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INTRODUCTION

In the 130 years following *Pennoyer v. Neff*, states and defendants are still asking the United States Supreme Court to clarify when personal jurisdiction may be exercised.[1] With each case, the Court relies on due process and sweeps the harms of such reliance under the rug. The Court claims that because personal jurisdiction is a due process matter, clear and predictable rules are favorable, yet state courts are no less uncertain of their power over out-of-state corporations than they were in the last two centuries.[2] The Supreme Court in *Daimler AG v. Bauman* sought to eliminate uncertainty and ruled that due process requires general personal jurisdiction only proper when a corporation (1) is incorporated in the forum state or (2) its principal place of business is in the forum state.[3]

However, even after the Supreme Court narrowed general personal jurisdiction options from fifty to two in the interest of predictability, states like Montana are still exercising personal jurisdiction over corporate defendants that do not meet the *Daimler* requirements.[4] In *Tyrrell v. BNSF* (the "Montana Decision"), the Montana Supreme Court found that it could exercise general personal jurisdiction over BNSF Railway Company ("BNSF"), because the corporation conducts business within Montana's boarders and the plaintiff's action against BNSF is brought under the Federal Employees Liability Act (the "FELA").[5] Furthermore, the Montana court found that because *Daimler* is factually distinguishable, it was not unconstitutional to decline to apply its holding.[6]

Nevertheless, BNSF urged the Supreme Court to hold that because the Montana Supreme Court declined to apply *Daimler*, the Montana Decision was therefore unconstitutional.[7] Further, BNSF appealed to the Supreme Court that the Montana Decision would lead to abusive forum shopping.[8] Arguably, however, the Montana Supreme Court may not be responsible for the "abusive forum shopping," but rather the Supreme Court and its less-than-predictable personal jurisdiction jurisprudence might be to blame.[9] With the Montana Decision awaiting review, the Supreme Court either had to acknowledge that due process is not the outer-boundary for federal

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[1] Pennoyer v. Neff, 95 U.S. 714 (1877).

[2] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 771 (2014) ("'[S]imple jurisdictional rules . . . promote greater predictability.'") (quoting Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)).

[3] *Daimler*, 134 S. Ct. at 760–763 (holding that due process requires a corporation to be essentially at home in states seeking to exercise jurisdiction).

[4] Tyrrell v. BNSF, 383 Mont. 417 (Mont. 2016), *rev'd*, 137 S. Ct. 1549 (2017).

[5] 45 U.S.C § 56 (2012); *see Tyrrell*, 383 Mont. at 418.

[6] *See Tyrrell*, 383 Mont. at 426.

[7] *See* Petition for Writ of Certiorari, BNSF Railway Co. v. Tyrrell, 2016 WL 5462798, at *3 (No. 16-405).

[8] *See* Petition for Writ of Certiorari, BNSF Railway Co. v. Tyrrell, 2016 WL 5462798, at *24 (No. 16-405) (arguing the Montana holding caused abusive forum shopping because after the decision thirty-two cases were brought against BNSF under FELA).

[9] See *Tyrrell*, 383 Mont. 417 (declining to apply *Daimler* and asserting jurisdiction); *see also* Bristol-Myers Squibb Co. v. Super. Ct. of Cal. for the Cty. of San Francisco, 206 Cal. Rptr. 3d 636, 377 P.3d 874 (2016) (granting specific jurisdiction over defendant even where the injury did not occur in the forum state).

personal jurisdiction or further limit plaintiffs's remedies in suits against corporations operating across multiple jurisdictions.

This note focuses on the current judicial inequity between corporate defendants and plaintiffs seeking to assert general jurisdiction over corporate defendants. First, this note will explain why the Montana Decision is a product of the inefficiencies created by the Supreme Court's personal jurisdiction jurisprudence. Second, this note will evaluate the FELA statute to (1) reveal the constitutionality of federally-conferred personal jurisdiction and (2) emphasize the benefits of federal personal jurisdiction for plaintiffs and states in corporate litigation. Third, this note will examine the judicial history of personal jurisdiction to explain why it is wrongly understood to be a due process right. Further, this note will emphasize the dangers the Supreme Court created in the *Daimler* decision. Finally, this note will conclude by recommending that the Supreme Court should recognize that due process is not the threshold for personal jurisdiction, and in the future, hold federally-granted general jurisdiction constitutional because it would correct the dangers created in *Daimler* and affirmed in *BNSF*.

