No. 21-1168

In the Supreme Court of the United States

ROBERT MALLORY, PETITIONER

v.

NORFOLK SOUTHERN RAILWAY CO., RESPONDENT

ON WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Norfolk Southern avoids the original public meaning of the Fourteenth Amendment until the tail-end of its brief, engaging with the historical evidence only after it discusses cases that declined to address the question presented, asks the Court to overrule cases that *did* address it, and invokes free-floating notions of fairness and policy.

Norfolk Southern sidelines the most important interpretive material because it has no answer for the historical ubiquity of consent-by-registration laws. States routinely conditioned access to their markets on corporations' agreeing to personal jurisdiction that would not otherwise exist. The Congress that drafted the Fourteenth Amendment did the same. Corporate compliance with registration statutes was widely understood to constitute valid, voluntary consent for purposes of due process.

Attempting to avoid this history, Norfolk Southern now claims that its consent was not "express," so it did not consent at all. That argument is both waived and wrong. The question presented (as framed by both the certiorari petition and the brief in opposition) makes clear that registration under Pennsylvania's statute amounts to consent and asks only whether that consent requirement is constitutional. Norfolk Southern did not raise its newfound argument in opposing certiorari and instead claimed that its consent was not voluntary. It is bound by its concession. In any event, Pennsylvania law clearly advised Norfolk Southern that registering as a foreign corporation constituted consent to jurisdiction, and Norfolk Southern manifested that consent by filing the registration form. That consent is no less effective than the other historical

variations of consent-by-registration on which Mr. Mallory grounds his argument.

Norfolk Southern next complains that Mr. Mallory's position would "gut" modern principles governing general jurisdiction, as described in *Goodyear* and *Daimler*. But those decisions *expressly* decline to address jurisdiction based on consent. They cannot credibly be said to have overruled precedent treating a company's consent to jurisdiction—including through registration—as valid.

Norfolk Southern eventually says what it really wants: to overrule longstanding precedent based on fairness and policy considerations. But there is nothing unfair about holding corporations to traditional jurisdictional rules grounded in longstanding historical practice, as this Court has held regarding the traditional rules that govern individuals.

When Norfolk Southern finally addresses the original public meaning of the Fourteenth Amendment, its argument is revisionist and inaccurate. After describing the ratification-era understanding of due process as an "anachronism" (at 1), Norfolk Southern essentially asks this Court to conclude that state statutes did not mean what they said, because their plain meaning is inconsistent with Norfolk Southern's view of *modern* doctrine. It cannot point to any evidence from the ratification era—not a shred—suggesting that consent-by-registration violates due process. The jurisdictional framework at the time placed no weight on the irrelevant distinctions Norfolk Southern fixates on, and Norfolk Southern's attempts to minimize the historical evidence repeatedly mischaracterize the cases and statutes.

The Court should not miss the historical forest for the doctrinal trees: If Norfolk Southern's position were accepted in 1868, it would have produced a result that even Norfolk Southern concedes (at 1) would be "intolerable." That should end the analysis, and the decision below should be reversed.

ARGUMENT

I. NORFOLK SOUTHERN CONSENTED TO PERSONAL JURISDICTION IN PENNSYLVANIA'S COURTS.

Norfolk Southern consented to the jurisdiction of Pennsylvania's courts by registering. In 1998, the company filed paperwork with the Pennsylvania Department of State. JA-2. The effect of that filing under Pennsylvania law was clear: to "lawfully register to do business and submit to the general jurisdiction of Pennsylvania courts." Pet. App. 54a.

Norfolk Southern now claims (at 11) it did not consent to jurisdiction because Pennsylvania's registration statute contains "no words of consent." But that argument is waived. In its Brief in Opposition, Norfolk Southern framed the question presented: "Whether due process allows a state to compel an out-of-state corporation to 'consent' to general personal jurisdiction in the state as a condition of doing business there." BIO at i. It recognized that "Pennsylvania explicitly treats this mandatory registration as consent to general personal jurisdiction." *Id.* at 3. And it conceded that "[t]he question here is whether Norfolk Southern's consent was voluntary, or instead 'coerced.'" *Id.* at 15. By embracing "petitioners' assertions . . . in [its] framing of the question presented and in

the substance" of its brief, Norfolk Southern waived any argument that its registration did not constitute consent to personal jurisdiction. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 107 (2015) (citing Sup. Ct. Rule 15.2).

