
Civil Procedure — Personal Jurisdiction —
BNSF Railway Co. v. Tyrrell

Since *International Shoe Co. v. Washington*,¹ the Supreme Court has framed personal jurisdiction as a due process doctrine prohibiting courts from hearing claims against a defendant who lacks certain minimum contacts with the forum state.² The doctrine takes two basic forms: “specific jurisdiction,” which attaches when a suit arises from the defendant’s contacts with the forum state, and “general jurisdiction,” which allows courts to hear any claim against a defendant with “continuous and systematic” forum contacts.³ Since 2011, the Court has decided two cases that narrowed general jurisdiction for suits involving corporate defendants, permitting it only in states where the corporation is “essentially at home,” which effectively means its principal place of business or place of incorporation.⁴ Last Term, in *BNSF Railway Co. v. Tyrrell*,⁵ the Supreme Court continued this trend by denying Montana’s courts general jurisdiction over a defendant that had continuous and systematic contacts with the state but was not essentially at home there.⁶ By demonstrating much more bluntly than its predecessors just how much the at-home test has altered general jurisdiction, *BNSF* highlights a number of problems with the newly narrowed doctrine and will likely exaggerate these problems as courts interpret and apply the case’s reasoning.

BNSF Railway Company is a Delaware corporation whose principal place of business is Texas.⁷ Around 10% of BNSF’s revenue (\$1.75 billion in 2013⁸) comes from Montana, where it employs over 2100 people (under 5% of its workforce) and owns over 2000 miles of railroad track (around 6% of its total mileage).⁹ In 2011, Robert Nelson, a truck driver from North Dakota, sued BNSF in Montana state court under the Federal Employers’ Liability Act of 1908¹⁰ (FELA), which enables workers to sue railways for workplace injuries.¹¹ Nelson sought compensation for knee injuries he allegedly suffered¹² while working in

¹ 326 U.S. 310 (1945).

² See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

³ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16, 414 nn.8–9 (1984).

⁴ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 924 (2011).

⁵ 137 S. Ct. 1549 (2017).

⁶ See *id.* at 1559.

⁷ *Id.* at 1554.

⁸ Joint Appendix at 37, *BNSF*, 137 S. Ct. 1549 (No. 16-405).

⁹ *Id.* at 26–27.

¹⁰ 45 U.S.C. §§ 51–60 (2012).

¹¹ See *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 2–3 (Mont. 2016).

¹² *Id.* at 3.

Washington.¹³ BNSF moved to dismiss for lack of personal jurisdiction, and Judge Baugh, citing the Supreme Court's then-recent opinion in *Daimler AG v. Bauman*,¹⁴ granted the motion because BNSF was not at home in Montana and Nelson's injuries took place elsewhere.¹⁵ In 2014, again in Montana state court, Kelli Tyrrell, who was appointed in South Dakota as special administrator for the estate of her deceased husband Brent T. Tyrrell, sued BNSF under FELA, alleging that her husband's long-term exposure to chemicals while working for BNSF in various states, none Montana, caused his fatal cancer.¹⁶ BNSF once again moved to dismiss for lack of personal jurisdiction, but Judge Moses held that Montana had general jurisdiction over BNSF because the company had shipped almost fifty million tons of goods from the state in one recent year and had recently invested close to \$500 million there.¹⁷

After consolidating appeals from Nelson and BNSF, the Supreme Court of Montana reversed in Nelson's case and affirmed in Tyrrell's.¹⁸ Writing for the majority, Justice Shea¹⁹ held that Montana courts had general jurisdiction over BNSF.²⁰ The court first discussed FELA, noting that when Congress passed the employee-friendly statute, its lack of a venue provision prevented many workers' suits.²¹ To solve for "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant," Congress amended the statute in 1910.²² The newly added § 56 allowed plaintiffs to bring FELA actions in a state where the "defendant shall be doing business at the time of commencing such action," and noted that federal "jurisdiction . . . shall be concurrent with that of the courts of the several States."²³ Citing several Supreme Court cases interpreting § 56, the *Tyrrell* majority rejected BNSF's argument that *Daimler's* constitutional holding overrode FELA's grant of general jurisdiction because *Daimler* was not a FELA case and because the statute made railroads "at home" wherever they did business.²⁴ The majority also rejected the

¹³ *Nelson v. BNSF Ry. Co.*, No. DV 11-417, slip op. at 1 (13th Jud. Dist., Yellowstone Cty., Mont. Nov. 18, 2014).