I. THE TRACK TO CERTIORARI: FROM THE MONTANA DECISION TO THE SUPREME COURT

A. FACTUAL AND PROCEDURAL BACKGROUND

Robert Nelson ("Nelson") and Kelli Tyrrell ("Tyrrell"), as Special Administrator of the Estate of Brent Tyrrell ("Brent"), filed separate suits in Montana state court against BNSF, pleading BNSF violated the FELA.[10] BNSF moved to dismiss both causes for lack of personal jurisdiction.[11] Neither complaint alleged that Nelson or Brent were injured in, or ever worked in, Montana.[12] Additionally, BNSF was a Delaware corporation with its principal place of business in Texas.[13] Judge Moses, the presiding judge over Tyrrell's claim, denied BNSF's motion.[14] To do this, Judge Moses implemented a prior Montana ruling regarding BNSF's activity within the state, where the court found:

> BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years. . . . In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum. . . . In the last year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development.[15]

[10] 45 U.S.C. § 56 (2012); *see Tyrrell*, 383 Mont. 417.
[11] *See Tyrrell*, 383 Mont. at 417.
[12] *Id.* at 419–20.
[13] *Id.* at 419.
[14] *Id.*
[15] *Id.* at 420 (quoting Jesse R. Monroy v. BNSF Ry. Co., No. DV 13-799 (Aug. 1, 2014)).

In the case quoted above, Judge Todd analyzed the FELA with Montana law and found that based on the information above, BNSF's contacts with the state merited general personal jurisdiction.[16] However, Judge Baugh, the presiding judge over Nelson's case, relied on *Daimler* to grant BNSF's motion.[17] Judge Baugh explained that BNSF's due process rights would be violated if the Montana court were to exercise general personal jurisdiction, because such an exercise would directly defy the holding in *Daimler*.[18]

BNSF appealed Judge Moses's decision and Nelson appealed Judge Baugh's decision.[19] In a joint appeal, the Montana Supreme Court sought to determine whether the FELA grants Montana courts general personal jurisdiction over BNSF, if such a decision would violate due process, and if this decision would be legal under Montana law.[20]

B. THE DAIMLER DECISION: THE TRANSNATIONAL CONTEXT

Before analyzing the Montana Decision, it is necessary to discuss the holding in *Daimler*, as the Montana court's failure to apply it is the crux of why BNSF petitioned for certiorari.[21] Twenty-two residents of Argentina brought suit against DaimlerChrysler AG ("Defendant") in the United States District Court for the Northern District of California (the "District Court"), alleging that the Defendant's subsidiary Mercedes Benz-Argentina, committed human-rights violations against the plaintiffs in Argentina.[22] The Defendant moved to dismiss for lack of personal jurisdiction.[23] The District Court granted the Defendant's motion; however, the Ninth Circuit reversed the decision after finding that jurisdiction could be established through one of the Defendant's subsidiaries, Mercedes-Benz USA, LLC ("MBUSA").[24] MBUSA was not incorporated in California, nor was its principal place of business located in the state. However, the Ninth Circuit presumed MBUSA fell within California's general jurisdiction because of its contacts with the state.[25] Furthermore, the Ninth Circuit believed that because MBUSA was an agent of the Defendant, the Defendant should be accountable for suit in the state of California.[26]

After the Ninth Circuit's reversal, the Defendant petitioned to the Supreme Court to determine if California jurisdiction was proper in such case.[27] The Supreme Court found that even if MBUSA's contacts with California could establish a connection with the Defendant for jurisdiction, such a connection was not strong enough.[28] What is clear from the holding is that the Court did not want to find jurisdiction proper, because such exercise would present a risk to

[16] *Id*. at 420.
[17] *See Tyrrell*, 383 Mont. at 419.
[18] *Id.*
[19] *Id*. at 419–20.
[20] *Id.*
[21] Petition for Writ of Certiorari, *supra* note 7, at *3.
[22] *Daimler*, 134 S. Ct. at 750–51.
[23] *Id*. at 748.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Daimler*, 134 S. Ct. at 760.

international comity.[29] The Court emphasized that foreign nations would not share the same approach taken by the Ninth Circuit.[30]