In any event, Norfolk Southern's about-face is meritless. A "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court," including voluntary appearance and waiver. *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 703 (1982). The Pennsylvania Supreme Court explained that Norfolk Southern's registration was just such a "legal arrangement," and the only question was whether the consent was "voluntary." Pet. App. 53a. That determination is binding. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75 (1939) ("The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals."). And that determination is not an outlier. *See, e.g.*, *Ex Parte Schollenberger*, 96 U.S. 369, 376 (1877).

Norfolk Southern is simply wrong to suggest that a corporation must use magic words, rather than file registration papers, to consent to jurisdiction. This Court has said otherwise. *See, e.g.*, *Neirbo*, 308 U.S. at 170 (complying with registration statute "constituted consent to be sued"). And that holding reflects common sense. Imagine Pennsylvania law stated that a corporation that submits a registration on blue paper consents to general jurisdiction but did not require that registrations be filed on blue paper. A corporation that filed on blue paper could not possibly argue that it did not consent—it chose the color,

knowing the consequences under state law. And if that constitutes consent, so does Norfolk Southern's registration. The company filed registration papers with full knowledge of the effect that legal filing carried under state law. The only remaining question is whether Norfolk Southern can escape the consequences of its actions because it claims it was coerced.[1]

II. PENNSYLVANIA'S CONSENT-BY-REGISTRATION STATUTE IS CONSTITUTIONAL UNDER THE ORIGINAL PUBLIC MEANING OF THE DUE PROCESS CLAUSE.

The original public meaning of the Due Process Clause permits States to require out-of-state corporations to consent to personal jurisdiction to do business in the State. *See* Pet. Br. at 11-28.

1. Faced with the universal embrace of consent-by-registration statutes around the time the Fourteenth Amendment was ratified, Norfolk Southern first offers (at

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[1] Norfolk Southern proposes a clear-statement rule, but the only case it cites addressed a State's waiver of sovereign immunity. *See* Br. at 12-13 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). This Court applies a "stringent" test before finding that a sovereign has waived immunity to suit. *Id.* But Norfolk Southern offers no reason why that test applies to a private party's consent to personal jurisdiction. Norfolk Southern also suggests (at 12) that Mr. Mallory's position means that an individual "consents to California's jurisdiction by going there." Not so. Norfolk Southern filed particular paperwork manifesting its consent. Merely doing business—without filing anything—would constitute "consent" only by "a mere fiction." *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93, 96 (1917).

39) a puzzling riposte: Mr. Mallory's invocation of the Constitution's original public meaning "ignores *International Shoe*." But *of course* what the Constitution meant in 1868 "ignores" a personal-jurisdiction innovation this Court first announced in 1945. *International Shoe* was not, and did not pretend to be, grounded in history or tradition. *See International Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (Black, J., concurring).

Mr. Mallory has no reason to ask the Court "to overturn *International Shoe*," Br. at 39, because this case does not present an either-or choice between *International Shoe* and the original public meaning of the Constitution. *International Shoe* expressly declined to address the scope of personal jurisdiction based on consent. 326 U.S. at 317 (addressing jurisdiction where "no consent to be sued or authorization to an agent to accept service of process has been given") (citations omitted). And this Court has already explained that *International Shoe* augments rather than supplants traditional methods of establishing personal jurisdiction. *See Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1990) (plurality) ("[T]he distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental."). If Norfolk Southern and other large corporations no longer wish to be subjected to *both* novel *and* traditional means of establishing personal jurisdiction, *they* are welcome to ask this Court to overrule *International Shoe* in an appropriate case.

2. Norfolk Southern criticizes (at 39, 44) Mr. Mallory's "framing" of the extensive historical basis for consent-by-registration, arguing that he must identify litigated "cases that adopted all-purpose registration-jurisdiction before

ratification" of the Fourteenth Amendment. That is wrong for two reasons.

