No. 21-270

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

ROBERT DANNELS,
Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, which affords railroad workers an exclusive federal remedy for physical workplace injuries resulting from a railroad's negligence, preempts Montana's generally applicable bad-faith standards regulating insurers and self-insurers.

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INTRODUCTION

Montana law requires those who handle claims—insurers and self-insurers alike—to follow basic ground rules. They must, for instance, conduct reasonable investigations of claims; attempt in good faith to settle claims when liability is reasonably clear; and refrain from intentionally low-balling settlements or unfairly leveraging settlement of some claims against others. BNSF violated those standards when processing a claim by Robert Dannels, a long-time BNSF employee who was permanently disabled in 2010 due to workplace injuries.

BNSF contends that it is immune from liability because the Federal Employers' Liability Act—which allows railroad workers to seek remedies for physical injuries resulting from a railroad's negligence—preempts Montana's generally applicable bad-faith standards. No appellate court has ever accepted BNSF's extreme preemption theory, which finds no support in the Act's text. Indeed, although BNSF tries to invent a conflict between federal and state courts, courts nationwide (including the Montana Supreme Court and the Ninth Circuit) are actually in agreement: FELA preempts state-law claims that arise out of on-the-job injuries caused by the railroad's negligence—and it doesn't preempt claims, like those here, that arise from separate and distinct injuries.

This Court's review is therefore unwarranted. All the more so because the question has little or no practical significance. BNSF asserts that the decision below will expose railroads to unchecked litigation in Montana courts. But BNSF admits that the Montana Supreme Court decided the preemption issue two decades ago. In the years since, BNSF's own discovery responses reveal

that it has only been sued four times under the state's bad-faith laws and has declined to invoke its right to remove the issue to federal court. And BNSF does not identify any other railroad that has ever faced such claims. At best, this issue affects one railroad in one state. The issue, in other words, will rarely—if ever—arise again.

Finally, even if the Court is interested in the preemption question, this case is a poor vehicle because the conflicts between FELA and Montana's laws that BNSF identifies are, as the Montana Supreme Court observed, entirely "hypothetical." Dannels litigated his FELA claims to a jury trial. Pet. App. 18a. Only after the jury awarded a verdict in Dannels' favor did he seek redress under Montana's bad-faith laws. The parties eventually settled to enter judgment on those claims for Dannels, reaching an agreement that permitted BNSF to continue to press the preemption issue on appeal despite the litigation's conclusion. So, in this case at least, BNSF was never prevented from asserting any of its federal defenses to Dannels' FELA claims. For this reason, too, the petition should be denied.

STATEMENT

After suffering debilitating injuries working on the BNSF railroad, Robert Dannels filed claims under FELA against his former employer, BNSF Railway. A jury found that BNSF's negligence was the cause of Dannels' injuries, and awarded him over a million dollars in damages. After the jury's verdict, Dannels brought a state-law action challenging BNSF's claim-handling practices under Montana's bad-faith laws. Following years of litigation and BNSF's discovery misconduct, the parties settled the bad-faith claims entirely in Dannels' favor. Although that settlement ended the litigation, the

agreement permitted BNSF to appeal only the issue of preemption. BNSF did so, and the Montana Supreme Court subsequently held that FELA, a federal scheme supplying an exclusive remedy for railroad workers who suffer on-the-job physical injuries, does not preempt Montana's generally applicable bad-faith laws.

A. Statutory background

1. The Federal Employers' Liability Act. In 1906, Congress first enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, to respond to the needs of railroad workers who were being injured and dying in droves while building, maintaining, and operating the country's railways. The statute covers some injuries that railroad workers incur while they are at work. It was intended "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

Around the time FELA was passed, railroad brakemen had a one-in-five chance of dying of natural causes, while a railroad switchman could expect to live an average of just seven years after assuming the job. Melvin L. Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). In FELA, Congress created a limited solution to this problem: In fewer than 1,300 words across eleven subsections, it granted railroad employees and their families a limited right to sue their employer if they are injured or die at work because of their employer's negligence. 45 U.S.C. § 51. No regulations guide courts' interpretation of FELA.

While workers' compensation laws today make many employers strictly liable for their employees' work

injuries, FELA predates most of those laws. FELA's subject area is narrow, but its grant of rights in the area it legislated was broad. Its narrow area of focus—on-the-job employee injuries that occur in interstate commerce where railroad negligence is at play—reflects the legal landscape when it was passed. At the time, states still enforced common-law rules barring recovery when an employee's injury resulted from a coworker's negligence (the fellow-servant rule) or where the accident was in any part the fault of the employee (the contributory negligence rule). *See* H.R. Rep. No. 1386 (1908). The Act did away with those rules and "fix[ed] a uniform rule of liability throughout the Union" for injuries caused by a railroad's negligence. *Id.* In 1939, Congress amended the Act to expand its definition of interstate commerce, prevent railroads from raising assumption of risk as a defense to liability, and penalize railroads for retaliating against employees who volunteered information in their coworkers' FELA suits. *See* Federal Employers' Liability Act, ch. 685 § 3, 53 Stat. 1404 (1939) (codified as amended at 45 U.S.C. § 51).