While keeping in mind the Supreme Court's rationale for declining general jurisdiction in a transnational matter, it is questionable how corporations, like BNSF, seek to apply the holding not only to foreign corporations, but also to domestic corporations.[31] To begin, the decision was based on an issue different from what the Court granted certiorari to decide.[32] Furthermore, in going beyond the certified issue, the Court adopted "a new rule of constitutional law that is unmoored from decades of precedent."[33]

In understanding the uncertainty created by *Daimler*, it is important to note that general jurisdiction cases are rare.[34] The *Daimler* decision relies on three general jurisdiction cases: *Goodyear*, *Helicopteros,* and *Perkins*.[35] All three cases have the following issue in common: whether general jurisdiction may be exercised over a foreign corporation.[36] Thus, the only implication, that the *Daimler* holding might apply to domestic corporations, is drawn from the following line, in which the Court directly quoted *Goodyear*: "'[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State.'" [37]

Consequently, those in favor of the *Daimler* decision believe it applies to domestic corporations, and base their rationale on the parenthetical attribution of "sister-states" to "foreign nations," in a case where the Court was limited to deciding the following: "'[a]re foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?'"[38]

C. THE MONTANA DECISION

Following the joint appeal, the Montana Supreme Court ultimately held that the state may exercise personal jurisdiction over BNSF under the FELA claims, because (1) BNSF's presence

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[29] *Daimler*, 134 S. Ct. at 763 ("The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed.").
[30] *Id.* at 763.
[31] Petition for Writ of Certiorari, *supra* note 7, at *3.
[32] *Daimler*, 134 S. Ct. at 763.
[33] *Id.* at 773.
[34] *Id.* at 775.
[35] *See id.* (referring to Goodyear Dunlop Tires Operations, S.A. v, Brown, 564 U.S. 915 (2011), Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408 (1984), and Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).
[36] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) ("Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"); Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 409 (1984) ("Petitioner Helicopteros Nacionales de Colombia, S. A. (Helicol), is a Colombian corporation with its principal place of business in the city of Bogota in that country."); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952) ("Among those sued is the Benguet Consolidated Mining Company, here called the mining company. It is styled a 'sociedad anonima' under the laws of the Philippine Islands, where it owns and has operated profitable gold and silver mines.").
[37] *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).
[38] *See* Petition for Writ of Certiorari, *supra* note 7, at *5 (quoting *Goodyear*, 564 U.S. at 918); *see also id.*, at *14 (claiming there is no legal distinction between foreign and sister-state defendants).

in the state satisfies the statutory requirement of "doing business" and (2) the state's long-arm statute does not conflict with the FELA.[39] Following this decision, BNSF petitioned the Supreme Court for a writ of certiorari, arguing that Montana's decision was unconstitutional because it does not fulfill the "at home" standard established in *Daimler*.[40]

The Montana Supreme Court declined to use the test set in *Daimler*, and explained that because *Daimler* is factually distinguishable, it does not apply.[41] As previously stated, the task in *Daimler* was to determine whether a California state court could exercise general jurisdiction over a foreign corporation, based on the presence of the corporation's subsidiary in California.[42] Specifically, the Court needed to clarify what it meant for a foreign corporation to be essentially at home in the forum state, as defined by *Goodyear*.[43] Thus, the Montana court reasoned the *Daimler* decision only applied to *foreign* corporations, not *domestic* corporations.[44]

Additionally, the Montana court noted the *Daimler* decision did not involve a claim under the FELA nor did BNSF cite any cases that showed *Daimler* precluded the state from acting in the FELA cases.[45] Furthermore, the Montana court examined Congress's legislative intent and the history concerning the statute.[46] The court found that at the time of the statute's enactment, the venue of an action, under the FELA, would be decided under the general venue statute; which ultimately put the suit in districts in which the defendant was an inhabitant.[47] Nevertheless, subsequent litigation emphasized the limitations the venue statute placed on plaintiffs.[48]

By choosing to remove these imposed venue limitations on plaintiffs, Congress changed the FELA statute and added that a FELA suit could also be brought in a state where the company is doing business.[49] With this, the Montana court found that Congress created the statute to give plaintiffs a chance to lodge a complaint against the corporate defendant "at any point or place or [s]tate" the plaintiff chooses.[50]

