this Court held in the Second Employers'  
3 Liability Act cases, decided just two years after  
4 Section 56 was enacted, Section 56 was designed to  
5 abrogate Supreme Court of Connecticut's decision in  
6 Hoxie, which had held that -- that -- that Congress in  
7 FELA had tried to establish exclusive Federal court  
8 jurisdiction over FELA claims. So Congress, in the  
9 concurrent jurisdiction clause in FELA, confirmed that  
10 State courts retained concurrent subject matter  
11 jurisdiction.

12 Concurrent subject matter jurisdiction is  
13 also a term of art that has for 200 years, since the  
14 Judiciary Act, and it's in the Judiciary Act, has been  
15 understood to refer to subject matter jurisdiction and  
16 not personal jurisdiction. Respondents don't say a  
17 single historical example of where subject matter  
18 jurisdiction has been deemed to include --

19 JUSTICE KENNEDY: It was related somewhat in  
20 the last case. Could Congress pass a statute conferring  
21 jurisdiction on -- in Montana State courts under the  
22 circumstances of this case?

23 MR. TULUMELLO: Well, we don't -- we --  
24 well, let me -- I'll take that in parts because the --  
25 one -- one part of it raises a significant --

1 JUSTICE KENNEDY: The thing is I don't know  
2 it was that essential for your argument. I'm just  
3 curious what your view is.

4 MR. TULUMELLO: I would -- I would --  
5 Justice Kennedy, I would take it in two parts.  
6 Congress, we believe, could constitutionally provide for  
7 nationwide service-of-process provisions in Federal  
8 courts. I think where the issue gets very difficult is  
9 whether Congress could prescribe the Federal  
10 jurisdiction of the State courts. It's not something  
11 that Congress has ever done. There is no historical  
12 example of that and it would raise some serious  
13 federalism constraints and we also argue serious  
14 Fourteenth Amendment constraints.

15 In any event, FELA does not attempt to do  
16 that. Again, as the Court in the -- almost  
17 contemporaneous decision in the Second Employers'  
18 Liability Act made clear that Congress was not trying to  
19 enlarge or regulate the jurisdiction of the State courts  
20 or to control their modes of procedure. And I think the  
21 consequences of trying to read a special venue statute  
22 as containing a grant of personal jurisdiction would  
23 really call into question what the 200 or odd-so special  
24 venue statutes in the Federal code are doing, whether  
25 they have some heretofore unknown grant of personal



1 jurisdiction. The may-have language is simply not the  
2 way that Congress traditionally has spoken to the issue  
3 of personal jurisdiction. The may-have language is  
4 currently in the general venue statute. Nobody thinks  
5 that 1391 provides for personal jurisdiction.

6 The general venue statute from 1948 to 1988  
7 used the may-have language as suit may -- may be brought  
8 wherever a corporation is doing business. Again, nobody  
9 thought that the general venue statute at that time was  
10 an independent source of personal jurisdiction.

11 Instead, the way that Congress speaks to Federal  
12 personal jurisdiction is through changing the options  
13 for service of process, and that was established in 1838  
14 in the Tollen v. Sprodd case. It was reiterated in  
15 Robertson in 1925 when the Court actually explored the  
16 difference between venue-type language and  
17 jurisdictional-type language and cited specific  
18 statutory examples of where Congress had expanded  
19 Federal court jurisdictions.

20 JUSTICE KAGAN: Are -- are you saying that  
21 service-of-process language is an absolute necessity?

22 MR. TULUMELLO: I don't think it's an  
23 absolutely necessity. The Court -- Congress could say  
24 something about personal jurisdiction itself like in  
25 current Rule 4. But I do think there must be some

1 method prescribed by Congress as this Court said in  
2 Omni.

3 JUSTICE KAGAN: Aren't there some statutes  
4 that look like the first sentence of this statute that  
5 have been read as personal jurisdiction requirements?

6 MR. TULUMELLO: It -- I -- I -- Respondents  
7 cite a couple post-Omni cases that infer service of  
8 process provisions from statutes that set up -- you  
9 know, agencies, and where the courts have held in those  
10 circumstances that unless we infer some kind of subpoena  
11 authority, the agency just, you know, won't be able to  
12 get out -- get out the door or do its job.

13 But, by and large, as this Court said in  
14 Omni -- I mean, this Court has never inferred a  
15 service-of-process provision, and the Court in Omni  
16 gave, you know, three very good reasons for why that  
17 would be a bad idea. Congress knows how to do it and so  
18 don't want to presume that Congress doesn't know how to  
19 do it. Second, that legislative rule making has the  
20 benefit of, you know, better predictability. And --  
21 and -- and third, that in light of the long tradition of  
22 how Congress has spoken to -- to these issues, it would  
23 be unwise for courts to get into the business of common  
24 law rule making for establishing personal jurisdiction.

25 JUSTICE ALITO: One of the amici supporting

1 Respondents says that adopting your position would  
2 create chaos in the industry. What is your response to  
3 that?

4 MR. TULUMELLO: I -- I think just the  
5 opposite is true, Justice Alito. Adopting our rule  
6 would bring some predictability and some order to the  
7 industry. Right now, it is a true wild west of FELA  
8 claims being filed in forums like Montana, and like  
9 these cases where the plaintiffs are not from Montana,  
10 none of the alleged negligence occurred in Montana, none  
11 of the alleged injury occurred in Montana, and yet we're  
12 still subject to suit there.

