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

RESPONDENT'S BRIEF

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August 26, 2022

QUESTION PRESENTED

Whether due process allows a state to assert general personal jurisdiction over a foreign corporation simply because it registers to do business there, as required by state law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Robert Mallory.

Respondent is Norfolk Southern Railway Company. Norfolk Southern Railway Company's parent corporation is Norfolk Southern Corporation, a publicly held corporation that holds at least 10% of Norfolk Southern Railway Company's stock.

RELATED PROCEEDINGS

This case directly relates to these proceedings:

Pennsylvania Supreme Court, No. 3 EAP 2021, *Mallory* v. *Norfolk S. Ry.*, judgment entered December 22, 2021. Reported at 266 A.3d 542.

Superior Court of Pennsylvania, No. 802 EDA 2018, *Mallory* v. *Norfolk S. Ry.*, order entered October 30, 2020. Reported at 241 A.3d 480 (unpublished).

Court of Common Pleas of Pennsylvania, Philadelphia County, Docket No. 1709001961, *Mallory* v. *Norfolk S. Ry.*, order entered February 6, 2018. Available at 2018 WL 3202860.

Counsel is aware of no other directly related proceedings.

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INTRODUCTION

All 50 states require out-of-state corporations doing in-state business to register. But Pennsylvania's statutes have a unique feature: The Commonwealth's long-arm statute treats this mandatory registration as grounds for general personal jurisdiction—and thus allows suits by out-of-state plaintiffs against out-of-state defendants on out-of-state causes of action. This case is a prime example. Robert Mallory, a Virginia resident, sued Norfolk Southern Railway Company, then based and incorporated in Virginia, for alleged harms in Virginia and Ohio. This case thus has "no connection to the Commonwealth" at all. Pet. App. 47a–48a.

The regime that allows this kind of suit is an anachronism—developed in a different era to solve a problem that no longer exists, based on a doctrinal foundation that disappeared decades ago.

Two centuries ago, suing a corporation generally required serving its principals within its state of incorporation. This common-law rule, together with the territorial approach to jurisdiction endorsed in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), allowed corporations to do business in other states, but to avoid suit there—even for claims arising from those very activities—because they could not be served. That intolerable result prompted states to pass laws requiring out-of-state corporations to actually or constructively appoint in-state agents to accept service of process. Courts upheld these laws, reasoning that, because a state could exclude foreign corporations altogether, it could impose conditions on entry, including these registration requirements.

For most of the 1800s, including when the Fourteenth Amendment was ratified, these registration laws were limited in scope: A state could "secure to its citizens a remedy, in their domestic forum," for claims arising "within that State." *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1855). It was not until the turn of the century, when courts concluded that foreign corporations doing business in a state were "present" there, that these laws were regularly applied to allow suits against foreign corporations arising elsewhere. These late-*Pennoyer* era cases often jumbled together ideas of "'consent,' 'doing business,' and 'presence'" to justify "state judicial power over such corporations." *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945), swept away this regime—including the creaky superstructure of fictions erected to prop it up. This sea change made registration-jurisdiction obsolete. Specific jurisdiction, "the centerpiece of modern jurisdiction theory," now ensures state jurisdiction over foreign corporations for claims arising from their in-state activities, registered or not. *Daimler AG* v. *Bauman*, 571 U.S. 117, 128 (2014). And around the same time, the notion that a state could entirely exclude foreign corporations—and thus could "attach such conditions as it chooses upon the grant of the privilege to do business"—"disintegrat[ed]." *W. & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657, 662 (1981).

Registration-jurisdiction is thus a relic of a bygone era. It is neither necessary nor doctrinally supportable today. That is presumably why no state other than Pennsylvania has a statutory registration-jurisdiction rule. Indeed, not one state has urged this

Court to rescue Pennsylvania's scheme—not even Pennsylvania.

And reviving registration-jurisdiction now would have dire consequences. If Pennsylvania can take jurisdiction over any suit against a corporation doing business there, so can any other state. Though most states have sensibly abandoned registration-jurisdiction, it would take only a few to badly distort the interstate balance of sovereignty. States have no legitimate interest in seizing jurisdiction over claims with no forum connection, and allowing them to do so invites gamesmanship, forum-shopping, and unfairness.

Mallory's response: None of this matters, because Norfolk Southern consented to general jurisdiction under *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). But *Pennsylvania Fire* did not survive *International Shoe*, and even if it had, its reasoning would not save Pennsylvania's current regime, which involves no consent. At any rate, a state "may not exact" a forfeiture of constitutional rights "as a condition of [a] corporation's engaging in business within its limits." *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494, 507 (1926). Consent—let alone voluntary, effective consent—does not exist here.

Indeed, while Mallory's brief constantly invokes the talisman of consent, his actual arguments belie the notion. After all, consent—true consent, expressed by the defendant's words or deeds—is an established, undisputed basis for jurisdiction. Br. 10. So if Norfolk Southern's actions really reflected voluntary consent, Mallory would not need to look beyond the facts here; he could simply show how Norfolk Southern demonstrated its assent. He would not need "150 years" of history (which he mischaracterizes). *Id.* at

29. Nor would he need to argue at length that registration-jurisdiction is "fair[]" based on a foreign corporation's in-state "presence," *id.* at 43—an issue that true consent would render irrelevant. That he spends so many pages trying to establish what "a State may require" of foreign corporations, *id.* at 8, shows that his consent argument is a fig-leaf. Mallory is really trying to revive the *Pennoyer*-era fictions that *International Shoe* properly vanquished. The Court should reject that effort.

STATEMENT

1. A foreign corporation "may not do business in" Pennsylvania "until it registers." 15 Pa. Cons. Stat. § 411(a). A registered corporation "enjoy[s] the same rights and privileges as a domestic entity." *Id.* § 402(d); see *id.* § 1502(a).

The registration statute nowhere mentions personal jurisdiction. Likewise, the registration form merely requires basic information like the company's name, its state of incorporation, and its addresses in its home state and Pennsylvania. JA1. The form notes that a corporation "represented by a commercial registered office provider" is "deemed" to be "located for venue and official publication purposes" in the county where the provider is located, but it includes no similar notice that the company will be deemed subject to the general jurisdiction of the state's courts. See JA1–2.

The state's long-arm statute, however, deems this mandatory registration "a sufficient basis … to exercise general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a)(2)(i). Thus, "any cause of action may be asserted against" a registered foreign corporation. *Id.* § 5301(b). This basis for asserting general jurisdic-

tion is separate from "[c]onsent, to the extent authorized by the consent." See *id.* § 5301(a)(2)(ii).

Failing to register is "unlawful[]." Pet. App. 54a n.20. It also precludes a corporation from "maintain[ing] an action or proceeding in this Commonwealth," 15 Pa. Cons. Stat. § 411(b), a restriction that likely includes federal diversity suits, *infra* p. 26.

This scheme is unique. All other states require foreign companies to register and appoint an agent for service of process, but only Pennsylvania's statutes assert jurisdiction based on registration. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1366 (2015). Some other states' courts have read their registration laws to create jurisdiction anyway, but many recently backtracked. Cert. Opp. 6–13.[1]

2. Mallory sued Norfolk Southern in the Pennsylvania Court of Common Pleas under the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60. He alleged that, while working for Norfolk Southern in Ohio and Virginia, he was exposed to harmful carcinogens. Pet. App. 12a. When he sued, he lived in Virginia. *Id.* at 2a. Virginia was also Norfolk Southern's home: The railroad is a Virginia corporation whose principal place of business was then in Virginia (now, Georgia). *Id.* at 12a. The dispute therefore has no connection to Pennsylvania. *Id.* at 45a.

Mallory thus asserted personal jurisdiction based solely on Norfolk Southern's registration. Norfolk Southern is a Class 1 interstate rail carrier, with

[1] Norfolk Southern does not dispute that states can require corporations to appoint agents for service of process, but such appointments cannot create personal jurisdiction.

about 19,300 miles of track in 22 eastern states and the District of Columbia. Its lines in Pennsylvania connect New England to the rest of its network. The current company registered in Pennsylvania in 1998, JA1, but its earliest predecessors had tracks in the State in the early 1800s. Norfolk Southern's business in Pennsylvania is mostly in interstate commerce.

The trial court held that Norfolk Southern's registration was not a sufficient basis for jurisdiction. Pet. App. 65a. On appeal—where the state Attorney General declined to participate—the Pennsylvania Supreme Court unanimously affirmed. It gave four reasons.

First, this Court's decisions in *Goodyear* and *Daimler* "'dramatically altered' the general jurisdiction analysis." Pet. App. 44a. After those decisions, a "court may assert general jurisdiction over foreign … corporations" only "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home" there. *Id.* Norfolk Southern is not at home in Pennsylvania. *Id.* at 45a. To still assert general jurisdiction over it, based on registration alone, would thus flout "*Daimler*'s directive that a court cannot subject a foreign corporation to general all-purpose jurisdiction based exclusively on the fact that it conducts business in the forum state." *Id.* at 46a. Indeed, if Pennsylvania could enforce such a scheme, every state could do so, "rendering every national corporation subject to the general jurisdiction of every state"—a result that "flies in the face of *Goodyear* and *Daimler*." *Id.*

Second, Pennsylvania's scheme "is contrary to the concept of federalism," because it "infringes upon our sister state[s'] ability to try cases against their corporate citizens." Pet. App. 47a. "Pennsylvania has no legitimate interest in a controversy with no connec-

tion to the Commonwealth that was filed by a nonresident against a foreign corporation that is not at home here." *Id.* at 47a–48a.