The Montana Decision then begs two questions for support. First, if Congress did intend to give states general jurisdiction, does Congress have the power to grant jurisdiction? Second, if Congress does have the power, and does create a statute conferring general jurisdiction to the states, can the states, acting under these statutes, ignore due process requirements articulated by the Supreme Court? Precisely, the Supreme Court had to determine: "whether a state court may decline to follow the Supreme Court's decision in *Daimler AG v. Bauman*, which held that the due process clause forbids a state court from exercising general personal jurisdiction over a

[39] *Id.* at *3.
[40] *Id.*
[41] *See Tyrrell*, 383 Mont. at 426.
[42] *See Daimler*, 134 S. Ct. at 750.
[43] *See id.* at 762 n. 20*; see also Goodyear*, 564 U.S. at 919.
[44] *Tyrrell*, 383 Mont. at 423.
[45] *Id.* at 424.
[46] *Id.* at 421.
[47] *Id.*
[48] *Id.*
[49] *Tyrrell*, 383 Mont. at 421 (quoting Balt. & Ohio. R.R. Co. v. Kepner, 314 U.S. 44, 50 (1941)) (stating that "[t]his language was added to rectify 'the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes.'").
[50] *Id.* at 421.

defendant that is not at home in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act."[51]

II. FEDERAL PERSONAL JURISIDICTION

A. FEDERAL DUE PROCESS: RULE (4)(K)

In theory, Congress can create a system of nationwide jurisdiction.[52] However, following Federal Rule of Civil Procedure 4(k), federal courts must apply the jurisdictional rules of the state in which they sit.[53] While Congress has not expressly created a system for nationwide jurisdiction, the FELA arguably eliminates state boarders for the adjudication of FELA claims.[54] Nevertheless, federal courts must comply with jurisdictional rules of the forum state; therefore, the Montana court examined the FELA under its jurisdictional rules to determine its validity.[55] Thus, by way of concurrent jurisdiction, the Montana court found that where the federal government has jurisdiction, it too has jurisdiction.[56]

However, it is important to note that while federal due process and state due process did not conflict in the Montana decision, it does not mean the same will be true in other states.[57] Thus, because of Rule 4(k), the federal government is limited to the laws of state in which they sit for jurisdiction.[58] If the federal government were to enact a nationwide system for jurisdiction, Rule 4(k) would have to be eliminated or modified.[59] Nevertheless, such an enactment would not be unconstitutional.[60]

B. FEDERAL JURISDICTION STATUTES AS A REMEDY FOR PLAINTIFFS

In reference to *Daimler*, the Montana court raised a valid point, and posed a situation in which a plaintiff is unfairly inconvenienced by the holding.[61] The court questioned what would happen if a resident of Montana, employed by BNSF, is injured in another state, a state in which BNSF is not "at home" for jurisdictional purposes as defined in *Daimler*.[62] The plaintiff would necessarily have to suffer the expense of travelling out-of-state, while the corporation that caused the harm would be protected from this expense and inconvenience.[63] It seems natural that Congress should have the power to remedy these cases. In recognizing the FELA's power to help

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[51] Brief for Petitioner, *BNSF Railway Company v. Tyrell*, No. 16-405

[52] *See* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1070 (1994).

[53] *See* Steven E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1303 (2014) (posing a system of national federal jurisdiction to fix the problems created by the Supreme Court).

[54] *Id.*

[55] *See* FED. R. CIV. P. 4(k) ("([s]ubject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . ."); *see also* Mont. R. Civ. P. 4(b)(1) ("All persons found within the state of Montana are subject to the jurisdiction of Montana courts.").

[56] *Tyrrell*, 383 Mont. at 426.

[57] *See* Sachs, *supra* note 53 at 1306.

[58] *Id.* at 1315.

[59] *Id*. at 1348-49.

[60] *Id.* at 1318-89.

[61] *Tyrrell*, 383 Mont. at 426.