First, the constitutional question does not turn on "all-purpose"—or general versus specific—jurisdiction. The modern distinction between general and specific jurisdiction did not exist in 1868. Rather, as Norfolk Southern concedes (at 40), at the time, *any* assertion of jurisdiction over an out-of-state corporation required the corporation's presence or consent. *See* Pet. Br. at 12-15. The historical cases Mr. Mallory cites relied on consent through registration as the sole ground for jurisdiction. The fact that *today* such cases might *also* satisfy modern approaches to specific jurisdiction does not change those courts' clear basis for finding jurisdiction at the time.

The Court's decision in *Burnham* makes this clear. In concluding that traditional "tag jurisdiction" satisfied due process, the Court relied on cases in which "personal service within the State was the exclusive basis for the judgment that jurisdiction existed." 495 U.S. at 613 n.2. The Court did not discount those cases if they also satisfied the minimum contacts test of *International Shoe*. What mattered in *Burnham* and what matters here is the actual basis on which jurisdiction rested at the time. It was not "relevant" to the analysis that historical cases addressing consent *could have* rested (anachronistically) on satisfying a test that *International Shoe* first announced decades after the judgments issued. *Id.* Similarly, all that matters here is that the historical cases rested on consent; Norfolk Southern cannot rescript those decisions because it does not like their express rationale.

Based on its misplaced reliance on modern notions of general and specific jurisdiction rather than consent,

Norfolk Southern argues (at 39) that the only relevant historical statutes are those identical in scope to Pennsylvania's. That is, only statutes that required consent to jurisdiction for *all* claims brought by *all* plaintiffs could serve as a "comparable tradition" supporting Pennsylvania's statute. Br. at 40 (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022)). Even embracing that myopic view, 20 States had such statutes, a comfortable majority of the Union in 1868.

Moreover, while *some* registration statutes—none of the 20—limited the plaintiffs, defendants, or claims to which they applied, why would any of those distinctions have mattered to whether the corporation consented? Norfolk Southern cannot answer that question without reference to *modern* constitutional doctrine; it says nothing about the *historical* practices that everyone at the time understood satisfied due process. Under the jurisdictional framework applicable in 1868, *any* assertion of jurisdiction over an out-of-state corporation required either the corporation's presence or consent. Without either, it was constitutionally irrelevant if a plaintiff was a resident of the State, sued an insurance company rather than a railroad, or was aggrieved by a corporate agent's activity within her State. Historically, the question was always consent *vel non*.

This Court's decision three quarters of a century later in *International Shoe* cannot rewrite the historical inquiry (and never purported to). That contacts now supply an *additional* basis for jurisdiction does not mean that contacts-based limitations in particular registration statutes are constitutionally relevant. And if a given method for securing personal jurisdiction satisfied due process when the

Fourteenth Amendment was ratified, that method satisfies due process today. *Burnham*, 495 U.S. at 619. Consent by registration is such a method.

Second, Norfolk Southern cannot avoid the plain meaning of statutes in the 20 States that provide for jurisdiction over defendants for all claims by pointing to a handful of cases that narrowed different statutes in different states. For example, Norfolk Southern notes (at 43-44) that courts in Georgia and Vermont interpreted those States' statutes narrowly. But those two States are not among the 20 that provided for general personal jurisdiction. And in any event, those cases never mention the Due Process Clause; they said nothing about the constitutionality of the statutes at all. *See Bawknight v. Liverpool & London & Globe Ins. Co.,* 55 Ga. 194, 196 (1875); *Sawyer v. N. Am. Life Ins. Co.,* 46 Vt. 697, 698, 706 (1874).

Ignoring 20 States' statutes based on a few non-constitutional cases is particularly inappropriate in discerning the original public meaning of the Due Process Clause. Whatever the propriety of judicial supremacy in other contexts, courts did not propose and ratify the Fourteenth Amendment—Congress and state legislatures did.