13 So FELA plaintiffs using specific  
14 jurisdiction or general jurisdiction, but going to  
15 forums that have a reasonable connection to the  
16 litigation will, in fact, you know, bring order to this  
17 area of the justice system.

18 JUSTICE ALITO: Well, what about someone  
19 who's working very far -- routinely they work very far  
20 from their home, they're injured very far from home,  
21 what would your rule do to them?

22 MR. TULUMELLO: The -- that -- that  
23 individual would have specific jurisdiction in the place  
24 where they were injured. If they were regularly  
25 employed in a particular State, let's say Montana, and

1 they were sent out of State, I think there would be --  
2 there may well be specific jurisdiction depending on  
3 the -- the analysis of the episode-in-suit. Did the  
4 supervisor send the person there? Was equipment from  
5 Montana sent out with that person that, you know, caused  
6 an injury? But specific jurisdiction would be  
7 available. And, of course, the -- the safety valve of  
8 all-purpose jurisdiction would be available as well.

9 I'd like to reserve the remainder of my  
10 time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Ms. Saharsky.

13 ORAL ARGUMENT OF NICOLE A. SAHARSKY

14 FOR UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONER

16 MS. SAHARSKY: Mr. Chief Justice, and may it  
17 please the Court:

18 So there are two questions before the Court.  
19 The Court said in *Omni* that in order to assert personal  
20 jurisdiction, you have to have a statute or a rule  
21 making the defendant amenable to service of process.  
22 There's a question of, here, is it Section 56 or Montana  
23 law. We've explained why we think it's Montana law.

24 And then the second question is if they're  
25 exercising service of process on Montana law, does -- is

1 that general jurisdiction consistent with the standards  
2 the Court set out in Daimler and Goodyear, and we don't  
3 think it is.

4 So on -- particularly on the Section 56  
5 question, because that's one where there's a strong  
6 Federal interest in not having words that don't say  
7 anything about service of process being interpreted to  
8 in fact say something about service of process, we have  
9 a first sentence that refers to venue only in Federal  
10 courts, and then a second sentence referring to State  
11 courts. But all it does is to clarify that there's  
12 concurrent jurisdiction in the State courts.

13 And we just don't see how you can get to  
14 conferral of personal jurisdiction in the State courts,  
15 especially when we know, very clearly from the  
16 legislative record, that Congress was trying to solve  
17 two particular problems, the first in the first sentence  
18 with venue in Federal courts, and then the second in the  
19 sentence -- second sentence with making sure that State  
20 courts understood that they could hear these claims.

21 I think it is also noticeable, as  
22 Petitioner's counsel suggested, that we have not -- we  
23 are not aware of any example in which Congress has used  
24 language of this type to confer personal -- or even more  
25 explicit language to confer personal jurisdiction in the

1 State courts, and also, that even at the time, back in  
2 1910, Congress knew how to confer personal jurisdiction  
3 if it wanted to.

4 We gave examples in -- of the Clayton Act  
5 from 1914 in our brief, the Credit Mobilier Act in  
6 Petitioner's brief, and then these were also discussed  
7 in the Robertson case from 1925. In that, Congress  
8 knows how to do venue versus service of process. That  
9 has continued up through the Court's decision in Omni.

10 So we just don't think that Section 56  
11 should be interpreted to be the first statute -- statute  
12 to do it, especially where the implication with respect  
13 to the second question would be to say that a company  
14 like BNSF is subject to general personal jurisdiction in  
15 28 or more States.

16 If the Court's decisions in Goodyear and  
17 Daimler mean anything, it's that that just can't be  
18 correct.

19 CHIEF JUSTICE ROBERTS: The Respondents note  
20 what we said in Daimler that, in addition to the State  
21 of incorporation and the principal place of business,  
22 there may be particular circumstances where another  
23 State could be considered their home as well. And given  
24 the volume of activity in the State in terms of the  
25 physical plant, it's a railroad, goes through -- I

1 forget the number of employees -- why doesn't that fit  
2 in that additional criteria?

3 MS. SAHARSKY: Well, the Court described  
4 that category very narrowly as a place where the  
5 contacts are not just that they are continuous and  
6 systematic business contacts, but where they are so  
7 significant that you consider the company at home there,  
8 that it's like the company's domicile.

9 And the only court -- example that the  
10 Court's given of that to this point is the Perkins case  
11 where you have the company that actually relocated  
12 during the war from the Philippines to Ohio. And there  
13 they said that --

14 JUSTICE SOTOMAYOR: What does that do in the  
15 hypothetical 50/50? Let's say a State has a  
16 headquarters in Delaware. It sells 51 percent of its  
17 goods in New York and 51 percent -- and 49 percent in  
18 California. Almost equal number of employees, a  
19 difference of 10 percent, let's say. Same amount of  
20 property, whatever. And I'm assuming this railroad  
21 could fit that description in a number of States.

22 Why isn't it at home where a substantial  
23 amount of its business is going on?

24 MS. SAHARSKY: Well, because that would make  
25 the railroad at home in so many places for purposes of

1 general jurisdiction. And the Court said that where the  
2 focus should be going forward, and we think that this  
3 makes sense, is in specific jurisdiction.

4 In the situation that you posited where  
5 there are these two States where a lot of things are  
6 happening, that's where you would expect a lot of causes  
7 of action to arise. And so there would be personal  
8 jurisdiction over the defendant there. It would just be  
9 on a specific jurisdiction.