[62] *Id.*

[63] *Tyrrell*, 383 Mont. at 426.

assist, it seems reasonable that Congress *should* be able to relieve plaintiffs where the Supreme Court fails them.[64]

The FELA serves as an excellent model for considering how Congress can resolve jurisdictional issues, such as judicial inefficiencies which harm plaintiffs.[65] The statute states in relevant part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.[66]

As stated above, the FELA gives plaintiffs a chance to reach the corporation that causes their injury.[67] On its face, one difficulty with the FELA statute is that it mirrors the language of the due process analysis the Supreme Court articulated that causes unpredictability. [68] The FELA sets the standard to be "doing business as."[69] However, if the FELA were a jurisdictional statute, it would not present the same problems as the due process analysis because the statute is limited to railroad companies and therefore creates less opportunity for uncertainty for when it applies.[70] Thus, if Congress were to create another jurisdictional statute for other corporations, similar limitations would need to be added to avoid uncertainty.[71] Part V of this note further examines how a jurisdictional statute resembling the FELA could eliminate concerns such as notice and provide predictability. [72]

III. THE SUPREME COURT'S UNPRECEDENTED INTERLOCKING OF *PENNOYER* TO THE CONSTITUTION

In *Pennoyer*, the Court held that a judgment could not be treated as a judgment in personam if it was rendered against a non-resident who did not either submit to the suit or was not personally served with process.[73] In the forty years following *Pennoyer* scholars, courts, and even the Supreme Court did not treat the decision as a constitutional holding.[74] Rather *Pennoyer* was treated as a matter of natural justice and international law.[75] Arguably then, before *Pennoyer*, jurisdiction was a matter of general law.[76] Moreover, because of the full faith and

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[64] *See* generally Sachs, *supra* note 53.
[65] *See Tyrrell*, 383 Mont. at 421-424.
[66] 45 U.S.C § 56 (2012).
[67] *Tyrrell*, 383 Mont. at 421-424.
[68] *See* Conison, *supra* note 52 at 1205 (explaining that federal statutes using traditional language such as "transaction of any business" would merely reintroduce the same problem experienced with current case law).
[69] 45 U.S.C. §56 (2012).
[70] *See generally*, Conison, *supra* note 52 at 1204-1205.
[71] *Id.*
[72] *See infra* Part V.
[73] Pennoyer v. Neff, 95 U.S. 714 (1877).
[74] Conison, *supra* note 52 at 1140-1141.
[75] *Id.* at 1141.
[76] *See* Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. (2017), at 1249 (discussing pre-*Pennoyer* case law and explaining that Natural Law is "that unwritten law, including much of the English common law and the customary

credit clause, jurisdiction was a fusion of general and international law.[77] International law in a jurisdictional context dealt solely with protecting state autonomy and not individual rights.[78] However, even with the full faith and credit clause, the law of jurisdiction and state court enforcement was not altered.[79] Prior to *Pennoyer*, federal courts did not prioritize laws seeking to assert jurisdiction beyond state borders above laws that confined jurisdiction within state borders.[80]

Today, however, *Pennoyer* is wrongly understood to be *the* authority which establishes that the fourteenth amendment limits jurisdiction.[81] Indeed, it was not until *Riverside & Dan Cotton Mills v. Menefee* that the Supreme Court fixed *Pennoyer* as a constitutional holding.[82] In *Menefee,* the Supreme Court considered whether a state judgment rendered against a foreign corporation could be enforced where the corporation was not served with in-state process.[83] While the Court in post-*Pennoyer* and pre-*Menefee* cases concerning service of process did not base their decisions on due process, the Court in *Menefee* explained that *Pennoyer* has "been without deviation upheld in a long line of cases."[84]

Therefore, without any explanation as to why an improper service of process on a foreign defendant would necessarily mean that a subsequent state adjudication over the defendant is a violation of the defendant's due process rights, personal jurisdiction jurisprudence rooted in due process began.[85] Moreover, through the *Menefee* decision, without explaining that defendants have a negative right, the exercise of state jurisdiction became a fundamental right.[86]

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law of nations, that formed the basis of the American legal system." The author further explains that the "[f]ounding-era states were free to override that law and to exercise more expansive jurisdiction. But if they did, their judgments wouldn't be recognized elsewhere, in other states or in federal courts anymore than if they tried to redraw their borders.").

[77] *See* Sachs, *supra* note 76, at 1252-53. *See also,* U.S.C.A. Const. Art. IV § 1 ("[F]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.").

[78] *See generally* Sachs, Pennoyer *Was Right,* 95 TEX. L. REV. (2017).

[79] *Id.,* 1253.

[80] *Id.*

[81] *See generally* Conison, *supra* note 52, at 1147-1157

[82] *See* Conison, *supra* note 52; *see also* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193 (1915) (concluding that Pennoyer established the doctrine that "the courts of one State cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment" and such an act would be "repugnant" to the due process clause).