Third, *Pennoyer*-era decisions do not support Pennsylvania's current regime. Those cases were decided "when courts applied a territorial approach to general jurisdiction," which *International Shoe* displaced. Pet. App. 48a.

Fourth, Norfolk Southern did not voluntarily consent to jurisdiction. Pet. App. 51a. The state "may not deny a benefit to a person because that person exercised a constitutional right." *Id.* at 52a. Pennsylvania's scheme violates that rule, "impermissibly condition[ing] the privilege of doing business in Pennsylvania upon a foreign corporation's surrender of its constitutional right to due process." *Id.* at 53a. And if a corporation "conduct[ed] business in Pennsylvania unlawfully without registering," it "would be compelled to surrender its constitutional guarantee to access to the courts." *Id.* at 54a n.20.

SUMMARY OF ARGUMENT

I. General jurisdiction under Pennsylvania's long-arm statute, based on a corporation's mandatory registration, does not involve consent. Registration-jurisdiction is unlike any form of consent this Court's modern cases recognize, none of which involves a state-mandated submission to jurisdiction in all future cases. And since express consent is plainly absent, any consent must be implied. But if consent could be implied whenever a party voluntarily took a step that a long-arm statute deems a basis for jurisdiction, consent would always exist. In reality, Pennsylvania's regime is a coercive assertion of jurisdiction based on the state's exercise of regulatory power over in-state corporate operations.

II. Pennsylvania's scheme violates basic personal-jurisdiction principles, whether or not consent exists.

A. Allowing every state to assert general jurisdiction over every corporation doing business there would gut the protections *Goodyear* and *Daimler* recognized. Every national corporation could be "at home" everywhere. That result would invert the relationship between specific and general jurisdiction, destroying the underlying principle of reciprocity.

B.1. Registration-jurisdiction creates serious interstate-federalism problems by letting states seize jurisdiction over suits in which other states have far greater interests. This case, involving a Virginia plaintiff, a Virginia defendant, and alleged Virginia injuries, is a prime example. Pennsylvania has no interest here, but its assertion of jurisdiction excludes Virginia. Letting this regime spread across the country would compound these problems. States could adjust their laws to maximize their control over corporations' conduct in other states, further infringing other states' sovereignty. Policing those efforts, in turn, would open new fronts of litigation and raise line-drawing problems.

2. Registration-jurisdiction is also unfair to defendants. It imposes significant practical burdens by requiring litigation distant from any witnesses or evidence, and it invites egregious forum-shopping. Mallory says all this is justified by a corporation's in-state presence and operations, but this Court has recognized since *International Shoe* that in-state operations justify claims *based on those in-state operations*. Pennsylvania's scheme subverts that principle.

C. Mallory relies heavily on *Burnham* v. *Superior Court*, 495 U.S. 604 (1990), upholding general "tag" jurisdiction over individuals. But tag jurisdiction was

upheld—despite its obvious unfairness—because of its unquestioned acceptance, both historically and today. Mallory cannot make a similar showing for general registration-jurisdiction, so *Burnham* is inapt. Nor can he show that registration-jurisdiction for corporations is functionally equivalent to tag jurisdiction for individuals.

III. Pennsylvania's regime independently creates an unconstitutional condition. It requires corporations to either avoid Pennsylvania altogether, or choose between (a) forfeiting their due-process protections against suit and (b) breaking state law and giving up their right to access the courts.

In a series of cases, this Court invalidated state conditions on doing business that required foreign corporations to forfeit constitutional rights. The reasoning of those cases applies even more strongly here. As a federally regulated interstate railroad, Norfolk Southern cannot choose to avoid Pennsylvania. And Pennsylvania's punishment for failing to register—denial of court access, including both state-court actions and federal diversity suits—is one of the conditions this Court has already condemned. Nor does any legitimate interest support the condition Pennsylvania seeks to extract.

IV.A. Mallory invokes as "controlling" the *Pennoyer*-era decision in *Pennsylvania Fire*. But even taking *Pennsylvania Fire* at face value, any "consent" to jurisdiction here would be fictional. And—as Mallory agrees—the *Pennoyer*-era implied consent was always limited to claims arising in the forum, and did not survive *International Shoe* anyway. Mallory also overlooks that *Pennsylvania Fire*'s "consent" analysis addressed service of process, not jurisdiction; the defendant there was subject to general jurisdiction be-

cause it was "present"—another *Pennoyer*-era concept Mallory concedes is defunct.

B. In any event, no aspect of *Pennsylvania Fire*'s reasoning survived *International Shoe*. That includes not only the fictions of implied consent and presence, but also the notion that a corporation's compulsory compliance with state law is "voluntary." In other words, compulsory registration cannot produce consent.

C. If necessary, the Court should formally overrule *Pennsylvania Fire*. No *stare decisis* factor supports this thinly reasoned decision, which the Court has not relied on since before *International Shoe*.

V. Original public meaning does not support Mallory. Setting aside that this argument is just an attempt to end-run *International Shoe*, Mallory badly misstates the ratification-era law and practice.

While Mallory claims most states required foreign corporations to submit to general jurisdiction, that argument relies on either broad statutory language whose application he cannot show, or snippets of dicta from court decisions whose results do not support him. Mallory's "mountain of historical evidence," Br. 2, includes *no* decisions that applied all-purpose registration-jurisdiction before ratification, and just *one* decision that did so over the next 28 years, departing from state precedent in the process.

In truth, most states' registration laws were limited to claims with a forum connection, either expressly or by judicial interpretation. That is because, as this Court consistently explained for six decades, these laws existed to give state residents a forum for claims arising from in-state business—not to seize authority over foreign plaintiffs' claims against foreign defendants on foreign causes of action.

ARGUMENT

I. Pennsylvania's registration-jurisdiction scheme is not based on consent.

Pennsylvania's long-arm statute deems a foreign corporation's mandatory registration "a sufficient basis" for "general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a)(2)(i). This assertion of jurisdiction is not based on consent.

A "variety of legal arrangements have been taken to represent express or implied consent" to jurisdiction. *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). *Bauxites* surveyed this landscape, listing a forum-selection clause; a stipulation; an arbitration agreement; certain state-court "procedures which find constructive consent" from participating in litigation; and failure to assert a jurisdictional defense. *Id.* at 704. Not listed: Registration-jurisdiction. And none of these arrangements resembles Pennsylvania's long-arm statute. All are case- or dispute-specific, and none involves the state's assertion of regulatory power against a private party. See Monestier, *supra*, at 1381–87. Nor could any of them fundamentally reshape the personal jurisdiction landscape or increase one state's power at the expense of the others. See *infra* §§ II.A, II.B.1. Registration-jurisdiction is simply unlike any form of consent this Court's modern cases recognize.

In any event, express consent—"Consent that is clearly and unmistakably stated"—is absent here. See *Consent*, Black's Law Dictionary (11th ed. 2019). Pennsylvania's regime does not speak in terms of consent. The registration paperwork itself says nothing about jurisdiction, courts, or even service of process. JA1–2; contra Br. 43. The registration statute is similarly silent on these topics. 15 Pa. Cons. Stat.

§ 411. And the relevant long-arm provision is separate from the one asserting jurisdiction "to the extent authorized by" a corporation's "consent." See *id.* § 5301(a)(2)(ii).

Mallory's arguments underscore the point. In disputing that Norfolk Southern's "consent" was "fictional," he invokes Judge Hand's statement that "actual consent … must be measured by … the words used." Br. 39 (quoting *Smolik* v. *Phila. & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915)). But no words of consent were used here.

Nor can Mallory show implied consent—especially since the Court will "not presume acquiescence in the loss of fundamental rights." *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). Mallory suggests consent exists because Norfolk Southern, "charged with knowledge of" state law, did something (registering) that the state's long-arm statute deems a basis for general jurisdiction. Br. 43. But that proves too much. After all, "everyone is presumed to know the law." *Parker* v. *Levy*, 417 U.S. 733, 751 (1974), and thus to know the grounds on which a state will assert jurisdiction. So if voluntarily taking such a step created consent, consent would *always* exist.

Indeed, *Burnham* v. *Superior Court* would have been a consent case. Since "a defendant voluntarily present in a particular State has a reasonable expectation that he is subject to suit there," 495 U.S. 604, 624–25 (1990) (plurality) (cleaned up); *id.* at 636 (Brennan, J., concurring), Mallory's position would mean Mr. Burnham consented to California's jurisdiction by going there. Yet that is not how the Court analyzed that case, or any other where a defendant simply did something legally deemed a basis for jurisdiction. See *J. McIntyre Machinery, Ltd.* v. *Nicas-*

tro, 564 U.S. 873, 880–81 (2011) (plurality) (listing various forms of "submission to a State's powers," like "[p]resence," that are distinct from "consent").