The statute's first section sets out to whom the Act applies: railroads engaging in interstate commerce. 45 U.S.C. § 51. It makes those railroads "liable in damages" to their employees or employees' next-of-kin. *Id.* And it defines when those railroads bear liability for their employees' injuries or deaths: when an injury or death occurs in interstate commerce and "result[s] in whole or in part from the negligence" of the railroads. *Id.* The Act also takes pains to ensure railroads' compliance. It strips them of the common-law defenses of contributory negligence, *id.* at § 53, and assumption of risk, *id.* § 54, and voids all "device[s]" that might otherwise allow railroads to exempt themselves from FELA liability, *id.* § 55. This

was necessary because at the time FELA was passed, "[s]ome of the railroads of the country insist[ed] on a contract with their employees, discharging the company from liability for personal injuries." H.R. Rep. No. 1386 at 6.

FELA does not contain any express-preemption clause. To the contrary, the statute makes clear that FELA is a floor, not a ceiling, for worker protections: "Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress." 45 U.S.C. § 58. The statute has accordingly been interpreted to preempt only those state laws that prevent a railroad employee from suing his employer over a workplace injury resulting from the railroad's negligence. When it last addressed FELA preemption in 1953, the U.S. Supreme Court held that FELA "displaces any state law trenching on the province of the Act." *S. Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953). State laws "trenching on the province of the Act," the Court held, include those that "gnaw at rights rooted in federal legislation." *Id.*; *see also id.* at 374 (Douglas, J., dissenting) (noting that "the remedy for personal injuries suffered by employees of interstate railroad carriers is regulated both inclusively and exclusively by the federal Act").

2. Montana's bad-faith laws. Montana adopted its bad-faith claims laws in 1977 after finding that insurer claims practices were "a continuing source of complaints." *See* Bus. and Indus. Standing Comm. Rep. on S. Bill No. 292, 45th Leg., Ex. 4 (Mont. 1977). Observing that there were "no ground rules" to enable regulators, consumers, and insurers to solve the problems of unscrupulous claims practices, the Legislature wanted to "set[] out desirable

standards," *id.*, and so adopted the Unfair Trade Practices Act, Mont. Code Ann. § 33-18-201 *et seq.*

Montana, like many other states, adopted its requirements in part based on model legislation from the National Association of Insurance Commissioners that was first introduced in 1947. States enact such laws to protect consumers and set baseline standards for insurance companies. Other states, like Montana, also give claimants—including third-party claimants—the ability to enforce these laws against an insurer directly. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ken. 1988); *Russell v. Protective Ins. Co.*, 751 P.2d 693 (N.M. 1988) (abrogated in the workers' compensation context on other grounds); *Clegg v. Butler*, 424 Mass. 413, 419–24 (1997).

In 1983, Montana's law was amended to make it easier on insurers and claims-handlers; in particular, it allowed an insurer to avoid liability for some of its actions where it has "a reasonable basis in law or in fact for contesting the claim or the amount of the claim." Mont. Code Ann. § 33-18-242(5). Both the legislature and the Montana Supreme Court have since clarified that insured people and third-party claimants can sue claims-handlers for violations of the UTPA, and that such claims apply to companies that self-insure like BNSF. *Id.* at (1), (8); *see, e.g.*, *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 430 (Mont. 2002); *Brewington v. Emps. Fire Ins. Co.*, 992 P.2d 237 (Mont. 1999); *Ridley v. Guar. Nat. Ins. Co.*, 951 P.2d 987 (Mont. 1997*); O'Fallon v. Farmers Ins. Exch.*, 859 P.2d 1008 (Mont. 1993).

B. Factual and procedural background

1. Dannels wins a jury trial against BNSF on his FELA claims.

For 20 years, Robert Dannels was employed as a railroad trackman for BNSF. During that time, the company routinely assigned him to work that hurt his lower back and spine. Pet. App. 2a–3a, 130a–131a. On March 17, 2010, BNSF directed Dannels to clear snow in the Havre railyard with a skid-steer loader. While doing the assigned work, he struck a steel wellhead that a coworker had buried under the snow. Pet. App. 131a. The impact from the collision permanently disabled Dannels and left him unable to work. *Id.* BNSF's liability for these injuries was reasonably clear. Pet. App. 131a–135a.

When Dannels was unable to work anymore, BNSF ended his employment. Pet. App. 136a. Not long after, Dannels asked his longtime employer to compensate him for his injuries as required by FELA. *Id.* BNSF refused. Pet. App. 136a–138a. In the ensuing three years, BNSF refused to pay Dannels anything—including his lost wages. *Id.* For much of that time, it did not respond to communication from Dannels at all, both before and after he hired a lawyer. *Id.* BNSF has a policy and practice of treating its claimants this way. *Id.*

Dannels eventually filed a FELA suit, and during its pendency a trial judge ordered the parties to try to reach a settlement. Pet. App. 136a–137a. BNSF made a settlement offer well below Dannels's reasonable damages, and then refused to negotiate further. *Id.* BNSF also tried to convince Dannels to settle by leveraging some of his claims against others. Pet. App. 138a.