¹⁴ 134 S. Ct. 746 (2014).

¹⁵ *Nelson*, No. DV 11-417, slip op. at 3-4.

¹⁶ *Tyrrell v. BNSF Ry. Co.*, No. DV 14-699, slip op. at 2-3 (13th Jud. Dist., Yellowstone Cty., Mont. Oct. 7, 2014).

¹⁷ *Id.* at 1, 16 (quoting *Monroy v. BNSF Ry. Co.*, No. DV 13-799, slip op. at 12 (13th Jud. Dist., Yellowstone Cty., Mont. Aug. 1, 2014)).

¹⁸ *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 2-3 (Mont. 2016).

¹⁹ Justice Shea was joined by Chief Justice McGrath and Justices Cotter, Rice, Wheat, and Baker.

²⁰ *Tyrrell*, 373 P.3d at 2.

²¹ *Id.* at 4.

²² *Id.* (quoting *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49-50 (1941)).

²³ 45 U.S.C. § 56 (2012).

²⁴ *Tyrrell*, 373 P.3d at 4-6.

possibility that the concurrent jurisdiction reference in § 56 referred to subject matter jurisdiction, rather than personal jurisdiction, because this narrower reading would frustrate Congress's goal of enabling railway workers to litigate in convenient forums.²⁵ Concluding that § 56 created personal jurisdiction over BNSF, the majority additionally held that Montana law authorized general jurisdiction because the railway's "continuous and systematic" contacts with the state — roughly 2000 employees and 2000 miles of track — brought it within reach of Montana's long-arm provision.²⁶ On the constitutional question, the court briefly pointed to its rejection of BNSF's *Daimler* argument and to its FELA precedent in holding that it had personal jurisdiction under the Due Process Clause.²⁷

Justice McKinnon dissented. She found *Daimler* controlling and would have held that Montana lacked general jurisdiction over BNSF because the state was not its corporate home and nothing about its Montana contacts made this the sort of "exceptional case" the *Daimler* Court noted in dicta might warrant general jurisdiction even where a corporation is not at home.²⁸ She also disagreed with the majority's conclusion that § 56 created personal jurisdiction over FELA defendants.²⁹

The Supreme Court reversed. Writing for the Court, Justice Ginsburg³⁰ held that § 56 did not address personal jurisdiction over railways and that Montana's exercise of general jurisdiction over BNSF was unconstitutional because the corporation was not at home in Montana.³¹ The Court first addressed jurisdiction under FELA, finding that the statute's authorization for courts to hear actions in a district where the defendant conducts business was a grant of venue, not personal jurisdiction, and that its concurrent jurisdiction provision referred only to subject matter jurisdiction.³² The Court held that its prior FELA cases did not suggest the statute created personal jurisdiction and emphasized that most of those cases were decided in an era when state

²⁵ *Id.* at 7.

²⁶ *Id.* at 7–9 (citing MONT. R. CIV. P. 4(b)(1)).

²⁷ *Id.* at 8–9.

²⁸ *Id.* at 9–11 (McKinnon, J., dissenting) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014)). For a paradigmatic "exceptional case," *Daimler* cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952), where Japanese occupation during World War II forced the president of a Philippine mining company to temporarily relocate to Ohio. *Daimler*, 134 S. Ct. at 756, 761 n.19. *Perkins* held Ohio had general jurisdiction over the corporation because of its president's "continuous and systematic supervision . . . of the company [in Ohio]." 342 U.S. at 448.