The same is true in other contexts. *College Savings* rejected the argument that a state impliedly submitted to federal-court jurisdiction because Congress "provide[d] unambiguously that the State will be subject to suit if it engages in certain specified conduct." See 527 U.S. at 679, 681–82. And so-called "implied-consent laws" for motorists—which "condition" the "'privilege of' using the public roads" on submission to breath or blood tests—do not "create actual consent," so must be analyzed in light of the "specific constitutional claims" they raise. *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525, 2531–33 (2019) (plurality). So too here.[2]

II. Pennsylvania's regime violates basic-due process principles.

Mallory does not directly assert that registration-jurisdiction is sustainable without consent, but he does suggest it is compatible with modern personal-jurisdiction doctrine. Br. 34–48. He is wrong.

A. Mallory's position would expand general jurisdiction by gutting *Goodyear* and *Daimler*.

Since *International Shoe*, specific jurisdiction has been "the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 925 (2011). Specific jurisdiction allows a suit that "arises out of or relates to the defendant's contacts" with the forum. *Id.* at 923–24 (cleaned up). General jurisdiction allows "any and all claims," even with no forum connection. *Id.* at 919.

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[2] Even if consent existed, it would not be voluntary. *Infra* § III.

Specific jurisdiction's primacy makes sense. Before *International Shoe*, most personal-jurisdiction doctrine involving corporations sought to ensure "the jurisdiction of local courts in controversies growing out of transactions within the state." *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929). Courts developed various work-arounds—including registration-jurisdiction—to try to square that common-sense goal with *Pennoyer*'s rigid, territorial rules. Specific jurisdiction replaced those rickety concepts, ensuring that an activity "subject to the State's regulation" will support a suit in the state's courts, *Goodyear*, 564 U.S. at 919, and making registration-jurisdiction "obsolete," see Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 Rev. Litig. 1, 3–4 (1990).

General jurisdiction is a rarer beast. If courts can hear claims arising from in-state activities, "[w]e do not need to justify broad exercises of dispute-blind jurisdiction." *Daimler*, 571 U.S. at 133 n.9 (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 676 (1988)). General jurisdiction thus needs to serve just one "essential function: providing [at least] one forum where a defendant may always be sued." Twitchell, *supra*, at 667.

For a corporation, that forum is where the company is "essentially at home." *Goodyear*, 564 U.S. at 919. Because general jurisdiction reaches "any and all claims," it requires contacts "so substantial and of such a nature as to justify" the state's assertion of all-purpose authority over the defendant. *Id.* at 919, 924. The "paradigm" locations are "the place of incorporation and principal place of business." *Daimler*, 571 U.S. at 137. These "unique" and "easily ascertainable" venues "afford plaintiffs recourse to at

least one clear and certain forum" for "any and all claims." *Id.* (cleaned up); see *id.* at 139 & n.19.

Daimler thus rejected the notion that a corporation is at home wherever it "engages in a substantial, continuous, and systematic course of business." *Id.* at 138. This follows from *International Shoe*. "A corporation's continuous activity … within a state, *International Shoe* instructed, is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Goodyear*, 564 U.S. at 927 (cleaned up). "A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 571 U.S. at 139 n.20.

Yet that is exactly the result Mallory's position compels. Every state could adopt Pennsylvania's regime, making every corporation subject to general jurisdiction everywhere it does business—for national corporations, in every state. Pet. App. 54a. This result, which the Court so recently rejected as "unacceptably grasping," would obliterate the "unique[ness]" *Daimler* emphasized. 571 U.S. at 137–38. It would, in countless cases, render irrelevant the "relationship among the defendant, the forum, and the litigation," which is *International Shoe*'s touchstone. *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). And it would largely moot the "reciprocity" analysis underlying specific jurisdiction: "When (but only when) a company 'exercises the privilege of conducting activities within a state' … the State may hold the company to account *for related misconduct*." *Ford Motor Co.* v. *Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (emphasis added). Indeed, Mallory's view would create general jurisdiction even if "the corporation had done *no business at all*, so long as it had registered." *Brown* v. *Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016). In short,

"*Daimler*'s ruling would be robbed of meaning by a back-door thief." *Id.*

B. Mallory's position violates the principles behind this Court's modern personal-jurisdiction decisions.

Registration-jurisdiction also violates basic principles of interstate federalism and fairness to defendants. See *Ford*, 141 S. Ct. at 1025.

1. Registration-jurisdiction harms interstate federalism.

"[R]estrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). Because one state exercising its "sovereign power to try a suit … may prevent sister States from exercising their like authority," *Ford*, 141 S. Ct. at 1025 (cleaned up), asserting "jurisdiction in an inappropriate case … would upset the federal balance," *Nicastro*, 564 U.S. at 884 (plurality).

Personal-jurisdiction law incorporates these principles to "ensure that the States, through their courts, do not reach out beyond the[ir] limits … as coequal sovereigns." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980). Thus, "even if the defendant would suffer minimal or no inconvenience … the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Bristol-Myers*, 137 S. Ct. at 1780–81 (cleaned up).

Registration-jurisdiction violates these principles. It allows states to seize jurisdiction over litigation

they have no real interest in—and certainly lesser interests than other states. This case is a "textbook example": It has "no connection to the Commonwealth," so "Pennsylvania has no legitimate interest" in it. Pet. App. 47a–48a. Virginia was home to both parties and a location of the alleged harm. *Id.* at 2a. Virginia thus has interests in protecting both resident parties and regulating or remedying conduct that allegedly causes harm there. Yet Mallory's view would give Virginia's judges and jurors no role in deciding this dispute. Ohio, another locus of the alleged harm, *id.*, likewise has an interest—unlike Pennsylvania. By allowing Pennsylvania to seize jurisdiction over this case and others like it, Pennsylvania's scheme "infringe[s] upon the sovereignty of sister states." *Id.* at 47a.

Likewise, registration-jurisdiction poses "risks to international comity" by reaching registered non-U.S. corporations, and thus asserting jurisdiction over claims arising around the world, including claims by foreign plaintiffs. See *Daimler*, 571 U.S. at 141; Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 Ala. L. Rev. 455, 473 (2022). Pennsylvania lacks any interest in such cases.

Ruling for Mallory would thus "invite states to become 'busybodies,' regulating conduct without any legitimate governing interest." Gardner, *supra*, at 473. "If there is general jurisdiction effectively everywhere, then the plaintiffs' bar need only capture a single state legislature and push for plaintiff-friendly law and choice-of-law rules that would apply to claims that arise anywhere." *Id.* at 473–74. Or a state might disapprove of conduct allowed in other states, on policy or political grounds, and seek to regulate it. Cf. Howard M. Erichson et al., *Case-Linked*

Jurisdiction and Busybody States, 105 Minn. L. Rev. Headnotes 54, 75–76 (2020).

Mallory does not argue that Pennsylvania has any real interest here—only that it has a "greater" interest than in a tag-jurisdiction case with zero forum connections. Br. 45. But greater than zero is still insubstantial. That is presumably why Mallory invokes a hypothetical suit by a Pennsylvania "resident." *Id.* Pennsylvania's scheme, however, is indifferent to the plaintiff's residence.

Mallory's true answer is that these federalism concerns are irrelevant—they "cannot bar a State's exercise of jurisdiction over a consenting defendant." Br. 41. But again, consent is absent here. In all events, while "a forum selection clause in a contract" does not distort the interstate balance of sovereignty, see *id.*, Pennsylvania's scheme does. No other form of "consent" allows one state to take jurisdiction over countless suits involving countless parties in which it has no interest.

Adopting Mallory's rule would also open new fronts of litigation, including case-specific Commerce Clause challenges to such schemes. *E.g.*, Brief of Scholars on Corporate Registration and Jurisdiction 22–24. The Court would thus have to dust off and modernize the fact-specific *Pennoyer*-era cases on when a forum's connections are too attenuated to allow jurisdiction over a business engaged in interstate commerce. *E.g.*, *Davis* v. *Farmers' Co-op. Equity Co.*, 262 U.S. 312, 317 (1923). Litigating these issues will also require routine jurisdictional discovery, creating delay and expense.

The Court would also have to police the scope of Mallory's rule itself. If a state can impose general jurisdiction on any foreign corporation "doing business"

there, then whether a company is "doing business" becomes a constitutional question—as it was during the *Pennoyer* era. But as Judge Hand observed, that question was "quite impossible" to answer consistently. *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930).

Mallory's rule would also deter corporations from registering. Monestier, *supra*, at 1406–07. His position thus encourages lawbreaking and undermines state registration regimes, which also serve to aid state regulators and create transparency for consumers. In turn, states might respond by ratcheting up the penalties for non-compliance, allowing fines, *e.g.*, 805 Ill. Comp. Stat. 5/13.70, or suits to enjoin unregistered operations, *e.g.*, N.Y. Bus. Corp. Law § 1303. This Court would then have to decide whether and when such penalties become unduly coercive.