Before trial, BNSF filed a motion in limine to block Dannels from referencing any "emotional distress not directly tied to Plaintiff's physical injury." Pet. App. 3a. The trial court granted the motion, and later instructed the jury that it could award only those damages "caused by the event in question"—that is, "injuries . . . sustained as a consequence of physical impact." *Id.*

BNSF lost at trial. A jury found BNSF negligent under FELA and awarded Dannels $1.7 million in damages. Pet. App. 3a. The jury "found BNSF to be 100% at fault and Dannels to be 0% at fault." *Id.* After the verdict, but before the judgment was made final, Dannels asked BNSF to at least pay him his lost wages—a small fraction of the jury award—but BNSF refused. *Id.* Pet. App. 137a–138a. This, too, was consistent with BNSF's policies and practices in handling claims. *See id.* BNSF moved for a new trial and lost; eventually, it agreed to pay Dannels the full amount the jury awarded. Pet. App. 3a.

2. After the jury verdict, Dannels brings state bad-faith claims based on BNSF's claim-handling practices.

BNSF Railway handles claims from its workers who are injured as a result of its own negligence. That includes all FELA claims. According to BNSF, it investigates these workplace injury claims, manages them, and has the power to settle them. *See* Dist. Ct. Dkt. 35 (Attachment 2, 27–28). Once it pays out a workplace injury claim, it is reimbursed by a captive company, BNSF Insurance, which is incorporated in Bermuda and purportedly participates in reinsurance pooling agreements with other railroads. Pet. App. 4a. In short, "BNSF is self-insured for claims like Dannels' underlying personal injury claims." Pet. App. 119a.

After his FELA suit was over, Dannels sued BNSF for acting in bad faith in violation of Montana common and statutory law regulating insurers and self-insurers. Pet. App. 3a–4a. He sought punitive damages and compensatory damages for mental distress. Pet. App. 4a. But Dannels's lawsuit never got off the ground; instead, the parties mostly argued over BNSF's refusal to comply with discovery. Pet. App. 70a–81a. (describing years of discovery disputes). For more than five years, despite repeated admonitions and sanctions, BNSF failed to produce compelled discovery. *See, e.g.*, Pet. App. 71a (observing that "BNSF objected to nearly every discovery request and failed to provide any meaningful information"); Pet. App. 102a (finding that "BNSF continued to violate the spirit and intent of Montana's rules of discovery" by "consistently attempt[ing] to conceal information and evade its discovery obligations").

While the case was stalled over BNSF's refusal to comply with discovery, the company repeatedly attempted to get the case dismissed. After the district court denied BNSF's motion for summary judgment, Pet. App. 113–127a, BNSF petitioned the Montana Supreme Court for a writ of supervisory control in which it also raised the issue of preemption. The Court denied the writ, noting that it could consider BNSF's preemption arguments in the normal appeals process. Pet. App. 111a.

To this day, compelled discovery has never been provided in this case. The trial court surmised that "with BNSF, there seems to be a corporate pattern, practice, and mindset of superiority, invincibility, or both." Pet. App. 102a. Specifically, the court found a

> pattern which has emerged in this case . . . a legitimate discovery request, followed by evasive non-responses,

> a motion to compel, an order to compel, qualified and incomplete responses from BNSF following the order to compel, deposition testimony and/or evidence contradicting BNSF's written discovery responses, more discovery meetings, a second motion to compel, more incomplete responses from BNSF, and, ultimately, hollow explanations for the noncompliance which purport to cast blame in all directions but [BNSF's headquarters in] Fort Worth.

Pet. App. 103a.

The district court eventually sanctioned BNSF's continued failure to comply with discovery orders by entering default judgment against BNSF on Dannels' state-law claims on the issues of liability and causation. *See* Pet. App. 105a–107a. BNSF sought a second writ of supervisory control from that order, again raising the issue of preemption, which the Montana Supreme Court denied a second time. Pet. App. 60a–64a. BNSF then filed a writ of certiorari with this Court, which it eventually withdrew before the parties reached a settlement on Dannels' bad-faith claims. *See* Pet. 13 n.1.

a. BNSF and Dannels reach a settlement on the bad-faith claims, ending the litigation and preserving only the preemption issue for appeal.

The parties ultimately agreed to settle the bad-faith action in Dannels' favor. BNSF agreed for judgment to be entered against it for the amount of $7.4 million, which would be payable in full to Dannels if BNSF's appeals were unsuccessful. Pet. App. 5a. And BNSF further agreed to pay Dannels $2.25 million "regardless of the outcome of any appeal." *Id.* The trial court entered final judgment on Dannels' bad-faith claims in his favor, which

"finally resolv[ed] this action." Stip. Final Judgment, Order, Stay of Execution, and Right to Appeal at 4. (D. Ct. Dkt. 318).