²⁹ *Tyrrell*, 373 P.3d at 13 (McKinnon, J., dissenting).

³⁰ Justice Ginsburg was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, Alito, Kagan, and Gorsuch.

³¹ *BNSF*, 137 S. Ct. at 1553–54.

³² *Id.* at 1555–57.

territorialism, rather than contacts-based analysis, animated personal jurisdiction doctrine.³³

Turning to the constitutional question, the Court reaffirmed the minimum contacts test and, because the plaintiffs did not allege a nexus between their injuries and Montana, the Court looked to its general jurisdiction precedent.³⁴ Citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*³⁵ and *Daimler*, the Court held that a state may exercise general jurisdiction over corporations only “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home [there].”³⁶ The Court elaborated, as in *Goodyear* and *Daimler*, that corporations are at home only in their place of incorporation and principal place of business, save for a truly “exceptional case.”³⁷ The Court explained that FELA did not alter this due process constraint and concluded BNSF was not at home in Montana.³⁸

Justice Sotomayor concurred in part and dissented in part. She agreed with the Court’s FELA analysis but not its constitutional holding under the “restrictive ‘at home’ test,” which she stated “has no home in our precedents and creates serious inequities.”³⁹ She argued that *International Shoe* asked only “whether the benefits a defendant attained in the forum State warranted the burdens associated with general personal jurisdiction,” and predicted the new test would require “individual plaintiffs, harmed by the actions of a farflung foreign corporation, . . . to sue in distant jurisdictions with which they have no contacts or connection.”⁴⁰ She also contended that the at-home test departs from *International Shoe*’s *minimum* contacts analysis by assessing “*comparative* contacts,” or whether a corporation’s contacts in one state exceed those in others.⁴¹ Finally, she argued that the majority’s cursory refusal to apply the “exceptional case” carve-out mentioned in *Daimler* was a reading “so narrow as to read the exception out of existence entirely.”⁴²

³³ *Id.* at 1557–58 (citing *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953); *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698 (1942); *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941); *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932)).

³⁴ *Id.* at 1558.

³⁵ 564 U.S. 915 (2011).

³⁶ *BNSF*, 137 S. Ct. at 1558 (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)).

³⁷ *Id.* The “exceptional case” carve-out is discussed *supra* note 28.

³⁸ *BNSF*, 137 S. Ct. at 1558–59.

³⁹ *Id.* at 1560 (Sotomayor, J., concurring in part and dissenting in part) (citing *Daimler*, 134 S. Ct. at 767–73 (Sotomayor, J., concurring in the judgment)).

⁴⁰ *Id.* at 1560–61. The majority disagreed with this reading of *International Shoe*, arguing the case involved specific, rather than general, jurisdiction. *Id.* at 1559 n.4 (majority opinion).

⁴¹ *Id.* at 1561 (Sotomayor, J., concurring in part and dissenting in part) (emphasis added); see also *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring in the judgment) (noting the comparative contacts problem would make a corporation “too big for general jurisdiction”).

⁴² *BNSF*, 137 S. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part).

BNSF reveals the costs of the at-home test in ways its predecessors could not. Although they applied the at-home test, “*Goodyear* and *Daimler* were easy cases” because they involved foreign defendants whose few forum contacts would not have sufficed for general jurisdiction under the Court’s prior doctrine.⁴³ The two cases demonstrate how the at-home test can quickly and efficiently resolve jurisdictional disputes and curtail problematic instances of forum shopping. But *BNSF* was not so easy because it denied jurisdiction over a domestic defendant with active operations, thousands of workers, and hundreds of millions of dollars in property in the forum state. By providing a bulletproof citation that the at-home test applies even when a defendant has substantial forum contacts, *BNSF* highlights, and will likely exacerbate, the costs of narrowing general jurisdiction: the at-home test creates tension with transient jurisdiction doctrine, confusingly draws attention to forum shopping concerns, and undermines federal statutes by placing litigation-discouraging burdens on plaintiffs.