Finally, Mallory says affirmance would "threaten[]" federal laws that "require foreign entities to consent to personal jurisdiction" in the United States. Br. 46. But this case does not implicate Congress's power over federal-court jurisdiction, which has different sources and raises no interstate-federalism concerns. See Terror Victims Br. 6–8.

2. Registration-jurisdiction is unfair.

"[T]reating defendants fairly," *Ford*, 141 S. Ct. at 1025, including protecting "against the burdens of litigating in a distant or inconvenient forum," is "always a primary concern," *Volkswagen*, 444 U.S. at 291–92. Though Mallory says the burden on a company in Norfolk Southern's position is "slight," Br. 44, this Court disagrees: "Requiring a foreign corporation … to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal

jurisdiction, is a significant burden." *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988).[3] In this case, for example, any relevant witnesses or equipment should be in Virginia or Ohio. While Mallory invokes "modern transportation and communications," Br. 44 (cleaned up), the *Burnham* plurality rightly rejected the argument that, "travel being as easy as it is nowadays," there is no "hardship" in being haled into court on a claim with no forum link. 495 U.S. at 624.

Mallory also invokes *forum non conveniens*. Br. 45. But such doctrines "impose high administrative costs and shield from appellate review potentially arbitrary and inconsistent decisions." Twitchell, *supra*, at 667. "[I]f we do not want a court to hear a case" where "the forum appears to have no legitimate regulatory stake … we should say that the court does not have jurisdiction." Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 843 (1985).

And fairness is not just a question of convenience. One historical basis for general jurisdiction is that "the defendant has sufficient ties" to the forum "to justify treating it as an insider." Twitchell, *supra*, at 669. Insiders are "regarded as 'local' by members of the community who serve as jurors and state judges," *id.* at 671, and thus face minimal risk of "local prejudice against out-of-state parties," cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 85 (2010). But a foreign corpora-

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[3] *Bendix* considered an Ohio law forcing "a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of [any statute of] limitations defense." 486 U.S. at 893. The Court invalidated the tolling provision under the Commerce Clause without addressing the jurisdictional provision's validity, which was uncontested. *See* Brief of Scholars on Corporate Registration and Jurisdiction 21.

tion, even one with substantial in-state activities, "is often not 'local' … in the eyes of the community." Twitchell, *supra*, at 671. Mallory's position would thus expose defendants to suit in forums where they might be viewed with suspicion or hostility, even though the forum lacks any interest in the dispute.

Mallory's view also invites forum-shopping. If every plaintiff can sue in multiple—or many—states, every plaintiff can seek the most favorable forum. A plaintiff may look for "the most advantageous substantive law and choice of law combination," Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 San Diego L. Rev. 309, 350 (2021); she may seek lenient procedures, like longer statutes of limitations, see Monestier, *supra*, at 1410–11; or she may just seek a forum where she is especially sympathetic or the defendant is unpopular.

None of this is rendered "fair" by Norfolk Southern's operations or profits in Pennsylvania. Br. 44. Pennsylvania's scheme is indifferent to the extent of a corporation's in-state facilities, functions, or revenues. See Twitchell, *supra*, at 676–77. Anyway, this is really an argument for *specific* jurisdiction: "[C]onducting activities within a state," and thus "enjoy[ing] the benefits and protection of [its] laws," supports jurisdiction over claims that "arise out of or are connected with the activities within the state." *Int'l Shoe*, 326 U.S. at 319; see *BNSF Ry.* v. *Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (railroad's extensive Montana operations did not support general jurisdiction there). Mallory's theory lacks any such "reciprocity." See *Ford*, 141 S. Ct. at 1025.

C. *Burnham* does not support Mallory.

Mallory relies heavily on the two lead opinions in *Burnham*, upholding general tag jurisdiction over a nonresident person. Br. 34–48. Neither supports him.

Justice Scalia's plurality opinion approved tag jurisdiction because it had "been immemorially the actual law of the land" throughout America. 495 U.S. at 619. But all-purpose registration-jurisdiction has never enjoyed such acceptance. The *Burnham* plurality emphasized that "*not one* American case" from the 1800s or early 1900s questioned all-purpose tag jurisdiction. *Id.* at 613. By contrast, in 1868, "the crucial time," *id.* at 611, registration-jurisdiction was almost invariably confined to cases *arising in the forum*. See *infra* § V. And today, only Pennsylvania's long-arm statute asserts registration-jurisdiction—a far cry from "*all* the States and the Federal Government" retaining tag jurisdiction. See *Burnham*, 495 U.S. at 615.

As for fairness, which Justice Brennan's concurrence addressed, Mallory says essentially that registration-jurisdiction is at least as fair as tag jurisdiction. Br. 42–48. But as Justice Scalia explained, the fairness rationale for tag jurisdiction is "powerfully inadequate"; viewed as a "contractual exchange," tag jurisdiction would fail for "unconscionability." 495 U.S. at 623 (plurality). The "only reason" the practice comported with due process was that it had always been, and still was, universally accepted. *Id.* at 624–25. Mallory cannot make any similar showing here. Even if history compelled accepting one unfairness, that fact does not support accepting another with no such foundation.

Mallory also says rejecting general registration-jurisdiction while allowing tag jurisdiction gives corporations "greater constitutional protections" than individuals. Br. 47. But he does not claim these two modes of jurisdiction are functionally equivalent; he just says "history and tradition" support both. *Id.* Since that is wrong, there is no inconsistency. And even if jurisdiction over individuals could meaningfully be compared to jurisdiction over corporations—"which have never fitted comfortably" in the same framework, *Burnham*, 495 U.S. at 610 n.1 (plurality)—this comparison would be apples and oranges. Tag jurisdiction, while unfair, is at least transient. It applies only while a person is voluntarily present in a state, and only in one state at a time. Indeed, a nonresident individual can do as much business as she likes in Pennsylvania; so long as she is not found there, the Commonwealth lacks general jurisdiction. Compare 42 Pa. Con. Stat. § 5301(a)(1), with *id.* § 5301(a)(2). Tag jurisdiction is thus easier to avoid, and raises minimal forum-shopping and extraterritoriality problems.

Nor is registration-jurisdiction like a forum-selection clause on a cruise-line ticket. Contra Br. 48. Setting aside that no private company wields the state's regulatory power or provides a service akin to accessing a state's market, forum-selection clauses do not sweep in disputes unrelated to the parties' contacts. If a cruise line's forum-selection clause also covered disputes with the phone company, it would be invalid.

* * *

Pennsylvania's scheme violates due process. No consent exists here, and Pennsylvania's scheme cannot be sustained on other grounds. But even if con-

sent existed, this scheme would be improper. One state cannot seize power from the others in this way.

III. Pennsylvania's regime imposes an unconstitutional condition.

A. The unconstitutional-conditions doctrine bars the government from "deny[ing] a benefit to a person because he exercises a constitutional right." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). This doctrine recognizes the danger of allowing a state to strip away "rights guaranteed by the federal Constitution … under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost Trucking Co.* v. *R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926); accord *W. & S. Life Ins.*, 451 U.S. at 664.

The unconstitutional-conditions doctrine grew out of this exact context: State conditions on doing business. *Home Insurance Co. of New York* v. *Morse* first addressed a Wisconsin law barring a foreign corporation from "transact[ing] any business" unless it filed "a written instrument" agreeing not to remove suits by Wisconsin citizens from state to federal court. 87 U.S. (20 Wall.) 445, 445–46 (1874) (emphasis omitted). This Court invalidated the law, distinguishing such a blanket forfeiture from a permissible case-by-case waiver: A party "may omit to exercise" his removal right "as often as he thinks fit, in each recurring case," but cannot "bind himself in advance … to forfeit his rights at all times and on all occasions." *Id.* at 451; accord *Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 531–32 (1922); *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892). That is, a state "may not exact as a condition of [a] corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be in-

fringed." *Hanover*, 272 U.S. at 507–08 (collecting cases).

Under these decisions, this case is straightforward. Norfolk Southern has a due process right not to be sued in Pennsylvania on a claim with no forum link. To do business in the State, it must forfeit that right. And a "statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution," is "unconstitutional and void." *Denton*, 146 U.S. at 207.

Good reasons support this rule. Access to a state's market is "a benefit over which the state has monopolistic control." D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 Del. J. Corp. L. 1, 37–38 (1990). There are no "alternative sources of the benefit," *id.* at 38—especially since, if one state can adopt a condition of doing business, they all can. Thus, "the recipient's power to forego the benefit serves as an illusory check on abuse of the conditioning power by the state." *Id.*; see Monestier, *supra*, at 1390.