Contemporaneous statutory text is therefore most probative of what the ratifiers of the Due Process Clause meant. For that reason, this Court cared that, historically, "28 out of 37 [States] had enacted statutes making abortion a crime," even in the absence of litigated cases enforcing those statutes. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252-53 (2022); *see also id.* at App'x A. Similarly, the fact that by 1868 every single State had enacted a statute authorizing consent-by-registration

forcefully illustrates that the ratifiers of the Fourteenth Amendment understood those statutes to satisfy due process.

Norfolk Southern strains to avoid the plain meaning of state statutes, repeatedly mischaracterizing cases in States with broad registration statutes. For example:

- Norfolk Southern cites (at 45) a Michigan case from 1869 (*Newell*) as narrowing Michigan's registration statute. But Michigan enacted its general jurisdiction registration statute in 1903. *See* Pet. Br. Appendix B 116a-117a.
- Norfolk Southern claims (at 45) that Mr. Mallory "overlooks" an 1881 Michigan statute that limited jurisdiction to cases "where the cause of action accrue[d] within" Michigan. But the legislature intentionally removed that express limitation to expand jurisdiction in the 1903 statute.
- Norfolk Southern (at 45) points to an 1867 statute in Massachusetts providing for attachment jurisdiction over only foreign non-insurance companies. But its general jurisdiction statute at that time applied only to insurance companies; Massachusetts enacted its general jurisdiction statute for all foreign corporations in 1884. *See* Pet. Br. Appendix B 98a-99a; 103a-106a.
- Norfolk Southern selectively quotes (at 46) an Oregon case holding that foreign companies' doing business in a State are "liable to suit upon a cause of action arising in the state . . . in the manner provided for the service of domestic

corporations, *unless the statute otherwise provides." Farrel v. Oregon Gold-Min. Co.*, 49 P. 876, 877 (1897) (emphasis added). But the statute did otherwise provide. It stated that service on foreign corporations "may be made in like manner as upon domestic corporations." *Id.* at 878.

- South Carolina enacted its general jurisdiction registration statute in 1894. *See* Pet. Br. Appendix B 229a-230a. Norfolk Southern cites (at 46) a case (*Littlejohn*) applying the prior version of the statute enacted in 1893.
- Pennsylvania enacted its general jurisdiction statute in 1874. *See* Pet. Br. Appendix B 215a. Norfolk Southern first cites (at 46) a case from 1863 (*Parke*). It then notes that a case applying the 1874 statute involved a Pennsylvania resident but ignores what the case actually said. *See Barr v. King*, 96 Pa. 485, 488 (1880) ("[C]itizens of other states, who are doing business here, ought to stand on an equal footing with each other and with the citizens of this state. . . legislation has done much to place foreign corporations on equality with domestic as respects the rights to sue and the liability to be sued.").
- Norfolk Southern cites (at 44) two non-insurance cases from New Jersey *(Camden* and *Berlin*). But New Jersey's general jurisdiction registration statute applied only to insurance companies. *See* Pet. Br. Appendix B 171a-172a.

3. When Norfolk Southern grapples with statutory text—again, from States *not* among the 20 whose statutes provided for general jurisdiction—it ignores crucial language. It cites Maryland, New York, South Carolina, and Wisconsin as allowing jurisdiction only over claims arising in the forum. But it elides the part of each statute permitting *residents* to sue for any claim at all. *See* Br. at 42-43 (citing Md. Code Ann § 26-211 (1868) ("by a resident of this state, for any cause of action"); Miss. Code Ann. § 24-919 (1906) ("liable to be sued by any resident of this state"); N.Y. Code Proc. § 427 (1849) ("By a resident of this state, for any cause of action"); S.C. Code Ann. § 13-1-442(1) (1873) ("By any resident of this State, for any cause of action"); Wis. Stat. § 120.2637(13) (1898) ("or the cause of action exists in favor of a resident of the state"); Wis. Stat. § 86.1 (1866) ("or where the cause of action exists in favor of a resident of this State")). The remaining statutes it cites are venue not jurisdictional provisions, which in any event authorized *any* suit where the plaintiff resided. *See, e.g.*, 1913 Fla. Laws 6422 § 2661c ("actions may be commenced against it in the proper Court of any County in this State in which a cause of action may arise, *or in which the plaintiff may reside*") (emphasis added).