The Court established the modern personal jurisdiction doctrine in *International Shoe*, where it held that defendants have a due process right not to be haled into court unless they have certain minimum contacts with the forum state.⁴⁴ *International Shoe* also observed that jurisdiction attaches when a defendant’s “continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”⁴⁵ The Court let this test stand for decades, referring to “continuous and systematic” contacts as the relevant criterion for what it later called general jurisdiction.⁴⁶ But in 2011, the Court clarified in *Goodyear* that general jurisdiction is appropriate only when a corporation’s contacts with a state “are so ‘continuous and systematic’ as to render [it] essentially at home [there].”⁴⁷ It reasoned corporations are at home in their place of incorporation and principal place of business because these locations are equivalent to domicile, the basis for general jurisdiction over people.⁴⁸ The Court applied the same rule in *Daimler*⁴⁹ and did so again in *BNSF*.⁵⁰ These cases transformed a holistic and subjective analysis into a clearer but narrower inquiry.⁵¹

⁴³ Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1162 (2015).

⁴⁴ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴⁵ *Id.* at 318.

⁴⁶ *See, e.g., Helicopteros Nacionales de Colom, S.A. v. Hall*, 466 U.S. 408, 416–18 (1984).

⁴⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int’l Shoe*, 326 U.S. at 317).

⁴⁸ *Id.* at 924.

⁴⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

⁵⁰ *BNSF*, 137 S. Ct. at 1558–59.

⁵¹ *See, e.g., id.* at 1560 & n.1 (Sotomayor, J., concurring in part and dissenting in part).

But *Goodyear* and *Daimler* would have come out the same way under the Court's prior doctrine. In *Goodyear*, after two American children died in a bus accident in France, their parents sued Goodyear USA and three of its European subsidiaries in North Carolina, attributing the accident to a defective Goodyear tire manufactured by the defendants.⁵² The plaintiffs argued North Carolina had general jurisdiction over the subsidiaries because some of their tires ended up in the state through the stream of commerce.⁵³ The Court dismissed the claims against the subsidiaries under the newly announced at-home test, but it could have done so under its prior doctrine because the subsidiaries did no business in North Carolina. *Daimler* involved Argentine nationals suing Daimler, a German corporation, for human rights abuses that took place in Argentina.⁵⁴ The plaintiffs argued that California had general jurisdiction over Daimler because 2.4% of its revenue came from cars sold in California by its indirect subsidiary Mercedes-Benz USA.⁵⁵ Even if these contacts were attributable to Daimler — a finding the Court seemed to reject but assumed for the sake of argument⁵⁶ — the case would not have been especially difficult under prior doctrine because Daimler's only alleged California contacts were its indirect subsidiary's sales, accounting for a small percentage of its revenue.

Goodyear and *Daimler* showcase the at-home test's reforms. The defendants in these cases spent years litigating a threshold jurisdictional issue that the at-home test would have quickly and efficiently resolved because "home states" are rarely ambiguous.⁵⁷ By making general jurisdiction available in just one or two states, the test also limits forum shopping and the cross-border effect of outlier laws.⁵⁸ If general jurisdiction applied broadly, plaintiffs could strategically choose among numerous possible forums, and corporations doing a high volume of business in many states could be subject to the most plaintiff-friendly version of every law in the country whenever they injure someone anywhere in the world. This reality could hinder economic growth if corporations found the benefits of doing nationwide business did not outweigh these risks. Further, if these concerns warranted federal intervention, Congress could only partially address them. While venue reforms could accomplish what the at-home test has done,⁵⁹ these rules

⁵² *Goodyear*, 564 U.S. at 918.

⁵³ *Id.* at 920.

⁵⁴ *Daimler*, 134 S. Ct. at 751–52.

⁵⁵ *Id.* at 752.

⁵⁶ *See id.* at 758–60.

⁵⁷ *See id.* at 760 (noting these locations are "easily ascertainable").