10 The Court conceived of general jurisdiction  
11 as a fallback, a place where you couldn't just subject  
12 the defendant to suit there for a claim arising out of a  
13 related-to its contacts with the State --

14 JUSTICE SOTOMAYOR: What's the logic of --

15 MS. SAHARSKY: -- just any type of claim.

16 JUSTICE SOTOMAYOR: What's the logic of --  
17 what's the logic of that?

18 MS. SAHARSKY: It's --

19 JUSTICE SOTOMAYOR: What's -- what's --  
20 other than we said it.

21 MS. SAHARSKY: Sure.

22 JUSTICE SOTOMAYOR: It certainly was very  
23 different than what International Shoe ever considered.  
24 What's -- what's the unfairness? We go back a little  
25 bit to the question that -- to the predecessor case. If



1 you're present in both States in an almost equal amount,  
2 and you are doing the bulk of your business equally, why  
3 shouldn't you feel that you're going to be hauled into  
4 both places?

5 MS. SAHARSKY: Well, the difference between  
6 being hauled into court for claims that arise out of or  
7 are related to the context with the State, as opposed to  
8 claims that are just any kind of possible claims. And I  
9 think the reason that the Court talked about you being  
10 at home is because it's the equivalent of like domicile  
11 for a person. It said what's the equivalent of a  
12 corporation? A place where it voluntarily chooses to go  
13 to do its business. It gets the benefits of that  
14 State's law, and then it means that it also has to have  
15 the burdens. And the burdens are not just that you  
16 would be subject to any claim -- or to the claims that  
17 are related to the State, but to any kind of claim.

18 So in somewhere where there is that kind of  
19 relationship that the corporation has in terms of  
20 incorporation or principal place of business, it's fair  
21 for the corporation, like a person, where they're  
22 domiciled, to have to answer for any type of claim. But  
23 if we're talking about somewhere that you -- that the  
24 corporation is just doing business where it's not  
25 considered at home, it's fair, the Court said, for the

1 corporation in that circumstance to have to answer for  
2 claims that are related to the forum. But here, we have  
3 these claims that have just no relationship to the forum  
4 at all. We don't have the plaintiffs from the forum, we  
5 don't have any injury in the forum, the defendants are  
6 not at home or incorporated in the forum.

7 So we do think it makes sense for general  
8 jurisdiction, as the Court conceived of it in Goodyear  
9 and Daimler, to be this kind of safety valve going  
10 forward, and that where the bulk of the action would be  
11 is in the specific jurisdiction context. Because after  
12 all, those are the places where things happened that are  
13 related to the litigation. There's people there;  
14 there's evidence there. Those States have an interest  
15 in having those claims adjudicated, spending their  
16 juries and their resources on claims that were related  
17 to and happened in the State.

18 If the Court has no further questions, we'd  
19 urge that the judgment of the court below be reversed.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Murray.

23 ORAL ARGUMENT OF JULIE A. MURRAY

24 ON BEHALF OF THE RESPONDENTS

25 MS. MURRAY: Mr. Chief Justice, and may it

1 please the Court:

2           For more than a century, injured rail  
3 workers have been able to sue their negligent employers  
4 in a court of -- in any State where the railroads are  
5 doing business. Congress gave workers the substantial  
6 right so that they, in Justice Jackson's words, would  
7 have the dice loaded in their favor. BNSF's view of  
8 Section 56 would turn this substantial right into an  
9 illusory one.

10           JUSTICE GINSBURG: Why isn't it that we were  
11 told -- and I think it's correct -- that the language  
12 that's used in Section 56, the wording, "Civil action  
13 may be brought in," is found in some 200-odd venue  
14 statutes? So the -- the way this statute is written, it  
15 sounds like a venue description, not a personal  
16 jurisdiction description.

17           MS. MURRAY: Certainly, Justice Ginsburg, we  
18 recognize that the -- the language, you know, "where  
19 suit may be brought" appears in other statutes and has  
20 been interpreted in that way. But I think this Court  
21 should look at Section 56 as a whole. We are not aware  
22 of another statute that, in a single paragraph, has the  
23 -- the same language that FELA does, where it has a --  
24 it talks about where suits may be brought, it then goes  
25 on to say that the jurisdiction of the State and Federal

1 courts would be concurrent, and then has some very  
2 unusual --

3 JUSTICE GINSBURG: "Concurrent" usually  
4 means that it's not -- it's a Federal claim, but it  
5 could be adjudicated in State as well as Federal court.  
6 That's what concurrent jurisdiction means.

7 MS. MURRAY: Well, I -- we think, Your  
8 Honor, in this context it is ambiguous, given -- if you  
9 look at the statute as a package where it has the  
10 "may" -- "may be brought" language, the "concurrent  
11 jurisdiction" language, and then the very unusual  
12 provision that actually prohibits removal of these  
13 State -- of these Federal causes of action into Federal  
14 court. And I would say, you know, to the extent that  
15 this Court is -- is troubled by the -- our reading of  
16 concurrent jurisdiction as perhaps an unusual one, I  
17 think I should be equally troubled by the -- the  
18 illusory reading of Section 56 that BNSF would give it.

19 Because the -- at the time that Congress  
20 amended FELA in 1910, it intended for workers not to  
21 have to go to the place of incorporation of the company,  
22 or to leave far from their homes in order to bring suit,  
23 regardless of where they were injured. And the reality  
24 is, I -- I think you can't think about this case if you  
25 don't accept our reading of FELA as being fair because

1 workers could still get specific jurisdiction over the  
2 railroads in a place close to their home. That's simply  
3 not going to be the case for many of these workers.