Norfolk Southern cannot rebut a straightforward historical fact: in the years before and soon after the ratification of the Fourteenth Amendment, States routinely enacted general personal jurisdiction registration statutes. The statutes meant what they said. And Norfolk Southern cites *no case* from any court during the ratification era holding that such a statute violated due process.

4. Norfolk Southern also misinterprets the cases applying statutes that required consent to all-purpose

jurisdiction by particular corporations. It flatly misreads *Fithian, Jones & Co. v. New York & E.R. Co.*, 31 Pa. 114, 116 (1857), which unequivocally states that "[t]he true intent of [the 1841 statute] was to bring the railroad company within the jurisdiction of this state, for the purpose of compelling it to answer in *all* suits or actions at law which might be brought against it." (emphasis added). The Pennsylvania Supreme Court later confirmed that broad scope. *See Barr*, 96 Pa. at 488 ("comprehensive" scope "embrac[ing] all actions" of "the Act of 1841 [for] the railroad company to which it specially applied").

Norfolk Southern similarly mischaracterizes (at 48) *Baltimore & O.R. Co. v. Harris*, 79 U.S. 65 (1870), which it claims involved a "local" dispute. Harris brought suit in the District of Columbia after "receiv[ing] the injuries complained of . . . in [a] collision near Mannington, in the State of Virginia." *Id.* at 78. The Court upheld personal jurisdiction over the railroad because "looking at the [1831 federal] statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality." *Harris*, 79 U.S. at 84. *See also Schollenberger*, 96 U.S. at 376 ("[A]lthough the company [in *Harris*] was a foreign corporation, it was suable in the District, because it had in effect consented to be sued there, in consideration of its being permitted by Congress to exercise therein its corporate powers and privileges."). The Court further explained that an identical 1827 Virginia statute also validly required the railroad to consent to jurisdiction. *See Harris*, 79 U.S. at 83.

5. Norfolk Southern does not even attempt to challenge the validity of state statutes that required foreign corporations to consent to jurisdiction for *all* claims brought by residents, wherever those claims arose. *See* Pet. Br. at 20-21. Its conclusory response (at 47)—that "a state has a sovereign interest in providing a forum for resident plaintiffs' suits"— is a non-sequitur. Norfolk Southern offers no reason why its consent would transform from constitutionally invalid to valid if Mr. Mallory moved to Pennsylvania for a few months before filing suit. Consent is constitutionally sound or it is not—the identity of the plaintiff does not impact any supposed "coercion."

6. Norfolk Southern also has no valid response to Congress's enactment of a broad registration statute in 1867. It concedes (at 48) that the statute required corporations to consent to "all process." 14 Stat. 404 (1867). It then speculates that "all process" refers to something less than all process, and instead includes only some process, for certain claims. There is no basis for that atextual reading, and Norfolk Southern offers no case embracing it. Congress clearly subjected foreign corporations to jurisdiction solely based on their consent through a registration statute. And it did so just a year before the ratification of the Fourteenth Amendment by the States and mere months before Congress itself proposed the Amendment.

Norfolk Southern observes (at 48) that "states do not share Congress's powers." *See also* US Br. at 28-29, 31-33. Which powers States share is irrelevant. The textual constraints imposed by the Constitution on federal power is identical to that imposed on Pennsylvania: "due process of law." Moreover, to the extent the Fifth and Fourteenth Amendments had differing original public meanings due

to the different understandings of our Nation's people in 1791 and 1868, *cf. Bruen*, 142 S. Ct. at 2137, *id.* at 2163 (Barrett, J., concurring), that differing history supports the constitutionality of state registration statutes more strongly than that of federal registration statutes. When the Fourteenth Amendment was ratified, state registration statutes were ubiquitous. When the Fifth Amendment was ratified, registration statutes did not yet exist. The historical basis for federal statutes' constitutionality under that Amendment is thus decidedly weaker.