Under the settlement, BNSF preserved its right to appeal the issue of preemption—and only that issue—to the Montana Supreme Court and to this Court. *See id.* at 3. Additionally, as part of the settlement, Dannels agreed to waive any right "to argue on appeal" that, by virtue of this settlement, "the issue of FELA preemption is [ ] unsuitable for appellate review on the merits." *Id.* at 3. Because the litigation is in all other respects over, resolution of the preemption issue on appeal can have no consequence other than the additional payment to Dannels.

As contemplated by the settlement, BNSF appealed the district court's ruling that FELA does not preempt Montana's generally applicable bad-faith laws to the Montana Supreme Court.

b. The decision below.

The Montana Supreme Court affirmed. The Court acknowledged that FELA "serves as the 'comprehensive' and 'exclusive' scheme of recovery for physical injuries suffered on-the-job by a railroad employee . . . as a result of the negligence of an employer." Pet. App. 7a. But, applying this Court's preemption jurisprudence to the statute, the Court concluded that FELA does not preempt Montana's generally applicable bad-faith laws.

Initially, the Court observed that "[t]here is no express [preemption] provision in the FELA" statute. Pet. App. 10a. That left the Court with only "an inquiry into implied preemption"—a form of preemption that is presumptively disfavored. *Id.* at 10a–11a; *see Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

Next, the Court considered field preemption. The plain language of FELA, the Court explained, indicates that "Congress' purpose was to enact a compensatory scheme under which railway employees who suffered occupational injuries caused by the negligence of their employer and in pursuit of interstate commerce could obtain redress." Pet. App. 11a–12a (cleaned up). The Court held that nothing about this narrow, though important, focus suggests that "Congress intended to regulate through the FELA the entire field of injuries and claims a railroad employee may have." Pet. App. 12a. Especially not claims like Montana's bad-faith claims, which target "an insurer's claims handling and settlement practices"—"intentional conduct that is separate and distinct from the negligent cause of the occupational injuries at issue" in FELA claims. *Id.*

Finally, the Court rejected BNSF's conflict-preemption theory—that Montana law conflicts with FELA because it "imposes an obligation on a self-insured employer to pay a plaintiff's lost wages and medical expenses in advance of a final settlement or judgment of the underlying FELA claim when liability becomes reasonably clear," and therefore "interferes" with the employer's right to a "trial by jury." Pet. App. 16a–18a. The Court noted that any such conflicts were "hypothetical" in this case, because Dannels did not seek advance payment or otherwise take action against BNSF under Montana's bad-faith laws "*until after* the jury had rendered a verdict in his FELA claim." Pet. App. 18a. "BNSF's obligations to adjust a claim in good faith," the Court continued, "do not impinge upon its right to a jury trial under the FELA any more than any other party's obligation to act in good faith when adjusting a personal injury claim that is not brought under the FELA." *Id.* at

19a. "They are two separate actions, providing two distinct remedies for two distinct courses of conduct, for damages that are wholly independent of each other." *Id.* BNSF's argument to the contrary, the Court rebuked, "would effectively immunize it from all bad faith conduct." *Id.*

Justice Sandefur concurred that FELA did not preempt Dannels' claims, but he concluded that these claims did not arise from Montana's statutory bad-faith laws but from BNSF's violation of the common-law duty of good faith and fair dealing. Pet. App. 20a–48a. In his special concurrence, Justice Sandefur noted that the Court's opinion arose solely from "the parties' stipulated narrow focus on whether FELA preempts," which had the "mischievous result of . . . limiting the scope of the Court's analysis" of that question. *Id.* at 47a. Justice Rice dissented, based on his view that Montana's bad-faith laws "interfere with" FELA, and are therefore preempted. Pet. App. 49a–53a.

REASONS FOR DENYING THE WRIT

I. The petition presents no split that warrants this Court's review.

No appellate court—state or federal—has accepted BNSF's extreme theory that FELA preempts generally applicable state-law claims that do not arise out of physical on-the-job injuries resulting from a railroad's negligence. Indeed, although it has been more than a century since FELA's enactment, BNSF identifies no appellate court aside from the Montana Supreme Court that has even weighed in on the question presented. That is enough, on its own, for this Court to deny review under its traditional criteria. *See* Sup. Ct. R. 10.

Presumably for this reason, BNSF does not discuss the purported split between federal and state courts until three-quarters of the way through its petition. Pet. 24. And, as explained below, all that BNSF can muster on its side of the split is a 25-year old, thinly reasoned district-court decision. That meager showing cannot justify this Court's intervention.