[83] *Menefee*, 237 U.S. 189, 191 (1915).

[84] Conison, *supra* note 52, at 1135 (quoting *Menefee*, 237 U.S.); *see* Goldey v. Morning News, 156 U.S. 518, 526 (1895) (relying on *Pennoyer* as a holding that state-service of process was improper on an out of state corporate defendant where the defendant neither did business in the state nor was incorporate in the state but not because it offended the corporation's due process rights); *see also* Conley v. Mathieson Alkali Works, 190 U.S. 406, 409 (1903) (holding that service of process on a foreign corporation's agent while the agent is not acting on behalf of the company is insufficient for service of process, however the holding did not explicitly state such service violated defendant's due process rights). York v. Texas, 137 U.S. 15 (1890) (recognizing that as a matter of due process there can be no violation until a judgment based on a state's jurisdiction statute is enforced but not that that state statute itself violates defendants due process).

[85] Conison, *supra* note 52, at 1158.

[86] *See* Conison, *supra* note 52, at 1158, which explained the proliferation of general service of process law as a constitutional right:

IV. THE SUPREME COURT'S SELF-APPOINTED ROLE AND THE DANGERS OF SUCH ROLE AS EVIDENCED IN *DAIMLER*

The holding in *Menefee* was unprecedented because for the first time, jurisdiction was attributed to a fundamental right.[87] This recognition also created a new role for the courts—defendant's protector in jurisdictional matters.[88] Mainly, if jurisdiction is now a constitutional matter, then the Supreme Court has the final say on personal jurisdiction.[89] Furthermore, if due process is the main concern, then when it comes to personal jurisdiction the Court's role is seemingly to guarantee defendants due process rights.[90]

A. *DAIMLER'S* TROUBLING LANGUAGE

What is troubling about *Daimler* is that it further enforces a liberty interest, as previously explained, that is grounded in nothing.[91] Even more troubling is how the language and policy reasons articulated in the case can be used against plaintiffs to favor defendants. Proponents of *Daimler* recognize the Court's apparent preference for protecting defendants from forum-shopping and the defendants use the strong language articulated in *Daimler* to that end.[92] For example, in reference to the Montana decision, BNSF argues that the decision is "egregiously wrong" and because makes defendants vulnerable to "abusive and flagrantly unconstitutional forum shopping."[93]

Continuing in this vein, Amici for BNSF argue the importance of the *Daimler* decision and why its purported constitutional holding should not be ignored:

> These predictable rules help potential defendants structure their conduct, guide potential plaintiffs to an appropriate forum for litigation, and assist all parties in efficiently litigating the actual merits of their claims, rather than engaging in costly threshold disputes over where the claims can be heard. Montana's novel approach, on the other hand, demands fact-intensive jurisdictional inquiries and subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court for any action it takes anywhere in the world. The resulting uncertainty fosters massive inefficiencies and is critically unfair for defendants, especially for small businesses,

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> Thus was the general law regarding in-state service of process transformed into constitutional law. A postulated, but unexplained, right that protects individuals and corporations from the "manifestation of power" of a foreign state court became enshrined as a right protected by the Due Process Clause. And at last the statutes that were disapproved, but tolerated, in *Goldey* and *Conley*, could be held unconstitutional.

[87] *See* Conison, *supra* note 52, at 1158.

[88] *See* Conison, *supra* note 52, at 1076 ("[T]he Supreme Court's role in protecting . . . [a] hypothesized right whose main function may have been to justify Supreme Court control over State Court Jurisdiction.").

[89] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding "it is emphatically the province and duty of the judicial department to say what the law is.").

[90] *Id.*

[91] *See generally Daimler*, 134 S. Ct. 746 (granting certiorari to determine whether Daimler could be amenable to suit in a California court without violating the Due Process Clause of the Fourteenth Amendment).

[92] *See, e.g.*, Reply of Petitioner BNSF Railway Co. at 1, BNSF Railway Co. v. Tyrrell., (No. 16-405).

[93] *Id.*

> which frequently lack the resources to adequately defend themselves in expensive litigation in distant and unfamiliar forums.[94]

However, this reasoning is flawed for the following three reasons: (1) the "predictable rules" argument assumes that following *Daimler* is the only means for predictability; (2) the claimed "novel approach" taken by Montana is not an inquiry that subjects "nearly every" company to Montana jurisdiction, but is actually an approach that would limit general jurisdiction to corporations subject to the FELA; and (3) the result of the Montana Decision is not critically unfair for small businesses, rather the *Daimler* test is unfair for small businesses as explained in *Daimler's* concurrence. These arguments originate from *Daimler* and are further explained below to show how defendants are using them limit their liability.