Norfolk Southern's focus on Congress's "powers" reflects its persistent misunderstanding of what this case is about: consent. Greater "powers" to regulate in certain spheres provides no basis—conceptually or constitutionally—to think that *consent* to jurisdiction would be any more or less valid. Consider a Chinese company that registers both with the United States and with Pennsylvania. Could it possibly be true that it has consented to the former's jurisdiction but not the latter's? Congress's power to regulate commerce with foreign nations says nothing about whether the company's consent with either sovereign was voluntary or coerced. If this Court rules that consent-by-registration is not valid, there is no escaping the nullification of multiple federal laws.

III. BINDING PRECEDENT CONFIRMS THE CONSTITUTIONALITY OF PENNSYLVANIA'S CONSENT-BY-REGISTRATION REGIME, AND THERE IS NO BASIS TO OVERRULE IT.

Norfolk Southern seeks to escape this Court's binding precedent in *Pennsylvania Fire Insurance Co. v. Gold*

Issue Mining & Milling Co., 243 U.S. 93 (1917), by arguing that it does not apply and that it should be overruled. Neither argument has merit.

1. Norfolk Southern first suggests (at 31) that "[b]ecause Norfolk Southern executed no document like the power of attorney there, it has 'not actually consented to personal jurisdiction in the way that the defendant in *Pennsylvania Fire* had.'" (quoting Pet. Br. at 38). That is nonsensical. Registering to do business is no more or less "express" than appointing an agent. Both involve filing paperwork with the State, and background rules of state law dictate the legal significance of the filings. Norfolk Southern attempts to liken this case to *Simon v. Southern Railway*, 236 U.S. 115 (1915), and *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907), but ignores that in those cases the defendants had not actually consented because they had failed to register to do business at all. And, as explained in Mr. Mallory's opening brief (at 38), *Pennsylvania Fire* distinguished those cases in which "consent is a mere fiction." 243 U.S. at 96 ("[W]hen a power actually is conferred by a document . . . [t]he execution was the defendant's voluntary act.").

Norfolk Southern's contrary position rests on the incorrect contention (at 32) that *Pennsylvania Fire*'s holding rested on "the fiction of corporate 'presence'" rather than consent. This Court decisively rejected that reading in *Neirbo*, explaining that jurisdiction via a registration statute rested on a corporation's being "found . . . only in a metaphorical sense, because they had consented to be sued there by complying with the [registration statute] for designating an agent to accept service." 308 U.S. at 170. The Court explained that "[t]he scope and meaning

of such a designation as part of the bargain by which [the defendant corporation] enjoys the business freedom of the State," and the "'stipulation is therefore a true contract.'" *Id.* at 175 (quoting *Bagdon v. Phila. & Reading C. & I. Co.*, 111 N.E. 1075, 1076 (N.Y. 1916)).

2. Norfolk Southern then vacillates between contending that this Court already overruled *Pennsylvania Fire sub silentio* and asking that this Court do so now. Both positions are incorrect.

First, *Pennsylvania Fire* remains in force. Norfolk Southern has no answer for the numerous cases expressly distinguishing contacts from consent as bases for jurisdiction. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 129 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927-28 (2011). Those cases did not retire a century-old, repeatedly reaffirmed precedent with nary a word about *stare decisis*.

Second, Norfolk Southern finally admits (at 36) what it really wants: for this Court to overrule *Pennsylvania Fire* and, with it, the dozens of cases before and after that based jurisdiction on consent via a registration statute. Norfolk Southern (at 37) says *Pennsylvania Fire*'s unanimous decision was "egregiously wrong." But the only "why" one can discern is that Norfolk Southern strenuously opposes its holding. Norfolk Southern invokes (at 37) its meritless policy concerns regarding "fairness" and "interstate federalism." But if vague concerns about "fairness" are an adequate basis to overturn a century-old, unanimous decision whose rationale—consent—has been expressly reserved by every subsequent case addressing jurisdiction, then none of this Court's cases is safe.