That is true especially for an interstate railroad, which "cannot easily remove" itself, making it "easy prey" for local regulators. See *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 336 (1994); Rensberger, *supra*, at 365. Norfolk Southern's tracks, or its predecessors', have been in the Commonwealth since the early 1800s, and it cannot leave now. Norfolk Southern's network could not function with a gaping hole where its Pennsylvania lines used to be. And it cannot "abandon any part of its railroad lines" without Surface Transportation Board permission, 49 U.S.C. § 10903(a)(1)(A)—which surely would not be

forthcoming, since freight-shippers in Pennsylvania and across the Northeast would be left high and dry.

The Court's doing-business cases do not turn on the severity of the penalty for noncompliance. Contra Br. 50. And with good reason—because failing to register is "unlawful[]," Pet. App. 54a n.20, Mallory's suggestion that Norfolk Southern need not register flouts the rule of law. But considering the penalty here confirms this scheme's invalidity. The penalty is precisely what cases like *Morse* condemned—denial of court access. An unregistered corporation cannot "maintain an action or proceeding" in Pennsylvania, 15 Pa. Cons. Stat. § 411(b), a restriction that likely bars federal-court diversity actions too, see *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Thus, to do business in Pennsylvania, a company must choose between (i) forfeiting its constitutional personal-jurisdiction protections and (ii) breaking the law, and thus giving up its constitutional right to access the courts—"one of the highest and most essential privileges of citizenship," *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). And the practical result is that an unregistered corporation has *no privately enforceable non-federal rights* in Pennsylvania.

It does not matter that Norfolk Southern supposedly consented. An unconstitutional condition "is not ratified by an acceptance." See *United States* v. *Chi., Milwaukee, St. Paul & Pac. R.R.*, 282 U.S. 311, 328 (1931); *Union Pac. R.R.* v. *Pub. Serv. Comm'n of Mo.*, 248 U.S. 67, 69–70 (1918).

B. In some contexts, the Court's unconstitutional-conditions cases ask whether the condition is germane and proportional to the benefit. See *Koontz*, 570 U.S. at 604–06. The Court has not applied that approach in the doing-business context, and Mallory

does not ask it to do so here. Br. 48–52. Even so, the result would be the same.

Registration-jurisdiction is neither germane nor proportional because authority over claims arising *outside* the state bears no legitimate relation to doing business *inside* the state. Such authority is neither necessary to police the corporation's in-state activities nor supported by the state's regulatory authority, which stops at its borders. The "right to engage in interstate commerce is not the gift of a state" to withhold as it pleases, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949), and a "State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company … does business in the State," *Fid. & Deposit Co. of Md.* v. *Tafoya*, 270 U.S. 426, 435 (1926). Pennsylvania's scheme thus asserts "all-purpose adjudicative authority, but without relinquishing anything additional in return." Monestier, *supra*, at 1398; see Brief of Scholars on Corporate Registration and Jurisdiction 16–20.

Also, like barring federal-court access, registration-jurisdiction "involve[s] the state conditioning a corporation's doing business upon submission to an unrelated burden" in an effort "to aggrandize its courts' power." Rensberger, *supra*, at 364. "The state is attempting to arrogate to itself a unit of litigation that by the otherwise applicable rules of jurisdiction would be in another court. This is an offense to the defendant and to the sister states whose jurisdiction is thus invaded." *Id.*; cf. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (condition is invalid if it enables the state to extract "unrelated" concessions).

C. Mallory claims the unconstitutional-conditions doctrine is "inapplicab[le] to corporate registration statutes." Br. 49. Not so.

Morse addressed a corporate registration statute. In a single sentence, that law required corporations to both appoint an agent for service and agree not to remove cases to federal court (though *Morse* considered only the second restriction). 87 U.S. at 445–46. Mallory cannot explain why the unconstitutional-conditions doctrine would apply to the second restriction, but not the first. He claims *Morse* "distinguished" *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404 (1855), which upheld a state law deeming service on a corporation's agent to be service on the company in certain suits. Br. 49. In fact, *Morse* emphasized *Lafayette*'s warning that any doing-business conditions must be "not repugnant to the Constitution … or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others." 87 U.S. at 456.[4]

These cases thus reflect that "a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission." *Washington* v. *Superior Court*, 289 U.S. 361, 365 (1933). Early assertions of registration-jurisdiction passed this test because they involved claims arising from forum-state business. See *Lafayette*, 59 U.S. at 406–09; *infra* § V.B. And though later cases like *Pennsylvania Fire* endorsed something more like all-purpose registration-jurisdiction, those

[4] Mallory similarly says *Denton* distinguished *Lafayette*. Br. 49. *Denton* actually said that a stipulation that "process might be served on any officer or agent engaged in [company] business within the State … *if valid*, *might* subject the corporation" to jurisdiction. 146 U.S. at 207 (emphasis added).

cases reflected the newly developed background assumption that a corporation doing business in a state was "present," and thus amenable to suit there for all purposes. See *infra* § IV.A.2. Against that backdrop, laws requiring such corporations to appoint agents for service "extracted nothing more than [states] already had," Kevin D. Benish, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. Rev. 1609, 1641 (2015)—and nothing of constitutional import, since the rules surrounding service of process were common-law creatures, not constitutional principles, see Br. 14; William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 Harv. L. Rev. 676, 686 (1917). Those cases were also decided at a time when the unconstitutional-conditions doctrine was in flux. See Lewis, *supra*, at 11–12 & nn.49–51. For both reasons, they suggest nothing about how the doctrine applies here.

Mallory also says the unconstitutional-conditions doctrine never applies to a "waivable procedural right." Br. 50. This claim overlooks the difference between case-by-case waivers and blanket advance forfeitures. See *Morse*, 87 U.S. at 451. Removal to federal court is just as "procedural" and "waivable" as personal-jurisdiction protections, but the government cannot extract a forfeiture of that right for "all occasions." See *id.* Mallory's contrary view would, for example, let states demand that benefit recipients forfeit their civil or criminal jury-trial rights in any future proceedings. That cannot be right.

For the same reason, Mallory is wrong to contend that affirmance here will prevent the government from plea-bargaining criminal cases or settling civil suits. Br. 51. Nothing prevents the government from

offering such case-by-case bargains. Cf. *Jenkins* v. *Anderson*, 447 U.S. 231, 236 (1980) ("the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'").

Nor does Mallory's strained analogy to *Burnham* help. See Br. 51. Applying the unconstitutional-conditions doctrine to doing-business conditions—as the Court has repeatedly done—will not undermine the established principle that an individual's physical presence within a state has always subjected her to its regulatory authority.

Pennsylvania's regime creates an unconstitutional condition, and is therefore invalid.

IV. *Pennsylvania Fire* does not control here.

Mallory says *Pennsylvania Fire* makes consent-by-registration "voluntary and operative." Br. 3. But even taken at face value, *Pennsylvania Fire* would not support him, and in any event, its reasoning depends on defunct *Pennoyer*-era concepts. Thus, *Pennsylvania Fire* is no longer good law—a point the Court should, if necessary, make explicit.

A. *Pennsylvania Fire*'s reasoning does not support Mallory.

1. *Pennsylvania Fire* addressed a Missouri statute requiring an out-of-state insurance company to file a power of attorney "consenting that service of process" on a state official "be deemed personal service upon the company." 243 U.S. at 94. The Pennsylvania-based defendant complied. But when it was sued by an Arizona corporation on an insurance policy issued in Colorado, it objected on due process grounds. This Court upheld the statute, explaining that such a law could support a valid suit in two situations.

First, if a corporation doing business in the state complied with the statute by *expressly* appointing an agent for service in any suit, it could be served on claims arising anywhere. In that situation, consent to service on out-of-state claims "actually is conferred by [the] document," whose execution the Court declared "voluntary." *Id.* at 96. Since the *Pennsylvania Fire* defendant had filed such a document, it expressly consented to service there. *Id.*

Second, if the corporation ignored the statute and thus made no such explicit appointment, it was deemed to consent *only* to service in suits arising from its forum business. This second situation was exemplified by cases like *Simon* v. *Southern Railway*, 236 U.S. 115 (1915), and *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8 (1907). In such cases, with no explicit appointment, the "consent is a mere fiction," whose scope is limited to in-state claims by "the general rules concerning jurisdiction." *Pennsylvania Fire*, 243 U.S. at 96.

Even if Mallory were right that this analysis addressed jurisdiction, and not just service of process, this case would fall in the second category. Because 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." Br. 38. As Judge Hand explained, in a decision *Pennsylvania Fire* cited and Mallory endorses (at 39–40): Absent "express consent," "a foreign corporation will be taken to have consented" to service, but that "does not mean that as a fact it has consented at all." *Smolik*, 222 F. at 150–51. "It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a

consent ...." *Id.* The "consent" is "a legal fiction." *Id.* at 151.

This point is fatal for Mallory. He admits that this kind of fictional consent is now defunct, Br. 38–40, and in any event, it was always limited to claims *arising in the forum*—even when the statutory language was broader. The statutes in *Simon* and *Old Wayne* made clear that a corporation doing business in the state would be subject to service on "any legal cause of action," *Simon*, 236 U.S. at 117, or "any action, suit, or legal proceeding," *Old Wayne*, 204 U.S. at 18–19. Even so, suits arising elsewhere would be "void as wanting in due process of law." *Id.* at 22. Thus, the very rule Mallory urges would foreclose his claim here.