4 CHIEF JUSTICE ROBERTS: Why is -- why is  
5 that?

6 MS. MURRAY: Well, I think Congress  
7 recognized in 1910 the railroad industry is unique. You  
8 have, in many cases, workers traveling five, six, seven  
9 hours, even to get to their starting work point where  
10 they then travel farther away. So if you look, for  
11 example, at Mr. Nelson, he is a resident of the State of  
12 Montana. He was injured in the State of Washington.  
13 And under BNSF's view, he would either have to go to  
14 Washington, he'd have to go to Tarrant County, Texas, or  
15 he could go to Delaware. That's simply not the outcome  
16 that Congress ever would have predicted, given the  
17 language that it adopted in 1910. And what we know it  
18 was trying to do when it adopted that language.

19 JUSTICE GINSBURG: Then why didn't it say  
20 the action could be brought at plaintiff's residence?

21 MS. MURRAY: Well, it considered that, Your  
22 Honor. And, in fact, it -- the reason it didn't have  
23 plaintiff's residence language is because industry said  
24 we don't want to have to defend suit in the plaintiff's  
25 residence if we're not doing business there. So the

1 doing business planning language, I think, was actually  
2 seen as being more fair to defendants than just a  
3 plaintiff's residence standard.

4 And the other thing that I would point out  
5 on that -- that issue, is that in 1947, Congress, again,  
6 considered adopting a different standard for Section 56.  
7 It considered a plaintiff's residence standard, and it  
8 rejected it, because it actually would have been used at  
9 that point to narrow the scope of places in which  
10 plaintiffs could have brought their suit.

11 Congress was presented with evidence that  
12 plaintiffs were bringing suits similar to what our  
13 clients have done here, where the only connection  
14 between the suits and the State was the fact that the  
15 defendant was doing business there --

16 CHIEF JUSTICE ROBERTS: Well, I -- I haven't  
17 looked at a route map, but BNSF, I assume, is doing  
18 business in a lot of States. And this would allow  
19 plaintiffs, wherever they reside, wherever they are  
20 injured, to sue in any one of those States, right?

21 MS. MURRAY: That's correct, Your Honor.  
22 And we think that that is what Congress intended, and  
23 it's -- Congress knew that that was, in fact, happening  
24 in 1947 --

25 CHIEF JUSTICE ROBERTS: Even though the

1 injury -- even though the injury occurred somewhere  
2 else.

3 MS. MURRAY: That's correct. And I think it  
4 is because of the unique nature of the railroad  
5 industry. You have --

6 CHIEF JUSTICE ROBERTS: It's not the unique  
7 nature of particular forums? I mean, the -- the  
8 discussion in the briefs is that there is a reason that  
9 someone, not a resident of Montana, injured in  
10 Washington, would want to sue in Montana. Is that  
11 something we ought to take into consideration?

12 MS. MURRAY: Well, I -- I think you can take  
13 it into consideration, but I actually think it, in many  
14 ways, favors us. I -- there are good reasons why  
15 someone would want to bring suit in Montana, even if  
16 they weren't injured there, even if they're not a  
17 resident. I mean, I think as BNSF concedes, there are a  
18 lot of these cases brought in Montana. And --

19 CHIEF JUSTICE ROBERTS: What's -- what's the  
20 good reason they would want to sue in Montana?

21 MS. MURRAY: Well, from a litigant's  
22 perspective, if you want predictability, you want to  
23 know that the court that you're going to know the  
24 specialized area of law like the back of their hand,  
25 that is Montana. These judges know FELA cases because

1 they see a lot of them.

2 So I -- I think there is good reason for  
3 some --

4 CHIEF JUSTICE ROBERTS: That seems -- that  
5 seems a little circular.

6 MS. MURRAY: Well, but it is the practical  
7 reality, in terms of -- of where people are bringing  
8 suits. I would say it's not the case that all of these  
9 cases are being brought in the State of Montana. I  
10 mean, I think BNSF and its amici certainly try to make  
11 that portrayal, but we don't have any hard data about  
12 that. And certainly in speaking with attorneys who  
13 represent FELA plaintiffs, they bring them lots of  
14 different locations, including, you know, other  
15 locations where people are not injured. And the fact of  
16 the matter is the railroad is just doing business there.

17 The other thing I would say is that, you  
18 know, whether you're concerned about people bringing  
19 suit in the State of Montana, if you were to say that  
20 our clients could not bring suit here, it would also  
21 mean that those clients who want to bring suit in their  
22 home State, again, in many instances, are not going to  
23 be able to do that.

24 As to the specific jurisdiction question, I  
25 think, you know, we are in agreement that people could



1 bring suit in the State where they were injured, but I  
2 actually think that the analysis of specific  
3 jurisdiction beyond that State gets quite complicated  
4 pretty quickly. You know, it would depend on, is this  
5 person, for example, primarily working in their home  
6 State. And the nature of this industry is many of  
7 these -- these workers do not primarily work in their  
8 home States. They may rarely, if ever, work there.

9           So in -- under those circumstances, I think  
10 it is -- you know, it's certainly not what Congress had  
11 in mind when it adopted the statute and said, you know,  
12 by -- by adopting this statute, we are going to make  
13 sure that people can find the defendant at any point or  
14 place or State along the railroad's tracks and there  
15 bring their actions.