"Time and time again," this Court has underscored the "'fundamental importance" of *stare decisis* "to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). *See also Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("Fidelity to precedent—the policy of stare decisis—is vital to the proper exercise of the judicial function."). It is "the means by which [the Court] ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Adherence to those principles requires respecting this Court's precedent in *Pennsylvania Fire*.

IV. NORFOLK SOUTHERN'S MERITLESS POLICY CONCERNS CANNOT OVERRIDE THE ORIGINAL MEANING OF THE DUE PROCESS CLAUSE.

The original public meaning of the Due Process Clause is clear. The Court should apply that meaning and reverse the judgment below. *See, e.g.*, *Bruen*, 142 S. Ct. at 2131; *Dobbs*, 142 S. Ct. at 2248. There is no warrant for this Court to favor the rights of corporations over those of flesh-and-blood people by expanding those corporations' rights beyond their historical ambit. But even if the Court were to assess the fairness of Pennsylvania's statute, the policy concerns raised by Norfolk Southern and its amici lack merit.

A. Principles of Interstate Federalism are Inapplicable to Corporate Consent Statutes.

Norfolk Southern misunderstands federalism when it claims (at 16) that recognizing the constitutionality of a

corporation's consent through a registration statute "harms interstate federalism" by impinging the "sovereignty of sister states." *See also* Virginia Br. at 3. Pennsylvania's statute does not "seize" power from other States any more than exercising jurisdiction based on a forum-selection clause or a defendant's waiver does so. And robbing States of their historical power to condition access to their markets on consent to personal jurisdiction does far more violence to the "sovereignty of Sister states," *id.* at 3, than upholding these statutes. That every State has enacted a consent-via-registration statute confirms their importance. That no court ever invalidated such a statute on federalism grounds—or on any other grounds until long after *International Shoe*—is similarly probative. Norfolk Southern's bare incantation (at 16) of "harm" to "interstate federalism" cannot carry the constitutional load the company places on it.

This Court's cases confirm the point. It is indisputable that any defendant, including a foreign corporation, can consent to any State's personal jurisdiction over any case brought by any plaintiff, no matter how *other* States feel about the matter. *Bauxites*, 456 U.S. at 703. But a defendant could never waive (or otherwise consent to the violation of) a State's sovereign power. This Court made that point clear in *Bauxites*, rejecting the notion that interstate federalism "operated as an independent restriction" on personal jurisdiction when a defendant consents:

> [I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can

> subject himself to powers from which he may otherwise be protected.

456 U.S. at 703 n.10.

There is no warrant for the Court to reverse course here.

B. Corporate Consent Statutes Are Fair.

Norfolk Southern complains (at 16-19) that subjecting it to jurisdiction would be unfair due to the "burdens" it would suffer. But burdens are constitutionally irrelevant when a defendant chooses to shoulder them. This Court did not inquire into the burdens on the corporate defendant that waived its objection to personal jurisdiction in *Bauxites*. 465 U.S. at 704. Nor did it do so with respect to a corporate defendant that entered a contract with a forum-selection clause. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). Nor when a corporate defendant stipulated to jurisdiction in the district court. *See Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495, 496 (1956). There is no reason to treat consent-via-registration any differently.

Even if a free-floating assessment of fairness were appropriate, Norfolk Southern cannot seriously suggest that it lacks the resources to litigate in Pennsylvania. The hardship it might face pales in comparison to those it imposes on individual people every day. A resident of Idaho struck by one of Norfolk Southern's trains while on vacation in Florida would be forced to litigate the case in either of two far-flung States, no matter how modest her means. That is, of course, if Norfolk Southern had not imposed an arbitration clause that deprived the plaintiff of her day in court entirely. Due process permits all that, as well as the

increasingly common practice of corporations' moving their headquarters and States of incorporation to venues they perceive to produce favorable judgments. This Court should not heed Norfolk Southern's pleas for mercy when the shoe is very slightly on the other foot.

Norfolk Southern's fairness argument ultimately devolves into an attempt to distinguish *Burnham*. It argues (at 22) that, unlike in *Burnham*, the historical practice supporting corporate registration statutes is insufficient to overcome their alleged unfairness. That is incorrect. *See supra*; Pet. Br. 11-28. Embracing *Burnham* while ruling against Mr. Mallory would require "halfway originalism," mixing and matching history and modern doctrine to reach a preferred outcome favoring corporations over people that is foreclosed by history alone. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2470 (2018).