2. In any event, *Pennsylvania Fire*'s "consent" analysis was about service of process, not jurisdiction, which depended on the fiction of corporate "presence."

In the *Pennoyer* era, as today, personal jurisdiction required both amenability to suit and valid service. See Pierre Riou, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 Rev. Litig. 741, 753 (1995) (explaining that *Pennsylvania Fire* has been misread because of this distinction). At the time, the two concepts generally ran together, since amenability required the defendant's "presence within the territorial jurisdiction," *Int'l Shoe*, 326 U.S. at 316, and a state's process could "[]not run beyond [its] territorial limits," *Tioga R.R.* v. *Blossburg & Corning R.R.*, 87 U.S. (20 Wall.) 137, 147 (1873) (Hunt, J., concurring).

At first, courts squeezed state registration laws into this regime "based on a notion of consent." Twitchell, *supra*, at 620–21. A corporation, courts concluded, could "consent to be 'found' away from home" and

served there. *Ex Parte Schollenberger*, 96 U.S. 369, 378 (1877). In the mid-to-late 1800s, this "consent" was almost invariably limited to claims "growing out of [the corporation's] transactions" in the forum state. *Id.*; see *infra* § V.

By the time *Pennsylvania Fire* was decided in 1917, however, the theory had shifted. Courts concluded that a corporation "doing business in" a state actually could be "present there." *Green* v. *Chi., Burlington & Quincy Ry.*, 205 U.S. 530, 532 (1907). This "presence" theory naturally overlapped with state registration laws. Since only corporations doing in-state business had to appoint an agent for service, a corporation that appointed an agent was presumably doing enough business to be "present." See Brief of Scholars on Corporate Registration and Jurisdiction 13. And under *Pennoyer*, "a present company could be sued for any claim," as long as the plaintiff could effect service. *Ford*, 141 S. Ct. at 1037 (Gorsuch, J., concurring); Twitchell, *supra*, at 621. So by the early 1900s, the assumption underlying registration-jurisdiction was "that the corporation [was] present, and that it [was] only necessary to provide for the method of service." See Cahill, *supra*, at 692 ("except in the very earliest cases," jurisdiction over corporations reflected presence, not consent).

Thus, cases like *Pennsylvania Fire* depend "not so much on consent as on [a] fictive presence that this Court later abandoned." Brief of Scholars on Corporate Registration and Jurisdiction 13 (cleaned up); Benish, *supra*, at 1638 & n.181. In *Pennsylvania Fire* itself, the Missouri Supreme Court held that the defendant "was found within … Missouri," as the "federal Constitution[] require[d]," because it was "doing business" there. *Gold Issue Min. & Mill. Co.* v. *Pa. Fire Ins. Co.*, 184 S.W. 999, 1016 (Mo. 1916), *aff'd*,

243 U.S. 93. That holding apparently went unchallenged, so in this Court the "only issue was the validity of service." Riou, *supra*, at 759.

Thus, as the Court later explained *Pennsylvania Fire*'s rule: Appointing the required agent for service helped "determin[e] the extent of the jurisdiction when the corporation is doing business within the state." *Louisville & Nashville R.R.* v. *Chatters*, 279 U.S. 320, 326 (1929). That is, compliance with a state appointment statute established the corporation's "presence for purposes of suit *when coupled with its other corporate activities within the state*." *Id.* (emphasis added).

In short, the *Pennsylvania Fire* defendant was subject to general jurisdiction because (i) it was "present" in Missouri, making it amenable to suit there for all purposes, and (ii) it had expressly consented to service there in all suits. But as Mallory agrees, *International Shoe* erased the *Pennoyer*-era fiction of "presence." Br. 38–39. Thus, no aspect of *Pennsylvania Fire*'s reasoning supports him.

B. *Pennsylvania Fire* did not survive *International Shoe*.

In Mallory's view, even as the *Pennoyer*-era doctrines expired, *Pennsylvania Fire*—which relies on those same concepts—survived. He says *Pennsylvania Fire* involved actual consent, which remains a valid basis for jurisdiction. See Br. 29, 31, 39–40. Of course, no consent exists here, and Mallory overlooks the separate "presence" element, which he admits is defunct. In any event, he is mistaken.

This Court has repeatedly warned against relying on cases "decided before [its] transformative decision on personal jurisdiction in *International Shoe*." *BNSF*, 137 S. Ct. at 1557. For example, *Daimler* not-

ed that such cases "should not attract heavy reliance today," 571 U.S. at 138 n.18, and thus refused to rely on *Barrow Steamship Co.* v. *Kane*, 170 U.S. 100 (1898), a case Mallory invokes here, see Br. 26 n.1. These warnings reflect that *International Shoe* decisively rejected *Pennoyer*'s framework, including the doctrines on which *Pennsylvania Fire* relied.

After *International Shoe*, the "relationship among the defendant, the forum, and the litigation" is "central." *Shaffer*, 433 U.S. at 204. Going forward, *Shaffer* thus held, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. … To the extent that prior decisions are inconsistent with this standard, they are overruled." *Id.* at 212 & n.39.[5]

That includes *Pennsylvania Fire*'s unexplained conclusion that the defendant "voluntarily" complied with state law. Indeed, just four years after writing *Pennsylvania Fire*, Justice Holmes conceded that the "assent" involved was "compulsory." *Robert Mitchell Furniture Co.* v. *Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921). The *Burnham* plurality explained that the defunct *Pennoyer*-era concepts included state requirements "that nonresident corporations appoint an in-state agent upon whom process could be served." 495 U.S. at 617. And scholars have consistently recognized that the "fictional … consent theory"—to which *International Shoe* delivered a "deathblow"—included cases where the corporation actually "appointed an agent." *State-Court Jurisdiction*, 73 Harv. L. Rev. 911, 920–21 (1960). That is, "the con-

[5] Mallory claims *Shaffer* "noted that *International Shoe* 'approved the practice of considering a foreign corporation doing business in a State to have consented'" to suit. Br. 40 n.3. But *Shaffer* was talking about *Pennoyer*, not *International Shoe*. 433 U.S. at 201.

sent theory"—in "either express or implied" forms—was "fictional." 4 Wright & Miller, *Federal Practice and Procedure Civil* § 1066 (4th ed. 2022); see Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 760 (1988). And Mallory agrees that no *Pennoyer*-era fictions survived.

It is thus unsurprising that this Court has not cited *Pennsylvania Fire*'s jurisdictional holding since 1952, see *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 433 n.4, 446 n.6 (1952), and has not relied on it since 1939, see *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939). Nor have any modern decisions suggested that registration-jurisdiction remains viable. Rather, *Perkins* observed that a foreign corporation's activities that require it "to secure a license and to designate a statutory agent … provide a helpful *but not a conclusive test*" for whether it is "reasonable and just to subject the corporation to the jurisdiction of that state." 342 U.S. at 445 (emphasis added). And as noted, registration-jurisdiction was not among—or similar to—the forms of consent that *Bauxites* surveyed. 456 U.S. at 703–04.

Pennsylvania Fire "cannot be divorced from the outdated jurisprudential assumptions of its era," *Brown*, 814 F.3d at 639, and did not survive *International Shoe*.

C. If necessary, the Court should formally overrule *Pennsylvania Fire*.

If the Court concludes that *Pennsylvania Fire* has evaded formal overruling, it should take that step now. No *stare decisis* factors counsel otherwise.

First, for all the reasons above, *Pennsylvania Fire* is "egregiously wrong," and affirming and extending it would produce "negative jurisprudential or real-world consequences." Contra Br. 32. The resulting unfair-

ness and distortions of interstate sovereignty favor overruling it. *Supra* § II. And "the precedents before and after its issuance contradict its central holding." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003).

Second, *stare decisis* wanes when "subsequent decisions of this Court" have "eroded" a precedent's "underpinnings." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). The Court has decisively rejected *Pennsylvania Fire*'s *Pennoyer*-era framework. And specific jurisdiction today serves the purpose that necessitated that era's fictions.

The Court has also dismantled *Pennsylvania Fire*'s other premise. *Pennsylvania Fire* rested on the assumption that the "power of a State to exclude foreign corporations" included the lesser power to condition doing business. *Hess* v. *Pawloski*, 274 U.S. 352, 355 (1927). But this concept produced "inconsistent or illogical" results, and its "legal underpinnings … were soon eroded." *W. & S. Life Ins.*, 451 U.S. at 658–59. The 1900s "saw 'an almost complete disintegration'" of this doctrine, and it was ultimately "replaced" by the rule that a state "may not impose conditions which require the relinquishment of constitutional rights." See *id.* at 659–62, 664; *supra* § III. Nothing thus remains to support *Pennsylvania Fire*: "[I]f the state's power to exact consent to be sued depended on its power to exclude, and it could not exclude, it could not exact such consent." Phillip B. Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 581 (1959).