16           JUSTICE ALITO: And I could understand why  
17 Congress -- I could understand why they might have  
18 wanted to allow the injured worker to sue where the --  
19 where the injury occurred, or where the worker resides,  
20 or where the company is headquartered, but why they  
21 would want to allow a -- a suit in -- in a State that  
22 satisfies none of those, really, is hard to understand.

23           MS. MURRAY: Well, Your Honor, I -- I think  
24 it is actually easier to understand if you sort of set  
25 it in the context of what was going on at that time.

1 The railroads -- there were thousands of these injuries.  
2 And I think Congress recognized, you know, these are  
3 highly sophisticated interstate transportation  
4 companies. They can get to these places of litigation a  
5 lot more easily than injured workers who may have to  
6 travel three States over to get to the --

7 JUSTICE ALITO: No, I know. And that  
8 would -- you could say that would justify saying --  
9 provide a reason for saying you could sue where you  
10 live, you could limit it to those -- to only those  
11 States where they're doing business. But why you would  
12 say you can sue anywhere has nothing to do with either  
13 the -- either the person who's injured or the company  
14 or -- or the -- or where the injury occurs, really, it's  
15 hard to understand going forward.

16 MS. MURRAY: Well, I -- I do think it is the  
17 language that Congress chose. And I -- I would say,  
18 too, with respect to the --

19 JUSTICE GINSBURG: With respect to that, I  
20 mean, we did have -- we say different things in  
21 different cases, but I think Kepner -- Kepner typed  
22 Section 56, a venue provision, didn't it?

23 MS. MURRAY: Certainly this -- this Court  
24 has referred to the provision as a venue provision. I  
25 don't think that's inconsistent with our position

1 because, as we concede, we think the first sentence  
2 does, in fact, confer both venue and personal  
3 jurisdiction in Federal court. So it's not  
4 inconsistent.

5 I would point, Your Honor -- I think, you  
6 know, the -- perhaps the -- the best cases, in terms of  
7 support for our position, are the Pope and the Boyd  
8 cases. So Pope, you had a situation very similar to  
9 this where someone brought suit in a State court that --  
10 where the injury had not occurred. The only connection  
11 was the railroad was doing business there. And in that  
12 case, this Court said this, Section 56, quote,  
13 "establishes Petitioner's right to sue in Alabama. It  
14 provides that the employee may bring his suit wherever  
15 the carrier, quote, 'shall be doing business,'" end  
16 quote.

17 JUSTICE GINSBURG: What -- what year is that  
18 case?

19 MS. MURRAY: I'm sorry?

20 JUSTICE GINSBURG: What year is the Pope  
21 case?

22 MS. MURRAY: It was 1953. So it's post  
23 International Shoe. And this is a case -- we just -- we  
24 talked about it at page 29 of our response, where the --  
25 the Court has clearly staked out a position that the

1 doing-business language in the first sentence of Section  
2 56 applies to State courts. And I think the only way  
3 that you can make sense of that is to read Section 56 in  
4 the way that we do, that takes the personal jurisdiction  
5 conferred by sentence --

6 JUSTICE GINSBURG: Do you have any -- any  
7 example of any other statute that does what you claim  
8 this one does, that is, that -- that determines State  
9 court jurisdiction, that has a provision, which you say  
10 is conferred, that alters the personal jurisdiction of  
11 the State court from what it would be without the  
12 Federal statute?

13 MS. MURRAY: So the -- as I said, we don't  
14 have a statute that we think mirrors FELA. We do think  
15 it's an unusual statute that was called for by unusual  
16 circumstances. Probably the closest example is 15  
17 U.S.C. 77b, it's part of the Securities Act, and that  
18 statute does actually have an express service-of-process  
19 provision with respect to Federal courts.

20 It also has a concurrent jurisdiction  
21 language in it. And it has, in fact, in at least some  
22 lower courts, been interpreted -- or there's a  
23 disagreement among the lower courts as to whether that  
24 language actually provides or permits State courts to  
25 exercise personal jurisdiction to the same extent as

1 Federal courts would as well.

2 CHIEF JUSTICE ROBERTS: The -- the Court in  
3 Pope didn't mention personal jurisdiction at all.

4 MS. MURRAY: That's right, Your Honor. We  
5 don't think -- we're not arguing --

6 CHIEF JUSTICE ROBERTS: And that's your  
7 strongest authority?

8 MS. MURRAY: Well, I think it is one. I  
9 certainly think the Boyd case, again, another -- this  
10 one is -- we talk about at pages 31 to 31 -- 32 of our  
11 brief. The Boyd case is another example where, again,  
12 we're not arguing it's a personal jurisdiction case, but  
13 it was a case in which this Court read Section 56,  
14 including sentence 2 of Section 56, to confer what it  
15 called a substantial right, but under another provision  
16 of FELA which prohibits any contract, the intent of  
17 which is to exempt the carrier from liability.

18 CHIEF JUSTICE ROBERTS: The right that --  
19 the right, I think, they're referring to, is the right  
20 to proceed in State court, right?

21 MS. MURRAY: That's correct, yes.

22 CHIEF JUSTICE ROBERTS: Which --

23 MS. MURRAY: That's --

24 CHIEF JUSTICE ROBERTS: -- which, of course,  
25 you'd expect that to deal with the second sentence,

1 because it talks about the concurrent jurisdiction.  
2 There's a difference between, you can proceed in State  
3 court and the question of whether there's personal  
4 jurisdiction in a particular State court.