⁵⁸ *Cf. Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (prohibiting states from imposing too great a burden on interstate commerce).

⁵⁹ *Cf. Stephen E. Sachs, How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1333–37 (2014).

would apply only to federal courts: states would remain free to enact and enforce aggressive long-arm statutes. Although Congress has combatted such statutes in the past by authorizing broad removal of certain actions,⁶⁰ the Commerce Clause limits Congress's legislative authority,⁶¹ and broad removal jurisdiction could overwhelm federal courts. Due process restraints like the at-home test may be the most effective way for any federal actor to limit state court jurisdiction over out-of-state defendants.

Unlike its predecessors, *BNSF* not only depended on the at-home test for its holding, but also offered a clear statement that courts should apply the test even when a corporation's forum contacts are continuous and systematic. While the Montana court and others were able to distinguish *Goodyear* and *Daimler* for involving foreign defendants with threadbare in-state contacts,⁶² *BNSF* involved American plaintiffs suing an American corporation in a state where it had 2100 employees, 2000 miles of track, and nearly half a billion dollars in recent investments.⁶³ Around ten percent of BNSF's revenue came from Montana, which is about four times higher than the percentage of revenue Daimler indirectly received from California.⁶⁴ When viewed as a clear and citable statement that even a domestic corporation's substantial forum contacts do not override the at-home test, *BNSF* is a better vehicle than its predecessors for assessing at least three significant drawbacks of the newly narrowed doctrine.

First, *BNSF* exacerbates the tension between the at-home doctrine and another form of general jurisdiction: that based on transient physical presence. Under *Burnham v. Superior Court of California*,⁶⁵ states may hear any cause of action against any person served within their borders, "no matter how fleeting his visit,"⁶⁶ because "jurisdiction based

⁶⁰ See 28 U.S.C. § 1453(b) (2012) (class actions subject to 28 U.S.C. § 1332(d)); 28 U.S.C. § 1452(a) (2012) (actions related to bankruptcy).

⁶¹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 553 (1995).

⁶² See, e.g., *Barriere v. Juluca*, No. 12-23510-CIV, 2014 WL 652831, at *8-9 (S.D. Fla. Feb. 19, 2014) (distinguishing *Daimler* on multiple grounds and finding a foreign corporation was at home in Florida because of un rebutted allegations of its extensive forum contacts); *In re Hellas Telecomms. (Lux.) II SCA*, 524 B.R. 488, 507-08 (Bankr. S.D.N.Y. 2015) (distinguishing *Daimler* and finding jurisdiction based on substantial in-state contacts); *Moore v. Lake States Dairy Ctr., Inc.*, No. 1-14-0149, 2014 WL 4929482, at *6-7 (Ill. App. Ct. Sept. 30, 2014) (distinguishing *Daimler* as concerning a foreign corporation with slim in-state contacts and asserting general jurisdiction over an out-of-state corporation based on "the frequency and nature of its contacts in Illinois," *id.* at *7).

⁶³ *Tyrrell v. BNSF Ry. Co.*, No. DV 14-699, slip op. at 2-3, 16 (13th Jud. Dist., Yellowstone Cty., Mont. Oct. 7, 2014) (quoting *Monroy v. BNSF Ry. Co.*, No. DV 13-799, slip op. at 12 (13th Jud. Dist., Yellowstone Cty., Mont. Aug. 1, 2014)).

⁶⁴ Compare *id.*, with *Daimler AG v. Bauman*, 134 S. Ct. 746, 752 (2014).

⁶⁵ 495 U.S. 604 (1990).