A. Given the absence of any real split on the actual question presented, BNSF instead tries to manufacture a conflict between the decision below and Ninth Circuit precedent. *See* Pet. 25–27. But all of the cited cases involved state-law claims that sought remedies for the *same* injury at the heart of the plaintiff's FELA claim. They, therefore, shed no light on this situation—where the state-law claims target a railroad's "intentional conduct that is *separate and distinct* from the negligent cause of the occupational injuries at issue in the underlying FELA claim." Pet. App. 12a (emphasis added).

BNSF's first example in fact demonstrates why the claimed split is illusory. The company asserts (at 25–26) that the Ninth Circuit held in *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987), that FELA preempts Dannels' state-law claims for punitive damages under the state's generally applicable bad-faith law. But *Wildman* was a FELA case—an appeal from a jury trial on FELA claims. It did not involve state-law claims at all. Specifically, Wildman had brought a FELA claim against the railroad for an injury he suffered during an emergency stop, and he had tried to "to amend his complaint to request punitive damages." *Id.* at 1393. In rejecting the plaintiff's argument, the Ninth Circuit held that "only compensatory damages [a]re available in FELA actions." *Id.* at 1394. The court, in other words,

simply held that FELA provides an exclusive remedy in FELA actions. But that holding says nothing about whether different remedies, like punitive damages, are available in *non-FELA state-law* actions like this one.

Same with *Stiffarm v. Burlington Northern Railroad Co.* According to BNSF, the Ninth Circuit held in that case that "FELA preempts state-law claims for intentional infliction of emotional distress." Pet. 26. But Stiffarm brought his state-law claim to remedy emotional distress stemming from the same injuries that formed the basis of his separate "FELA action in state court." *See* 81 F.3d 170 (Table), 1996 WL 146687, at *2 (9th Cir. 1996). Given this, the court concluded that any remedy for emotional distress "must be found in the FELA." *Id.* The Ninth Circuit never even suggested in *Stiffarm* that FELA preempts state-law claims for emotional-distress damages that *do not* arise from physical injuries suffered as a result of a railroad's negligence.

BNSF's last case—*Counts v. Burlington Northern Railroad Co.*, 896 F.2d 424 (9th Cir. 1990)—presents a different situation, but it too fails to substantiate any conflict with the decision below. There, Counts brought a state-law fraud action against the railroad alleging that it had fraudulently induced him to settle and release his FELA claim. *Id.* at 425. The Ninth Circuit held that, because an injured railroad employee can bring a "FELA suit for damages by challenging the validity of the release for fraud," FELA barred independent state-law claims seeking to do precisely the same thing. *Id.* The federal remedy, the Ninth Circuit explained, would allow "Counts [to] be fully compensated for his personal injuries." *Id.* at 426. That is the opposite of the case here, where Dannels' "FELA action provided him with no opportunity to

recover damages for BNSF's alleged intentional bad faith conduct" in handling his claims. Pet. App. 14a.

BNSF claims (at 26) that Montana's bad-faith cause of action at issue here "squarely conflict[s] with *Counts*." Remarkably, however, BNSF entirely omits from its petition the fact that the Montana Supreme Court has previously *agreed with* the Ninth Circuit's decision in *Counts*. In *Sinclair v. Burlington Northern and Santa Fe Railway*, 200 P.3d 46, 53–56 (Mont. 2008), the plaintiff brought a state-law fraud claim against the railroad alleging that the railroad had misrepresented and concealed evidence during a jury trial on the plaintiff's FELA claims. Expressly following the Ninth Circuit's reasoning in *Counts*, the Montana Supreme Court held that FELA preempted the plaintiff's state-law claim, because it was "inextricably linked" to his underlying FELA claims, and because he could adequately challenge any alleged fraud in a FELA action. *Id.*

Sinclair makes clear that there is no actual federal-state conflict over FELA's preemptive scope. Both the Montana Supreme Court and the Ninth Circuit agree that FELA supplies the exclusive remedy for claims that arise from, or are inextricably linked with, injuries caused by a railroad's negligence. And neither has held that FELA preempts state-law claims and remedies like those at issue here, which challenge entirely distinct and separate conduct by the railroad. This consensus obviates any need for this Court to weigh in.

B. Setting aside these inapposite Ninth Circuit cases, the entirety of BNSF's claimed split rests on a single foundation—the District of Montana's decades-old decision in *Toscano v. Burlington Northern Railroad Co.*, 678 F. Supp. 1477 (D. Mont. 1987). But a wayward decision

by a single district judge is hardly sufficient to establish a lack of "uniformity" warranting this Court's review. Pet. 24.