V. PENNSYLVANIA'S CORPORATE REGISTRATION STATUTE DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION.

Norfolk Southern argues (at 24-30) that Pennsylvania's corporate registration statute imposes an unconstitutional condition. That too is wrong.

As Professor Sachs explains, statutes like Pennsylvania's are not unconstitutional conditions "because the consent to jurisdiction they exacted had satisfied the relevant constitutional rule, rather than merely waiving it." Sachs Br. at 12. The relevant right is to not be "deprived of life, liberty, or property on the basis of a jurisdictionless judgment." *Id.* at 19 (citing *Scott v. McNeal*, 154 U.S. 34, 46 (1894); *York v. Texas*, 137 U.S. 15, 20-21 (1890)). Consent

historically grounds jurisdiction, ensuring all the process that a defendant is due.

Norfolk Southern's contention (at 25) that there is "a due process right not to be sued in Pennsylvania on a claim with no forum link" begs the question, improperly treating contacts-based jurisdiction as exclusively defining the scope of the constitutional right. Norfolk Southern is entitled to "that process which American society . . . has traditionally considered 'due,'" not to the particular test for jurisdiction established by this Court in *International Shoe*. *Burnham*, 495 U.S. at 627 n.5. Under traditional principles, "Norfolk Southern's consent to [Pennsylvania's] jurisdiction . . . means that the requirements of due process have been *satisfied*, not waived away in exchange for a government benefit." Sachs Br. at 19.

Norfolk Southern does not dispute that this Court has never held a registration statute like Pennsylvania's to impose an unconstitutional condition. And analogizing to removal misunderstands this Court's cases. This Court's decision in *Home Insurance Co. of New York v. Morse*, 87 U.S. (20 Wall.) 445 (1874), invalidated a State's requirement that a foreign corporation not remove a case to federal court. *Morse* explained that "conditions may [not] be imposed which are repugnant to the Constitution and laws of the United States," *id.* at 457, reciting the then-applicable test for preemption. This Court soon confirmed that implied preemption was the basis of that decision: "Congress . . . made citizenship in the state, with residence in the district, the sole test of jurisdiction in this class of cases." *S. Pac. Co. v. Denton*, 146 U.S. 202, 208 (1892). *See also Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-33 (1922) (a federal statute "confers upon citizens of one state

the right to resort to federal courts in another" and "state action . . . calculated to curtail the free exercise of the right thus secured is void . . . [under] supreme fundamental law"). And the Court made clear that its decision did not call into question corporate registration statutes that "subject the corporation . . . to the jurisdiction of any appropriate court of the state." 146 U.S. at 207.

Finally, Norfolk Southern has no coherent limiting principle. State and local governments condition benefits on the waiver of litigation rights thousands of times every day. Applying the unconstitutional conditions doctrine in this sphere would walk courts into a minefield. Norfolk Southern simply postulates (at 30) that "case-by-case bargaining" of procedural rights does not impose an unconstitutional condition but Pennsylvania's statute does. It offers no authority or justification for that novel rule, which would prohibit States from including forum selection and arbitration clauses in their contracts with private parties. Norfolk Southern raises the specter (at 29) of a state registration statute requiring waiver of criminal jury rights. That hypothetical has no historical precedent, unlike the universal practice of consent-via-registration statutes. The Court need not speculate about every unsavory marcher in Norfolk Southern's parade of horribles to rest assured that 150 years of historical practice has not suddenly become unconstitutional in 2022. A "page of history is worth a volume of logic." *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

In sum, the doctrine of unconstitutional conditions does not apply to personal jurisdiction because a defendant has no constitutional right not to be subject to jurisdiction to which it consented. In more than a century and

a half of cases addressing registration statutes, no court has ever held otherwise. This Court should not invent a due process right prohibiting statutes that were ubiquitous when the Fourteenth Amendment was ratified.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

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