5 MS. MURRAY: Well, I -- I take your point,  
6 Your Honor, but, I think, we don't typically think of a  
7 provision that just says there's concurrent jurisdiction  
8 between State and Federal courts and is referring only  
9 to subject-matter jurisdiction. Certainly in the  
10 circumstances like this, where Congress, you know,  
11 thought that there was this jurisdiction before and it  
12 just wanted to -- to be extra sure to confirm it --

13 CHIEF JUSTICE ROBERTS: I'm sorry. We  
14 don't -- we don't typically think of concurrent State  
15 and Federal jurisdiction to refer to subject-matter  
16 jurisdiction?

17 MS. MURRAY: No. What I was going to say is  
18 we don't typically think of provisions like that as  
19 conferring a substantial, non-waivable right. And so I  
20 think the -- the Boyd case certainly in terms of looking  
21 at what is Section 56 doing, if all it is doing is  
22 saying that you can bring a -- a cause of action in  
23 Federal court in certain venues and just reconfirming  
24 that State courts have subject-matter jurisdiction, you  
25 wouldn't normally think of that. Or it seems

1 difficult --

2 JUSTICE GINSBURG: Wasn't there -- wasn't  
3 there a decision that suggested that State courts didn't  
4 have concurrent -- concurrent jurisdiction and that's  
5 why Congress made the change?

6 MS. MURRAY: There was, Your Honor. And we  
7 don't take issue with the -- the proposition from BNSF  
8 that that is one thing that Congress was doing with the  
9 concurrent jurisdiction language. It was -- it was  
10 confirming that State and Federal courts both had  
11 subject-matter jurisdiction. But we think given --  
12 given the precedent, given Boyd and Pope, you're not  
13 writing on a blank slate in terms of how you interpret  
14 Section 56.

15 CHIEF JUSTICE ROBERTS: Well, Pope didn't  
16 mention personal jurisdiction. Did Boyd?

17 MS. MURRAY: No. These are not personal  
18 jurisdiction cases, but I do think the rationale that  
19 they used in interpreting Section 56 necessarily -- when  
20 you look at what Section 56 is doing, I -- I think you  
21 do have to recognize it is doing something more than  
22 what BNSF says it is doing. And -- and through Pope,  
23 that the language of doing business in sentence 1  
24 applies to sentence 2 somehow, or applies to State  
25 courts somehow, and we think that sentence 2 provides

1 that necessary link.

2           If I -- if I could talk briefly about our  
3 alternative argument, you know, if this Court were to  
4 read FELA not to permit State courts here to exercise  
5 personal jurisdiction, we do think that under this  
6 Court's determination in Daimler and the preceding  
7 precedent that there could be general jurisdiction here  
8 as well, given the nature of BNSF's contacts with the  
9 State of Montana.

10           And I think one key in that analysis -- or  
11 one way to frame that analysis is to really look at  
12 railroads as being unique. This is not -- in -- in the  
13 instance of BNSF and Montana, you have, again, a very  
14 sophisticated interstate commerce company that has, in  
15 fact, been in Montana, through its predecessors, has  
16 been engaged there before Montana was even a State, and  
17 helped to populate the State by bringing in farmers and  
18 ranchers. There's some of the history of this in the  
19 Maintenance of Way amicus brief.

20           JUSTICE KAGAN: Well, is your argument that  
21 railroad companies are so unique that they should be  
22 subject to general jurisdiction everywhere?

23           MS. MURRAY: I don't think that that would  
24 necessarily have to follow, but I think it is a key  
25 ingredient as to why BNSF is at home in the State of



1 Montana.

2 JUSTICE KAGAN: But, I mean, at home in the  
3 State of Montana and at home in everyplace else that it  
4 operates?

5 MS. MURRAY: I -- Your Honor, I think it  
6 would depend on the other States in which it operates  
7 and its history in -- in those States, the level of  
8 contacts. I mean, I think in addition to the -- the  
9 history, if you look at present day, BNSF has a gigantic  
10 footprint in Montana. That's not true in all of the  
11 States in which it operates. It has over 2100 miles,  
12 roughly 2100 miles of track, 2200 employees in the  
13 State, more than 40 facilities in the State, a permanent  
14 presence that crisscrosses the State --

15 CHIEF JUSTICE ROBERTS: And there is  
16 something --

17 MS. MURRAY: -- and has for decades.

18 CHIEF JUSTICE ROBERTS: I understand the  
19 notion that railroads -- for those reasons, they  
20 obviously have to have a lot of physical plant, they  
21 have to have a lot of workers, they, you know, traverse  
22 the State. I understand how that might look like  
23 they're at home. But there are a lot of other  
24 industries that have a significant impact. I don't  
25 know, there are interstate banks, airlines. I suspect

1 that there are agricultural companies that do a lot of  
2 business and cover a lot of land and territory.

3 I mean, is your -- your test just that it's  
4 a railroad, or -- or how do you decide what other  
5 companies and industries are at home in Montana?

6 MS. MURRAY: Well, sir, we are not arguing  
7 for a standard that would sweep beyond railroads here.  
8 I think there could be aspects of other industries that  
9 would lend themselves to the same types of analysis.  
10 But I -- I think that railroads actually are in a pretty  
11 unique segment of interest -- industry in the sense of  
12 unlike interstate or international banks, you know, you  
13 depend on railroads to have a permanent physical  
14 presence in the State, because, otherwise, you cannot  
15 actually, you know, guarantee that you can carry goods  
16 from one point of the country to another.