That is especially true in light of the fact that *Toscano* spent only two paragraphs on the issue of preemption. *See* 678 F. Supp. at 1479. For the most part, the court merely recited general propositions about FELA—that, for instance, "FELA presents the exclusive remedy in all actions falling within the ambit of the Act, to the exclusion of the common and statutory law of the several states," and that "[e]mployers subject to the terms of the FELA are protected, in a sense, from the nuances of law of the several states." *Id.* It then concluded, with almost no legal analysis, that "[t]he desire for uniformity which prompted Congress to enact the FELA precludes Toscano from imposing liability upon the Burlington Northern for actions relating to an FELA claim, when the liability is predicated upon a duty having its genesis in state law." *Id.*

Such thin reasoning cannot justify this Court's review, particularly when compared to the Montana Supreme Court's comprehensive analysis of the preemption issue—not just in the decision below but also in *Reidelbach* and *Sinclair*.

Moreover, if there were an actual conflict over whether FELA preempts Montana's bad-faith laws, one would expect further percolation in the federal courts, including the Ninth Circuit. BNSF asserts (at 28) that "plaintiffs can unilaterally avoid all of the preemption rules in federal court (and prevent any possible further percolation) simply by filing in state court." *See also* Pet. 4 (arguing "there is no realistic prospect of further percolation on these issues in federal court"). That is wrong. FELA's anti-removal rule does not apply to

Montana's bad-faith claims—which are not FELA claims at all. *See* 28 U.S.C. § 1445(a). Indeed, BNSF has *itself* previously removed such claims. *See Sinclair*, 200 P.3d at 52–53 (noting that "BNSF removed" Sinclair's "bad-faith claims . . . to federal court," "divest[ing] [the state court] of jurisdiction over them").

So, if BNSF truly believes that federal courts would apply its favored preemption rule to Montana's bad-faith claims, it could simply choose to litigate the question there. That it has chosen not to do so suggests that the company realizes that the federal courts, like the Montana Supreme Court, would find no preemption here. For that reason too, this Court should deny the petition.

II. The question presented rarely arises and has no practical importance.

BNSF's repeated claims that the question presented is "exceptionally important" do not make it true. On BNSF's account, Montana is an "outlier." Pet. 27–28. And nowhere in its petition does BNSF substantiate its or its amici's assertions that permitting a limited category of bad-faith claims to proceed in a single state will unleash "destabilizing forces in the railroad industry." Pet. 30; *see, e.g.*, Ass'n of Am. R.R. Amicus Br. 17 (arguing that, after the decision below, FELA plaintiffs have "an incentive to funnel additional cases to" Montana).

That's because it cannot. Most critically, the problem identified in BNSF's petition almost never occurs. If the question presented had any practical effect, one would have expected significant bad-faith litigation against railroads in state court to have materialized over the past two decades—ever since *Reidelbach* held that FELA did not preempt Montana's statutory and common-law bad-faith claims. Indeed, some of BNSF's amici hyperbolically

assert that, because of the Montana Supreme Court's "outlier view" on preemption, "railways in Montana are routinely sued for bad faith." Wash. Legal Found. Amicus Br. 10, 12.

Such assertions have no basis in fact. According to BNSF's sworn response to discovery, there have been only *four* other bad-faith claims made against the railroad in Montana in the last *seventeen years*. *See* BNSF Response to RFP No. 4 (D. Ct. Dkt. 175). There are no other reported decisions—zero—involving bad-faith claims against *any* other railroad company in Montana. And BNSF does not identify any unreported cases either. The question whether FELA preempts Montana's bad-faith laws, in other words, has arisen in fewer than a handful of cases—all of them against the same railroad. There is therefore little reason to believe BNSF's warnings that the decision below will somehow open the floodgates for bad-faith litigation against railroad companies in Montana courts. *See* Pet. 31.

Additionally, the only reason why BNSF can be held liable for bad faith under Montana's laws in the first place is because it *chose* to handle its own claims and "maintain[] a program of self-insurance in conjunction" with its wholly owned subsidiary, BNSF Insurance. Pet. App. 4a. Put differently, it's not "[t]he Montana Supreme Court's decision" that "treats the railroad as the worker's insurer," Pet. 3—it's BNSF's own decision. By choosing to self-insure for coverage of FELA claims made by BNSF employees in Montana, the company agreed to be bound by the state's laws regulating insurance. And, as BNSF admits (at 8), the company could entirely avoid liability under Montana law if it adopted the "traditional" model of purchasing "third-party insurance."

At most, the question whether FELA preempts Montana's generally applicable bad-faith law affects one railroad in one state. And even then, time has shown that the legal issue barely arises in the real world. Because resolution of that issue will have no practical impact, this Court should deny review.[1]

III. This case is an especially poor vehicle for review.

Even if the Court is generally interested in addressing the FELA preemption question, this case is an unsuitable vehicle because any conflict between FELA and Montana's bad-faith laws here is entirely "hypothetical." Pet. App. 18a.