Third, *Pennsylvania Fire* is poorly reasoned. It did not explain why it deemed compliance with state law "voluntary," 243 U.S. at 96, and its distinction between the scope of "implied" and "express" consent makes little sense. As Justice Holmes soon acknowl-

edged, "the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is express[]." *Robert Mitchell*, 257 U.S. at 216. Likewise, there is no reason "why, if … the Due Process Clause … denied the power of the state to imply consent to suit on claims arising out of transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing." Kurland, *supra*, at 580; see also *State-Court Jurisdiction*, *supra*, at 920–21 (this "tenuous distinction," and "the fictional nature in general of coerced consent, were longstanding objections to the consent rationale") (footnote omitted); 4 Wright & Miller, *supra*, § 1066 (similar).

Finally, no significant reliance interest supports *Pennsylvania Fire*. If states had truly "relied on *Pennsylvania Fire*," Br. 34—despite the Court's warnings about *Pennoyer*-era precedent—Pennsylvania would not be the *only* state with such a statute. Mallory also cites Georgia, *id.*, but Georgia's law "does not expressly" assert registration-jurisdiction, and in any event the state high court has already urged amendments. *Cooper Tire & Rubber Co.* v. *McCall*, 863 S.E.2d 81, 90, 92 (Ga. 2021), *cert. pet. filed* (Dec. 22, 2021) (No. 21-926). Indeed, the Georgia court noted that it had "not identified … any reliance interests that would be significantly impaired" by rejecting registration-jurisdiction. *Id.* at 91 (cleaned up). And again, no state—including Pennsylvania—appeared as *amicus* in this Court to support Mallory.

If necessary, the Court should confirm that *Pennsylvania Fire* is not good law.

V. Original public meaning does not support Mallory.

Mallory invokes what he claims is the Fourteenth Amendment's original public meaning. But he ignores *International Shoe*, relies on the wrong framing, and misrepresents how the ratification-era laws actually applied.

A. This argument is just a backdoor effort to revive *Pennoyer*-era rules that *International Shoe* rejected. Almost all of Mallory's cases are from the period between *Pennoyer* and *International Shoe*—cases that are no longer good law, for the same reasons as *Pennsylvania Fire*. Mallory is thus asking the Court to restore *Pennoyer*—or at least one specific aspect of it, which would warp all the surrounding doctrine.

If Mallory wants to overturn *International Shoe*, he should say so. He has not made that request, below or here. He is thus stuck with *Shaffer*'s clear command: Earlier cases "inconsistent" with *International Shoe* "are overruled." 433 U.S. at 212 & n.39. That includes the decisions he relies on here.

B. In any event, Mallory's framing is wrong. He attempts a sleight of hand, defining the state power at issue too generally: He says the 1800s registration laws created *some* "personal jurisdiction that would not have been available" otherwise, Br. 12, so states are free to do the same now—to the maximum possible extent. But the ratification-era laws overwhelmingly governed claims arising from forum-state business. See *id.* at 22–23; *infra* § V.D. These targeted laws thus provide no support for *general* registration-jurisdiction.

Mallory tries to duck this problem, declaring that "[c]onsent required as a condition of doing business in a State is either consistent with due process, or it is

not," and the "scope of that consent is irrelevant." Br. 23. But of course the scope is relevant. For his historical argument to have force, Mallory must show "a comparable tradition" to Pennsylvania's scheme. *Id.* at 11 (quoting *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2132 (2022)). All-purpose jurisdiction and forum-linked jurisdiction are not comparable. And there is no in-for-a-penny, in-for-a-pound principle of constitutional interpretation. Just as "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," *Birchfield* v. *North Dakota*, 579 U.S. 438, 477 (2016), there was a limit to the scope of the "consent" a state could extract as a condition of doing business.

This Court's early cases reflect that limit. As noted, registration laws came about because early-1800s courts believed a corporation could "have no existence" beyond its state of incorporation, *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 588 (1839), and could be sued only by serving its principal, who generally shed his official status when he left that state, see *St. Clair* v. *Cox*, 106 U.S. 350, 354 (1882). This made it essentially impossible to sue a corporation outside its home. States responded by "provid[ing] for service of process on officers and agents of foreign corporations doing business therein." *Id.* at 355. After all, "it seemed only right" that a corporation "should be held responsible in [a state's] courts to obligations and liabilities *there incurred*." *Id.* (emphasis added).

In the six decades between *Lafayette* and *Pennsylvania Fire*, this Court consistently emphasized this limited rationale, and apparently never allowed a suit that did not arise from the corporation's in-state business. *Lafayette* approved Ohio's effort to "secure

to its citizens a remedy, in their domestic forum, upon [insurance] contracts made and to be performed" there, but carefully "limit[ed] [its] decision" to that situation. 59 U.S. at 407–08. *Schollenberger* applied that holding to diversity suits, concluding that a corporation may "consent to be 'found' away from home, for the purposes of suit … growing out of its transactions" there. 96 U.S. at 378. And *St. Clair* reiterated that a state may "impose as a condition" of doing business that a corporation accept service "in any litigation arising out of its transactions in the State." 106 U.S. at 356, 360.

Even after the turn of the century, *Simon* and *Old Wayne* rejected jurisdiction in suits arising outside the forum. The "highest considerations of public policy" supported giving each state's courts jurisdiction over "business there transacted." *Old Wayne*, 204 U.S. at 22–23. But that did "not imply" any interest in "business transacted in another State." *Id.* at 23. Thus, while a company was "deemed to have assented to any valid terms" set by the state for entry—and the statute there applied to "any legal process affecting the company"—this rule was not "sufficient to bring it into court in respect of *all* business transacted by it, no matter where." *Id.* at 18, 21; *Simon*, 236 U.S. at 130.

To be sure, *Pennsylvania Fire* reversed course—49 years after the Fourteenth Amendment was ratified—and distinguished the earlier cases as involving implied consent. But none of this Court's decisions closer in time to ratification supported this distinction and, as explained, *Pennsylvania Fire* depended on a developing concept of corporate presence that did not support the earlier decisions. The earlier cases instead rested on a compulsory "consent to be 'found,'" *Schollenberger*, 96 U.S. at 378, whose scope

was limited by "those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others," *Lafayette*, 59 U.S. at 407. *Pennsylvania Fire* thus "represented a significant departure from the Court's nineteenth-century view," and from the corresponding original understanding. See Kipp, *supra*, at 9.[6]

C. Ratification-era state law tracked this Court's contemporaneous decisions. Overwhelmingly, state statutes were either expressly limited to claims with some forum connection or interpreted that way.

To start, as Mallory admits, many state statutes explicitly applied only to "claims arising out of the corporation's activities in the State." Br. 22. See, *e.g.*, 1913 Fla. Laws 6422 § 2661c (requiring consent to service "in the proper Court of any County in this State in which a cause of action may arise"); Ind. Code § 25-2 (1852) (consent to service limited to suits "arising out of any transaction in this State"); Kan. Stat. Ann. § 50a-2453 (1876) (foreign corporation must consent to suit "in the proper court of any county in this State in which the cause of action shall arise"); 1890 La. Acts 188 § 1 (similar); Md. Code

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[6] Mallory's unexplained string-cite of this Court's decisions, Br. 26 n.1, collapses upon inspection. It includes cases *invalidating* registration laws on commerce-clause grounds (*Pigg*, *Coleman*) or as unconstitutional conditions (*Barron*, *Denton*, *Morse*); cases rejecting out-of-state claims (*Hunter*, *Simon*, *Old Wayne*); cases rejecting jurisdiction because the defendant was not doing business (*St. Clair*) or was not properly served (*Pinkney*); cases merely allowing claims arising from forum business (*Alexander*, *Brown*, *Davis*, *Harris*, *Lafayette*, *Meyer*, *Milliken*, *Phelps*, *Schollenberger*, *Spratley*, *Woodworth*); cases where the defendant submitted to jurisdiction by participating in litigation (*Rupp*, *Merchants Heat & Light*), and many cases not addressing state-court personal jurisdiction at all (*Doyle*, *Ducat*, *Ferguson*, *Gerling*, *Kane*, *Philadelphia Fire Association*, *Prewitt*, *Shaw*, *Tioga*).

Ann. § 26-211 (1868) (non-resident plaintiff may sue foreign corporation only "when the cause of action has arisen, or the subject of the action shall be situate[,] in this state"); 1881 Mich. Pub. Acts 343 (allowing suits "where the cause of action accrues within the state"); Miss. Code Ann. § 24-919 (1906) (allowing suits "so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here"); N.H. Rev. Stat. Ann. § 187:1 (1913) (providing for service in a suit "upon any liability arising in this state"); N.Y. Code Proc. § 427 (1849) (non-resident may sue foreign corporation if "the cause of action shall have arisen, or the subject of the action shall be situated within this state"); S.C. Code Ann. § 13-1-422(2) (1873) (same); Tenn. Code Ann. § 226-1 (1887) (allowing suit "so far as relates to any transaction had, in whole or in part, within this state, or any cause of action arising here, but not otherwise"); Wis. Stat. § 120.2637(13) (1898) (foreign corporation may be served "only when the cause of action arises out of business transacted in this state or when the defendant has property therein").[7]

Even statutes with broader language were construed narrowly. The Vermont Supreme Court in 1874 rejected jurisdiction over a suit against a foreign corporation arising elsewhere. The statute's language contained no such limitation, but allowing out-of-state claims was unnecessary to provide "a full remedy" for the state's citizens, so the statute was "presumed" not to do so. *Sawyer* v. *N. Am. Life Ins. Co.*, 46 Vt. 697, 698, 706 (1874).