17 CHIEF JUSTICE ROBERTS: So trucking  
18 companies? Trucking companies, they carry a lot of  
19 goods, too.

20 MS. MURRAY: And they can go in many  
21 different routes, Your Honor. I think here where you  
22 have --

23 CHIEF JUSTICE ROBERTS: No, no. I mean,  
24 they're going to take -- what is it? -- 95 across -- not  
25 95. 90?

1 JUSTICE GORSUCH: I-80 across Montana.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: There you go. It's  
4 that geographical diversity.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: So -- so I-80 across  
7 Montana, that's the route they're going to take.  
8 They're going to, just like the railroad, is going to  
9 follow the railroad tracks.

10 JUSTICE GORSUCH: Maybe it's 90.

11 CHIEF JUSTICE ROBERTS: The truckers are  
12 going to follow I-80.

13 MS. MURRAY: Well, they're -- they're still  
14 not going to have that same sort of permanent physical  
15 presence in the State of laying down 2100 miles of  
16 track.

17 The other thing that I would point out with  
18 respect to BNSF's role in the State of Montana, I think  
19 to Justice Sotomayor's question about the registration,  
20 we do have an alternative argument with respect to  
21 consent, but we have all along also argued that the --  
22 the registration, the longtime doing of business in  
23 Montana should -- should play a role and is distinct  
24 from some of the -- the cases that this Court -- Court  
25 has had before it in the past.

1           And, you know, one other thing to note,  
2           which, I think, is, again, distinct from -- including  
3           Daimler, what we know here about BNSF is that it is so  
4           integrated into Montana's economic and political life,  
5           it set up its own government relations shop in the State  
6           of Montana. It's got lobbyists there to advocate for  
7           its interests.

8           CHIEF JUSTICE ROBERTS: Oh, I'm sure a lot  
9           of other companies have government relations offices in  
10          the State.

11          MS. MURRAY: Well, that may be true, Your  
12          Honor. And, certainly, I think in this analysis, when  
13          you are looking at various factors that could lead you  
14          to conclude that BNSF is at home in the State of  
15          Montana, I think that is one factor that plays a role  
16          into it. You don't have to worry about, as you would in  
17          cases, for example, with, you know, foreign companies  
18          that are being dragged into court because their products  
19          happen to -- to land in that State. Here you have a  
20          company that has a permanent physical presence and it's  
21          got lobbyists there who are looking out for its  
22          interests if it doesn't like what is happening in the  
23          courts of Montana or the substantive law to which it is  
24          subjected in Montana.

25          JUSTICE SOTOMAYOR: You would still have a

1 right to bring a Federal action in Montana -- no? --  
2 under the Section 56, which permits an action to be  
3 brought in a district in which the defendant shall be  
4 doing business?

5 MS. MURRAY: No, Your Honor. If I  
6 understand your hypothetical, if we were to bring -- if  
7 this Court decided that FELA did not address personal  
8 jurisdiction at all, what would happen if we tried to  
9 bring our suits in Montana Federal court is that that  
10 Federal court would say, great, you have venue, but I  
11 look to Rule 4 for personal jurisdiction --

12 JUSTICE SOTOMAYOR: That's assuming we reach  
13 that issue.

14 MS. MURRAY: Right. I suppose if this --

15 JUSTICE SOTOMAYOR: We could just say  
16 it's -- we could just say it doesn't apply to State  
17 courts, it only applies to Federal courts.

18 MS. MURRAY: You could.

19 JUSTICE SOTOMAYOR: Whatever it does.

20 MS. MURRAY: You could, Your Honor. I think  
21 that that would be, you know, certainly preferable for  
22 us if there is still some availability of Federal court.  
23 One thing that I would note, however, is that would sort  
24 of create a topsy-turvy scheme. I think when Congress  
25 enacted FELA, it assumed that most of these suits would

1 be brought in State court.

2 JUSTICE SOTOMAYOR: But it would take care  
3 of the question of the -- of where a plaintiff lives.

4 MS. MURRAY: It would take care of the  
5 question of where a plaintiff lives.

6 JUSTICE GORSUCH: And, counsel, I -- I must  
7 apologize.

8 It's 90 across Montana.

9 (Laughter.)

10 JUSTICE GORSUCH: 80 across Wyoming. I'm  
11 very sorry, Mr. Chief Justice.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Didn't I say 90?

14 (Laughter.)

15 JUSTICE BREYER: Anyway, your problem, I  
16 guess, that you're trying to get around is that Daimler  
17 had about 2.4 percent of its world sales in California  
18 and was the largest seller of luxury goods in  
19 California, luxury cars. And I suspect when you sell  
20 luxury cars in California, it's really something.

21 MS. MURRAY: Well, certainly --

22 JUSTICE BREYER: They had a very big market.  
23 And the problem is how do you get around that? And --  
24 and I know you're trying, and it's a -- making a valiant  
25 effort and so forth, but -- but I don't really see the

1 difference.

2 MS. MURRAY: Well, Your Honor, we hope it's  
3 more than a valiant effort in the sense that we do think  
4 that there are key distinctions not just in the numbers  
5 here in terms of the track and employees and business,  
6 but in terms of the nature of the industry --

7 JUSTICE BREYER: What percent -- what  
8 percent of their total operation is in Montana?

9 MS. MURRAY: We know that they get up to  
10 10 percent of their revenue in the State of Montana,  
11 which, given that they operate in 28 States and a couple  
12 Canadian provinces, it has to be the case that that is  
13 disproportionately large compared to the other States in  
14 which they operate.