BNSF's merits argument is that Montana's laws conflict with FELA because they prevent railroads from asserting non-frivolous federal defenses against FELA claims and interfere with the railroad's right to a trial by jury. *See* Pet. 15, 17–24. As we explain below, BNSF is wrong. But, putting the merits aside, BNSF's argument only makes clear why this case—in which the railroad was *not* prevented from asserting any such defenses, and in

[1] BNSF's hyperbolic claims (at 29) that Montana's laws unfairly authorize wide-ranging, nationwide discovery into otherwise privileged materials are unfounded. The trial court specifically and exhaustively ruled against BNSF after conducting in-camera review of the supposedly privileged documents in response to the railroad's concerns. *See* D. Ct. Dkts. 208, 216. And the company's claims are particularly risible in light of the company's conduct throughout this litigation. After BNSF refused to comply with the district court's discovery orders for more than five years, the court imposed sanctions—and the company still refused to comply. As the district court explained, "with BNSF, there seems to be a corporate pattern, practice, and mindset of superiority, invincibility, or both." Pet. App. 102a. Simply put, nothing in FELA permits this kind of litigation misconduct.

which it fully exercised its right to a jury trial and then *lost*—is a poor vehicle.

Here, though it tries, BNSF can hardly suggest that allowing Dannels' bad-faith claims conflicted with its right to defend itself under FELA. *See* Pet. 18. BNSF never paid Dannels anything before the jury verdict; no prejudgment interest ever accrued on the payments it did not make. And significantly, Dannels never waived his rights under FELA. Instead, he litigated his FELA claim in front of a jury—which ended in the jury awarding him $1.7 million in damages for his physical workplace injuries—before ever raising his state-law bad-faith claim. As the Montana Supreme Court explained, "Dannels made no demand for advance payment of either his wage loss or medical bills *until after* the jury had rendered a verdict in his FELA claim; nor did Dannels seek a declaratory judgment establishing BNSF's obligations to advance pay his wage loss or medical bills." Pet. App. 18a. Indeed, far from preventing BNSF from asserting its federal defenses, the trial court *granted* BNSF's motion in limine to exclude evidence of harm that did not flow from Dannels' physical injuries.

It might be that BNSF may forswear available defenses in a future FELA case due to state-law liability concerns. If so, that might offer the Court a better vehicle to address any supposed conflict. But in this case, BNSF's preemption theory—that FELA and Montana's bad-faith laws conflict—is nothing more than a hypothetical. And, as this Court has made clear, "the existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). If the Court is inclined to consider the preemption issue, it should wait for a case

in which the conflicts between the state law and FELA are real. Indeed, if BNSF and its amici are to believed, such cases are all but certain to arise soon.

IV. The decision below was correct.

This Court should deny review because the petition does not satisfy the Court's traditional criteria for certiorari, not to mention that it is a particularly unsuitable vehicle for resolving the question presented. But review is also unwarranted because the Montana Supreme Court's holding was correct: FELA does not preempt Montana's generally applicable bad-faith standards. Nothing in FELA's text remotely supports BNSF's extreme preemption theory, which has not been accepted by any appellate court anywhere in the nation.

A. "In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," this Court starts from a "cornerstone" assumption: "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth* 555 U.S. at 565 (cleaned up). Montana's bad-faith laws represent an exercise of the state's traditional police power: They regulate areas—insurance and consumer protection—that are "primarily and historically" of "local concern" over which "States traditionally have had great latitude." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (cleaned up). Accordingly, BSNF "bear[s] [a] considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (cleaned up).

BNSF comes nowhere close to carrying that burden. For starters, its petition barely mentions FELA's text.

But time and again, this Court has been clear: Preemption "must be grounded 'in the text and structure of the statute at issue.'" *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Indeed, "the plain wording of the [statute] . . . necessarily contains the best evidence of Congress' pre-emptive intent." *Easterwood*, 507 U.S. at 664.

FELA contains no express-preemption clause. Pet. App. 10a–11a. In fact, it includes a provision emphasizing that the statute should not be read broadly to displace existing law: "Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress." 45 U.S.C. § 58. That reading of the statute—setting a floor, but not a ceiling, for state regulation of railroads—also aligns with FELA's purpose. When the remedial scheme was enacted, workers' compensation laws for the most part did not exist. At the time, railroad workers were dying and suffering horrific injuries on the railroad, and archaic common-law rules were letting their employers entirely off the hook. *See Wilkerson*, 336 U.S. at 68 (Douglas, J., concurring) (noting FELA "put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."); s*ee also Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542–43 (1994). Congress passed FELA to give workers a right of action they did not previously have against a backdrop of several state laws that offered no relief to them or their surviving family members. Nothing in the statute's text suggests that Congress intended to bar former employees from bringing a state-law action challenging a railroad's intentional mishandling of claims.

B. Given the absence of an express-preemption clause in FELA, BNSF must resort to implied preemption. Although BNSF's petition is entirely silent about this Court's modern preemption framework, it seems to argue that Montana's bad-faith laws should be preempted both under (1) field preemption and (2) "purposes-and-objectives" preemption.[2] But BNSF fails to overcome the strong presumption against implied preemption. *See Wyeth*, 555 U.S. at 565 n.3.