⁶⁶ *Id.* at 611 (plurality opinion).

on physical presence alone constitutes due process.”⁶⁷ *Burnham* justified its holding by noting that personal jurisdiction’s due process rationale “was developed by *analogy* to ‘physical presence.’”⁶⁸ The at-home cases analogize between people and corporations by reasoning that because a person is subject to general jurisdiction in her domicile, a corporation should be subject to general jurisdiction in its two versions of a home state.⁶⁹ But courts do not draw this analogy for assertions of transient presence jurisdiction: the doctrine applies only to people, even though fleeting corporate contacts, and especially permanent operations, are similar to a person’s passing presence in a state.⁷⁰

Although critics noted these contrasts after *Goodyear* and *Daimler*,⁷¹ no real tension arose because the foreign defendants in those cases had no alleged corporate presence where they were sued. But *BNSF* substantiates these criticisms because the railway had permanent presence and even an agent registered to receive service of process in Montana.⁷² Read together, *BNSF* and *Burnham* present a troubling contrast: courts lack general jurisdiction over a corporation with dozens of offices, thousands of employees, and almost half a billion dollars in recent investments in a state that provides nearly ten percent of its revenue but is not its corporate home; but, for example, courts can hear any cause of action against a person served while his airplane crosses over the forum state mid-flight.⁷³ This contrast does not necessarily invalidate *BNSF*, and may do more to suggest that *Burnham* was wrongly decided.⁷⁴ But so long as these doctrines coexist, their tensions will remain,⁷⁵ and *BNSF*’s strong endorsement of the at-home test will likely create further disparities as courts decline to exercise general jurisdiction over corporations doing substantial business outside their home states.

Second, *BNSF* exposes the difficulty of reconciling the at-home test with the rule that choice-of-law concerns are irrelevant to minimum contacts analysis. *Keeton v. Hustler Magazine, Inc.*⁷⁶ observed that “any potential unfairness in applying [one state’s especially generous] statute of limitations to all aspects of [a] nationwide suit has nothing to do with

⁶⁷ *Id.* at 619.

⁶⁸ *Id.*

⁶⁹ See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

⁷⁰ See generally Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1 (2016).

⁷¹ See Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. 153, 176 (2014) (citing sources).

⁷² Brief for Respondents at 5, *BNSF*, 137 S. Ct. 1549 (No. 16-405).

⁷³ *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

⁷⁴ Cf. Cox, *supra* note 71, at 187–92 (arguing *Burnham* is wrong in light of broader personal jurisdiction principles).

⁷⁵ *BNSF*, *Daimler*, and *Goodyear* do not discuss possible tension with transient jurisdiction.

⁷⁶ 465 U.S. 770 (1984).

the jurisdiction of the court to adjudicate the claims.”⁷⁷ Due process requires this outcome because it looks to the relationship between the state and the defendant and is agnostic toward the plaintiff. Although the at-home cases do not suggest the test is intended to limit forum shopping, each case illustrates why it has that effect.⁷⁸ The *Daimler* and *Goodyear* plaintiffs sued foreign defendants in states where the defendants did virtually no business, presumably to litigate in favorable or convenient forums. In *Daimler*, neither the petitioners nor the respondents were American, a fact the Court highlighted by expressing respect for international comity at the end of its opinion.⁷⁹ *BNSF* raised the mildest forum shopping concerns of the trio because it involved domestic plaintiffs suing a domestic corporation in a state bordering their own. But the petitioner’s brief is replete with allegations that Montana is a haven for FELA plaintiffs,⁸⁰ and *BNSF*’s counsel referred to “a true wild west of FELA claims being filed in forums like Montana” when explaining at oral argument why the Court should rule for *BNSF*.⁸¹ These accounts prompted the Justices to spend nearly four minutes engaging with the respondents’ counsel about forum shopping.⁸² While *BNSF*’s allegations raise legitimate policy concerns, the attention that the corporation devoted to a jurisdictionally irrelevant issue underscores the reality that attorneys have understood the at-home test as a measure for curbing forum shopping. Guided by *BNSF*’s success, future defense attorneys litigating personal jurisdiction may similarly flag forum shopping abuses, and *BNSF* will provide those attorneys a much better citation than *Goodyear* or *Daimler* because it demonstrates that whatever prudential principle the at-home test may imply is not limited to international defendants with few forum contacts.