15 JUSTICE BREYER: Good point.

16 MS. MURRAY: And -- and if -- if I could  
17 come back to -- to your question, Justice Sotomayor,  
18 about if -- if plaintiffs were able to bring these  
19 claims in Federal court versus State, that would  
20 certainly be preferable. Then they -- they couldn't  
21 bring it --

22 JUSTICE GINSBURG: But that would -- that  
23 would depend on it being it's a personal jurisdiction  
24 provision, not just a venue provision.

25 MS. MURRAY: That's -- that's correct.

1 JUSTICE GINSBURG: If it's a venue  
2 provision, which this Court said it was, then you -- you  
3 satisfy the venue requirement, but not personal  
4 jurisdiction.

5 MS. MURRAY: That's right, your -- Your  
6 Honor, and I -- what would happen in that case is that  
7 Mr. Nelson, for example, living in North Dakota, would  
8 be headed to Washington, Texas, or Delaware to bring his  
9 claim. That would be the reality, despite what Congress  
10 intended when it adopted and it -- or amended FELA in  
11 1910. But in --

12 JUSTICE GINSBURG: But what is -- what is  
13 his state of residence?

14 MS. MURRAY: He is a North Dakota resident.  
15 And -- and was injured, you know, in -- in the State of  
16 Washington. Again, I think an example of how far these  
17 workers frequently travel in order to bring their -- or  
18 frequently travel in the course of their -- their work  
19 for BNSF, it, in many ways, is simply a coincidence  
20 whether they're injured at home versus injured somewhere  
21 else, and of course, they would have no way of knowing  
22 that in advance.

23 But I -- I would say with respect to  
24 bringing suit in Federal court, I don't think it would  
25 completely solve the problem in this sense. You know,



1 when Congress thought these cases would be brought in  
2 State court, it didn't want them removed -- or, at least  
3 where plaintiffs chose to file them in State court, it  
4 did not want them to be removable. And I think part of  
5 that is because these are personal injury cases. Some  
6 of them are low -- low-dollar claims. Congress wanted  
7 the -- the plaintiffs to have their choice of forum too,  
8 with respect to, you know, if you want to take this kind  
9 of claim to a State court judge for whom this is the  
10 bread and butter of their docket, you can do that. And  
11 I think if you were to -- to limit these types of claims  
12 to Federal court in Montana, for example, or on the  
13 doing-business rationale, one, plaintiffs would still be  
14 very limited in terms of where they could choose State  
15 courts, but it also wouldn't be as easily accessible to  
16 them. I mean, most of the time, Federal courts you only  
17 have one or two in a State, and so it's not going to be  
18 as readily available of a forum for injured workers who,  
19 you know, certainly as compared to the railroads, are  
20 going to be far more burdened by a rule like that.

21 JUSTICE GORSUCH: Ms. Murray, one of the  
22 rationales that Montana relied on was that Daimler  
23 applied only to foreign corporations, and I didn't see  
24 the briefs really grapple or attempt to defend that.

25 Do you -- do you concede that that's

1 erroneous?

2 MS. MURRAY: We don't -- we think the way  
3 that the Montana Court framed it, I think, is not a  
4 helpful one to think about it.

5 What -- what I would say is this: I don't  
6 think that you can simply say Daimler doesn't apply  
7 because it was a foreign corporation.

8 But I do think Daimler, as earlier general  
9 jurisdiction cases had recognized, continued to  
10 recognize the nature of context matters. And so  
11 certainly, I think once you start moving up the  
12 corporate chain, once you start hopping into other  
13 continents and having to impute -- to the extent that  
14 that is actually appropriate -- having to impute  
15 contacts of a subsidiary, I think the nature of the  
16 contacts becomes so attenuated, that at that point that  
17 transnational element of Daimler actually does play a  
18 role; it's just not a dispositive one.

19 JUSTICE GORSUCH: Thank you.

20 MS. MURRAY: If the Court has no further  
21 questions.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Tulumello, nine minutes.

24 REBUTTAL ARGUMENT OF ANDREW S. TULUMELLO

25 ON BEHALF OF THE PETITIONER

1 MR. TULUMELLO: Thank you, Mr. Chief  
2 Justice.

3 Just a couple points. First, the Montana  
4 Supreme Court held that it did not need to apply this  
5 Court's decision in Daimler based on Daimler's  
6 transnational facts and because BNSF is a domestic  
7 railroad. We think neither rationale is persuasive.

8 And at least with respect to railroads being  
9 unique, we don't read these -- this Court's due process  
10 cases as saying due process protection depends on the  
11 particular line of business that you're in.

12 There are -- you know, as to movement and  
13 ownership of property, there are many industries, cable  
14 companies, agriculture businesses, and so forth, that  
15 have physical plants and that transport people across  
16 the country.

17 And then with respect to FEELA, we don't  
18 think it would be helpful or faithful to the text or  
19 legislative history to interpret Section 56 in a way  
20 that grants personal jurisdiction when no other special  
21 venue statute or general venue statute has ever done so.

22 So we respectfully ask that the Montana  
23 Supreme Court judgment be reversed.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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Thank you.

The case is submitted.

(Whereupon, at 11:56 a.m., the case in the  
above-entitled matter was submitted.)

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