First, in enacting FELA, Congress has not impliedly occupied the field of all railroad workers' suits against their employers—let alone ex-employees' suits for bad-faith claims processing—as BNSF argues. Pet. 15–16. Courts find field preemption only where a federal statutory scheme is "so pervasive as to make reasonable the inference that Congress left no room for [] States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The fuller picture of congressional management of the employer-employee relationship in the railroad context makes clear that this is not the case for FELA. The Railway Labor Act, 45 U.S.C. § 151 *et seq.*, for example, governs other employer-employee issues, and even the RLA and FELA together do not preempt all state law remedies for railroad workplace injuries. *See Atchison, Topeka, & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 565– 66 (1987); *S. Buffalo*, 344 U.S. at 367 .

Moreover, the text of FELA—just under 1,300 words—makes clear that it is a narrow statute applicable in specific situations: when a railroad employee suffers an on-the-job injury as a result of a railroad's negligence.

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[2] BNSF does not even attempt to argue the "demanding defense" of "impossibility preemption." *Wyeth*, 555 U.S. at 573.

Indeed, as a statutory scheme, FELA bears not little but *no* resemblance to other contexts where this Court has found field preemption, like immigrant registration, *Arizona v. United States*, 567 U.S. 387, 400–02 (2012), or certain types of nuclear safety regulations, *English v. Gen. Elec. Co.*, 496 U.S. 72, 84–85 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241–42 (1984). FELA's slim statutory scheme, limited right of action, and lack of regulations make application of modern field preemption to the statute highly implausible.[3]

Second, BNSF cannot show that Dannels' state-law bad-faith claims pose an obstacle to Congress's "purposes and objectives" in enacting FELA. For starters, as discussed above, there was no conflict here: The parties litigated the FELA claims to a jury trial before Dannels ever raised Montana's bad-faith laws. The trial court granted BNSF's motion in limine, and accordingly instructed the jury that, under FELA, it could only award damages caused by Dannels' physical injuries. After all this, the jury found that Dannels' injuries were caused entirely by the railroad's negligence. The history of this case thus belies BNSF's claim that it was "coerce[d] . . . to surrender [its] federal defenses Pet. 22. Here, the company had full opportunity to—and in fact did—raise those defenses. The

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[3] To be sure, BNSF cites several cases that use the word "field" to describe the ambit of the statute: railroad workers' workplace injuries. Pet. 16, 20 (citing *Chi., Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926); *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 172 (1917)). But this usage predated this Court's use of the word "field" as a term of art in preemption cases, which is usually traced back to 1947. *See Rice*, U.S. at 230. And *Coogan*'s reference to "field" was not about preemption at all, but whether a jury's finding of negligence in a given factual circumstance was sufficient as a matter of law. *See* 271 U.S. at 424.

jury simply did not find BNSF's defense persuasive. That is no basis for finding conflict preemption—for a state law to be preempted, it must "*irreconcilably* conflict" with the federal law. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (emphasis added).

Further, BNSF's conflict-preemption argument rests on a dramatic overreading of several of this Court's century-old FELA cases. It contends (at 20) that, under these cases, "the fact that Dannels could not recover the damages he seeks under FELA means that he cannot *recover* those damages under state law." But, on even the most expansive view of FELA preemption—reflected in a trio of cases from 1917—FELA would preempt only claims concerning workplace injuries at railroads where the employee was engaged in interstate commerce. *See N.Y. Cent. & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360, 361–62 (1917); *Winfield*, 244 U.S. at 154*; Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917).[4] And, in its most recent FELA preemption case, this Court even cut back on some of the sweeping language from its earlier cases, holding that FELA did *not* bar a railroad employee from recovering for accidental injuries from the railroad under a state workers' compensation scheme. *S. Buffalo*, 344 U.S. at 373. In light of that holding, BNSF simply cannot argue

[4] BNSF's repeated reliance on *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), is similarly misplaced. Like the 1917 trio, *Dice* involved a FELA claim seeking damages for injuries caused by the railroad's negligence. The question there was simply whether Ohio law or federal law governed the validity of the plaintiffs' FELA release. *See id.* at 361. Notably, this Court reversed the state court's application of a stricter fraud standard, holding that Ohio's "harsh" rule was "wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers." *Id.* at 362.

that FELA preempts a former railroad employee from bringing state-law claims that are entirely separate and distinct from the employee's underlying physical injuries caused by the railroad's negligence.

In the end, BNSF's arguments are in severe tension with this Court's recent warnings that courts should not adopt freewheeling theories of purposes-and-objectives preemption that are unmoored from the statutory text or structure. As this Court has explained, "[e]fforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent. . . . The only thing a court can be sure of is what can be found in the law itself." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907–08 (2019) (lead opinion of Gorsuch, J.). Here, the Montana Supreme Court got it right—at least as applied to these facts, there is simply no preemption to be "found in the law itself." This Court's review is therefore unwarranted.

CONCLUSION

This Court should deny BNSF's petition for a writ of certiorari.

Respectfully submitted,

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