Third, *BNSF* demonstrates better than its predecessors how the at-home test may discourage plaintiffs from filing valid claims. Narrow general jurisdiction might beneficially prevent plaintiffs from suing in friendly forums, but it also prevents them from suing in convenient forums when they are injured outside their domicile by a corporation with different home states than their own.⁸³ This sort of problem did not

⁷⁷ *Id.* at 778; see also *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (“The issue is personal jurisdiction, not choice of law.”).

⁷⁸ See Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 107 (2015); Freer, *supra* note 43, at 1162 n.18; Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 528, 540–41 (2012).

⁷⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 762–64 (2014).

⁸⁰ Brief for Petitioner at 10–13, *BNSF*, 137 S. Ct. 1549 (No. 16-405).

⁸¹ Oral Argument at 9:42–9:48, *BNSF*, 137 S. Ct. 1549 (No. 16-405), <https://www.oyez.org/cases/2016/16-405> [<https://perma.cc/Y4HT-QUNC>].

⁸² *Id.* at 22:59–26:52.

⁸³ See *BNSF*, 137 S. Ct. at 1560–61 (Sotomayor, J., concurring in part and dissenting in part).

arise in *Daimler*, where Argentine plaintiffs sued a German corporation in California, and although the *Goodyear* plaintiffs could not sue in their home state for injuries they suffered in France, the foreign defendants had clear countervailing interests because they did no business in North Carolina, where the plaintiffs brought suit. But after *BNSF*, a truck driver from North Dakota, injured in Washington, will be forced to travel to Delaware, Texas, or Washington to bring his claim for knee injuries against a corporation worth \$93.2 billion.⁸⁴ This outcome seems especially troubling because BNSF has a permanent presence in Montana and does close to \$2 billion of annual business there,⁸⁵ and the reason Nelson's alleged injury took place in Washington is that the corporation sent him there for work.⁸⁶ Plaintiffs like Nelson will be forced to take repeated trips to faraway states, find a local attorney, and manage their litigation from afar. Especially when their claims are small or would require lengthy litigation, rational individuals may choose not to pursue completely valid claims rather than bring a lawsuit that would cost them more than they could reasonably expect to recover in damages. This is exactly the problem Congress tried to solve by enacting FELA,⁸⁷ and *BNSF* highlights how the at-home test may lead to significant under-enforcement of FELA and similar statutes designed to encourage injured parties to seek redress.

Goodyear and *Daimler* make *BNSF* an easy case. But *BNSF* is difficult to justify on due process grounds, and this problem stems from deeper conflicts underlying the Court's recent personal jurisdiction doctrine. Academics have proposed broad reforms, arguing the Court should recalibrate general and specific jurisdiction⁸⁸ or move away from the due process rationale entirely.⁸⁹ Although no solution may completely untangle the doctrine, the confusions *BNSF* highlights add new urgency to these calls for reform.

⁸⁴ See Gillian Tan, *That Big Berkshire Hathaway Railroad Deal*, BLOOMBERG GADFLY (Nov. 11, 2016, 12:14 PM), <https://www.bloomberg.com/gadfly/articles/2016-11-11/berkshire-hathaway-bnsf-railroad-deal-shines-bright-in-hindsight> [<https://perma.cc/AQQ9-U33Z>].

⁸⁵ See Joint Appendix, *supra* note 8, at 37.

⁸⁶ *Nelson v. BNSF Ry. Co.*, No. DV 11-417, slip op. at 1 (13th Jud. Dist., Yellowstone Cty., Mont. Nov. 18, 2014).

⁸⁷ See *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 3-4 (Mont. 2016).

⁸⁸ Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 263-69 (2014).

⁸⁹ See Brief of Amicus Curiae Alan B. Morrison, in Support of Respondents at 18-36, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (No. 16-466) (arguing that all state court exercises of personal jurisdiction should be analyzed under the dormant commerce clause); Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1313-25 (2017) (arguing that all of personal jurisdiction is justified under general and international law principles).