1. PREDICTABILITY

Amici argued that the Montana Decision asserting jurisdiction under the FELA causes defendants to be without guidance as to "structure their conduct."[95] Amici advantageously drew this from the *Daimler* decision, which explains why an exercise of general jurisdiction over *Daimler* through MBUSA would be "exorbitant."[96] In *Daimler* it would be excessive, because the state would be reaching the foreign defendant through their agent's contact with that state.[97] Directly quoting *Burger King*, the Court explained that the policy for not allowing such a reach is to allow the defendant "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[98]

With this justification in mind, it is reasonable to see how it would be unfair to a foreign corporation if a state that has jurisdiction over the foreign corporation's agent could reach them. However, the argument is much different for domestic corporations like BNSF which have direct contact with the state. As stated above, BSNF has invested over $470 million into the state of Montana, by way of conducting business there. Furthermore, it is not this contact alone that would subject it to general jurisdiction but also the FELA statute. As a railroad operating in Montana, BNSF is on notice that it is subject to the federal statute.

Thus, it is difficult to see how BNSF, or corporations subject to similar federal statutes, could argue they do not know how to "structure their conduct."[99] And moreover, that a statute such as the FELA leaves them without "minimum assurance" of where they may be sued.[100]

2. MONTANA'S LIMITED REACH

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[94] Motion for Leave to File Amici Brief Filed by the Chamber of Commerce of the United States of America at 6, BNSF Railway Co. v. Tyrrell., (No. 16-405).

[95] *See Daimler*, 134 S. Ct. 761, *see e.g.*, Motion for Leave to File Amici Brief Filed by the Chamber of Commerce of the United States of America at 6, BNSF Railway Co. v. Tyrrell., (No. 16-405).

[96] *See Daimler*, 134 S. Ct. 761-762 (quoting Burger King Corp., 741 U.S. at 472, 105 S.Ct 2174); *see, e.g.*, Motion for Leave to File Amici Brief Filed by the Chamber of Commerce of the United States of America at 6, BNSF Railway Co. v. Tyrrell., (No. 16-405).

[97] *See Daimler*, 134 S. Ct. 762 (quoting Burger King Corp., 741 U.S. at 472, 105 S.Ct. 2174).

[98] *Id.*

[99] *See id.*

[100] *See Daimler*, 134 S. Ct. 762 (quoting Burger King Corp., 741 U.S. at 472, 105 S.Ct 2174).

BNSF also argues that the Montana Decision subjects "nearly" every corporation that does business in Montana to Montana's jurisdiction. Again, this is an opportunistic argument made by a corporation seeking to limit its liability by associating itself to a factually distinguishable case.[101] In *Daimler*, there was not a federal statute that subjected *Daimler* to liability based on being a corporation. BNSF and Amici ignored this, and in doing so, failed to see that the state's reach is limited under the FELA statute. Thus, only entities that (1) do business in Montana and (2) are subject to FELA would be answerable to the Montana court.

3. FAIRNESS FOR SMALL BUSINESSES

Amici argue that the Montana approach is unfair for small businesses. However, again the Montana approach is limited under the FELA. Unless the small business is a railroad operating in Montana, Montana would not be able to exert jurisdiction. Finally, even assuming that the small business is a railroad, this approach would arguably present greater justice and fairness than the *Daimler* approach.[102] In concurrence, Justice Sotomayor explains in relevant part:

> the proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be. For instance, the majority holds today that Daimler is not subject to general jurisdiction in California despite its multiple offices, continuous operations, and billions of dollars' worth of sales there. But imagine a small business that manufactures luxury vehicles principally targeting the California market and that has substantially all of its sales and operations in the State—even though those sales and operations may amount to one-thousandth of Daimler's. Under the majority's rule, that small business will be subject to suit in California on any cause of action involving any of its activities anywhere in the world, while its far more pervasive competitor, Daimler, will not be. That will be so even if the small business incorporates and sets up its headquarters elsewhere (as Daimler does), since the small business' California sales and operations would still predominate when "apprais[ed]" in proportion to its minimal "nationwide and worldwide" operations.[103]

With the three arguments made by Amici and their incomplete conclusions, it can be seen how the Supreme Court armed corporate defendants with objections for personal jurisdiction, without any justification as to why the *Daimler* approach *must* be adhered to.