Other decisions are similar. The Georgia Supreme Court rejected the "strange" idea that a suit with "no connection" to Georgia might be allowed there. *Baw-*

[7] These laws all appear in Mallory's statutory appendix.

knight v. *Liverpool & London & Globe Ins. Co.*, 55 Ga. 194, 196 (1875). The New Jersey Supreme Court made clear that its statute had "no scope beyond" allowing service in suits over which state courts already had jurisdiction. *Camden Rolling Mill Co.* v. *Swede Iron Co.*, 32 N.J.L. 15, 18 (N.J. 1866); see also *Berlin Iron Bridge Co.* v. *Norton*, 17 A. 1079, 1079 (N.J. 1889) (foreign corporation's agent may be served "in all actions arising in this state out of the conduct of the business"). The Alabama Supreme Court held that a suit was improper "unless the contract sued on was made, or the injury complained of was suffered, in the State." *Cent. R.R. & Banking Co.* v. *Carr*, 76 Ala. 388, 393 (1884). And the Delaware Supreme Court limited a statute allowing service of "all processes against [the] company" to in-state causes of action, to ensure a "relation" between the "condition" on doing business and "the permission" to do so. *Nat'l Bank of Wilmington & Brandywine* v. *Furtick*, 42 A. 479, 480, 483 (Del. 1897).

D. Mallory relies mainly on broad statutory language whose application he cannot show, or statements from court decisions whose results do not support him. He cites *no* cases that adopted all-purpose registration-jurisdiction before ratification, and just one case that did so in the next 28 years.

Mallory's key category—"statutes that required foreign corporations to submit to general personal jurisdiction," Br. 16—supposedly includes 20 states. But for 14, he relies on statutory language alone. *Id.* As shown above, that approach is treacherous. For example, Mallory lists Delaware, Vermont, and New Jersey in this category. *Id.* at 18. But as just explained, those states' cases say otherwise. And Mallory cites no cases showing that other states applied their similar provisions any more broadly.

This category includes other errors too. Mallory cites an Arkansas law allowing service on a corporate agent, Br. 18, ignoring separate provisions limiting where an action against "a foreign corporation" could be "brought." *Code of Practice in Civil and Criminal Cases for the State of Arkansas* §§ 84–85, 95 (1869); see *Nat'l Liberty Ins. Co.* v. *Trattner*, 292 S.W. 677, 680 (Ark. 1927) (court never allowed a suit with no forum connection). He also points to a 1903 Michigan statute. Br. 18. But he overlooks the state high court's conclusion in 1869 that the legislature "could never have intended" to allow a suit by "a citizen and resident of another State or country, and upon a cause of action arising abroad." *Newell* v. *Great W. Ry. of Can.*, 19 Mich. 336, 345–46 (1869). He also overlooks Michigan's 1881 law, which applied only "where the cause of action accrue[d] within" Michigan. 1881 Mich. Pub. Acts 343. And his Nebraska, New Hampshire, and North Carolina citations are from 1895 or later. Br. 18.

Moreover, Mallory's six cited cases for this first category, Br. 16, include just one decent example: A Massachusetts case from 1882, construing an 1856 law limited to insurance companies. See *id.* at 16–18. But even that example overlooks two events from 1867—the year Massachusetts ratified the Fourteenth Amendment. First, a Massachusetts statute authorized suits against other foreign corporations "having property in this state" by "attachment." Mass. Gen. Laws ch. 68, § 15 (1867). Second, and consistently, the state high court held that foreign corporations could be sued only "to the extent of [their] property and rights" in the state. *Smith* v. *Mut. Life Ins. Co. of N.Y.*, 96 Mass. 336, 339–40 (1867). Massachusetts did not expand its registration statute to cover all foreign companies until 1884, and

Mallory cites no case applying that statute to a wholly out-of-state dispute.

Of Mallory's five remaining cases, three involved suits arising in the forum. For example, the Oregon case, which arose from the defendant's in-state mining business, says merely that a foreign corporation is "liable to suit upon a cause of action arising in the state." *Farrel* v. *Or. Gold-Min. Co.*, 49 P. 876, 877 (Or. 1897). Service was valid in the South Carolina case because "the cause of action arose here." *Littlejohn* v. *S. Ry.*, 22 S.E. 761, 762 (S.C. 1895). And in the Pennsylvania case, the plaintiff was seeking to garnish a debt owed by an Ohio corporation doing business in Pennsylvania to a Pennsylvania resident; the only question was whether the corporation's consent "embraced an attachment execution." *Barr* v. *King*, 96 Pa. 485, 485, 488 (1880); cf. *Parke* v. *Commonwealth Ins. Co.*, 44 Pa. 422, 422 (1863) (legislature did not intend to allow suits "in any county" where corporations did business, "whether th[e] claim originated there or not").

Mallory's final two examples are not contemporaneous with ratification, instead shading into the period when courts began to find corporations "present" in states where they did business. His Indiana example is from 1896, and his Missouri example is from 1911—43 years after ratification. Br. 16.

Mallory's key category of 20 states, then, boils down to one decision that departed from closer-in-time state precedent and two other cases from three or four decades later. He cites no case that endorsed or applied general registration-jurisdiction before ratification or within 14 years thereafter. This is not the stuff of "a governmental practice [that was] open, widespread, and unchallenged" around ratification. Br. 11 (quoting *Bruen*, 142 S. Ct. at 2137); cf. *Deck* v.

Missouri, 544 U.S. 622, 643 (2005) (Thomas, J., dissenting) ("State practice that was only nascent in the late 19th century is not evidence of a consistent unbroken tradition ….").

Neither of the cases in Mallory's second category—"Consent to General Personal Jurisdiction by Specified Foreign Corporations," Br. 19—helps him. The Pennsylvania law in *Fithian, Jones & Co.* v. *New York & Erie Railroad* referred to "all suits or actions" against the railroad, but as explained above, that is not a reliable guide, and *Fithian* apparently involved in-state plaintiffs trying to garnish a debt based on an in-state judgment. 31 Pa. 114, 116 (1857). And Mallory's claim that *Baltimore & Ohio Railroad* v. *Harris* upheld a "Virginia statute conditioning [the] operation of [a] Maryland railroad in Virginia on consent to jurisdiction," Br. 19, is mistaken. The Virginia law, which the Court discussed but did not apply, imposed no such condition. Any "assent" to suit was "implied" to ensure a "remedy … for causes of action arising under contracts and acts entered into or done within" Virginia. 79 U.S. (12 Wall) 65, 66–67, 81, 83 (1870).

Mallory's third category—five statutes "requiring all foreign corporations to submit to general personal jurisdiction in suits by resident plaintiffs but not out-of-state plaintiffs," only three of which he identifies as having been applied, Br. 20—cuts against his position. Although Mallory sees "no basis" for holding "that consent is valid only if required to benefit just resident plaintiffs," *id.* at 23, a state has a sovereign interest in providing a forum for resident plaintiffs' suits, though a much weaker interest than if the cause of action arose there. See Brief of Scholars on Corporate Registration and Jurisdiction 25–26. It has zero interest in a suit with no forum connection.

At any rate, Mallory again cites cases that arose in the forum, *e.g.*, *Cromwell* v. *Royal Canadian Ins.*, 49 Md. 366, 374 (1878) (contract issued by insurance company's "Baltimore Branch"), which do not show a widespread practice of allowing suits arising elsewhere.

The last category—"statutes requiring corporations to submit to personal jurisdiction for claims arising out of the corporations' activities in the State," Br. 22—hurts Mallory the most. These registration laws, the "most common type," *id.*, align with modern *specific* jurisdiction, offering no support for Pennsylvania's regime.

Finally, Mallory cites a registration statute Congress passed for the District of Columbia, which this Court supposedly "applied" in *Harris*. Br. 24. But this statute was passed *after* Mr. Harris sued, 79 U.S. at 69, so *Harris* was decided under "the old law," *Schollenberger*, 96 U.S. at 375–76. Consent to suit was thus "implied" solely to prevent "immunity" in "suits local in their character." *Harris*, 79 U.S. at 84. And *Harris* involved such a "local" claim; the plaintiff bought his train ticket in the District. *Id.* at 68. Anyway, the later-enacted statute merely referred to "all process," 14 Stat. 404 (1867), which (as with the similar state laws) does not show that Congress meant to create general jurisdiction. But even if it did, states do not share Congress's powers.

In short, the ratification-era materials do not support Pennsylvania's current regime.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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August 26, 2022