B. *Daimler*'s EFFECT ON PLAINTIFFS

As previously explained, BNSF and Amici attempt to capitalize on *Daimler'*s language and the Court's apparent partiality for protecting corporate defendants. However, the *Daimler* approach is dangerous because it ignores what may be *fair* for the plaintiff or in the *best interest*

[101] *Daimler*, 134 S. Ct. at 773.
[102] *Id* at.772.
[103] *Id*. at 773.

of the state seeking to exercise jurisdiction.[104] Without balancing the state's, plaintiff's, and defendant's interests together, the analysis in *Daimler* justifies a rule underhandedly in the defendant's favor.[105] Ultimately the court reached an approach that allows corporations to evade liability.[106] The concurrence rightly pointed out that "it should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions.[107]

C. *Daimler* AFFIRMED IN *BNSF*

Upon its conclusion that Congress intended §56 to apply to to venue, the Court in *BNSF* held that §56 of FELA does not authorize state courts to exercise personal jurisdiction over railroad defendants.[108] The court then analyzed whether Montana's exercise of jurisdiction was proper under Montana law and if such exercise was constitutional.[109] Following *Daimler*, the Court held that while Montana law authorized the suit, the exercise was unconstitutional because, as the Court "repeat[s]," BNSF (1) is not incorporated in Montana, (2) does not hold its principal place of business in Montana, and (3) does not engage in activity that would "render it essentially at home in the state."[110] With this, the court reaffirmed general jurisdiction standards that favor defendants.[111] In her dissenting opinion, Sotomayor cautioned that the holding grants multinational corporations with a "jurisdictional windfall" and further makes it "virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation."[112]

V. SOLUTION TO THE PROBLEM CREATED BY THE SUPREME COURT

When issues of general jurisdiction arise, multinational corporations like BNSF have the upper hand because of general jurisdiction jurisprudence that reasons due process is the outer limit for asserting jurisdiction. However, because the Supreme Court in BSNF held that §56 of the FELA concerns venue and as such is not a congressional grant of jurisdiction, a question now remains open: if Congress does intend to grant jurisdiction to states, would such a grant be constitutional? If later presented with the opportunity to examine this issue, the Court should at the very least acknowledge Congress' power to confer jurisdiction through federal statutes.

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[104] *Daimler*, 134 S. Ct. at 757–58 ("Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the 'relationship among the defendant, the forum, and the litigation,' *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.") (quoting Shaffer v. Heitner, 433 U.S. 186 (1977)).

[105] *See id.* at 764–73 (Sotomayor, J., concurring).

[106] *See id.* at 760 (arguing that simple jurisdictional rules "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."). *But see supra* note 104.

[107] *See id.* at. 773.

[108] BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1553 (2017).

[109] *Id*. at 1554.

[110] *Id*. at 1559.

[111] *Id*. at. 1561 (2017) (Sotomayor, J., dissenting) (stating "individual plaintiffs, harmed by the actions of a far flung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.").

[112] *Id*. at 1561-62.

As explained above, statutes like the FELA, if established as a jurisdictional statute, can be fair to corporations because such statutes meet due process concerns such as notice and predictability. Furthermore, federal jurisdictional statutes that are limited to multinational corporations that operate across multiple jurisdictions can provide plaintiffs with a remedy that the current general jurisdiction jurisprudence bars.

CONCLUSION

Current general jurisdiction jurisprudence creates a method for large corporations who spend hundreds of millions of dollars in states to avoid liability if they are not incorporated in that state or maintain their principal place of business there. This jurisprudence protects a right that corporations arguably are not owed or never have been owed. Yet, with federal statutes, the injustices created by this jurisprudence can be fixed. In circumstances where large domestic corporations are operating at a multi-state level, plaintiffs and states alike should be able to reach corporations beyond their principal place of business and incorporation. Congress should be able to recognize when jurisdiction over corporations is necessary and accordingly create statutes that confer jurisdiction. Ultimately, this change in general jurisdiction will provide clarity and remedy injured plaintiffs who are denied appropriate forums.