No. 21-1168

IN THE
Supreme Court of the United States

ROBERT MALLORY,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Respondent.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF IN OPPOSITION

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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.

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.

RULE 14.1(b)(iii) STATEMENT

This case directly relates to these proceedings:

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

Superior Court of Pennsylvania, No. 802 EDA 2018, *Mallory* v. *Norfolk S. Ry. Co.*, 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 Reported at 241 A.3d 480 (unpublished).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. Co.*, order entered February 6, 2018. Available at 2018 WL 3202860.

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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INTRODUCTION

Petitioner asks the Court to decide whether a state can require an out-of-state corporation to "consent" to general personal jurisdiction—and thus to being sued for any cause of action, even if the litigation has no relation to the state—as a condition of doing business there. That question does not warrant this Court's review now. To be sure, state and federal courts have taken differing views on this issue over the years. But not anymore. Almost every state high court or federal court of appeals to consider the question since *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), and *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011), understands those cases to have answered this question. And rightly so: *Daimler* and *Goodyear* establish that a state cannot, consistent with due process, exercise general personal jurisdiction over a corporation just because it does business in the state. Requiring a corporation to give up this due-process protection as a condition of doing business in the state is thus impermissible. 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).

The sole post-*Daimler* outlier is *Cooper Tire & Rubber Co.* v. *McCall*, which upheld Georgia's consent-by-registration scheme against a due process challenge. 863 S.E.2d 81 (Ga. 2021), *petition for cert. filed*, No. 21-926 (Dec. 20, 2021). The petition thus leans heavily on *Cooper*—but *Cooper* cannot bear that weight. The Georgia Supreme Court explained in *Cooper* that it felt compelled to uphold Georgia's regime because, thanks to a quirk in the state's long-arm statute, out-of-state corporations are subject to

either general jurisdiction or no jurisdiction at all. *Id.* at 91–92. Upholding consent-by-registration was thus necessary to avoid the "perverse consequence" of exempting out-of-state corporations from suit entirely. See *id.* But the court candidly admitted that its holding stood in "tension" with this Court's "recent . . . precedent," and directly invited the Georgia General Assembly to "tailor this State's jurisdictional scheme within constitutional limits." *Id.* at 92.

A decision that the state high court has asked its legislature to abrogate is hardly a basis for this Court's review. And every other post-*Daimler* decision by a state high court or federal appellate court agrees with the Pennsylvania Supreme Court's ruling in this case. Although some other courts still have contrary pre-*Daimler* precedents on the books, nothing stops them from revisiting those decisions in an appropriate case based on the intervening authority from this Court.

In short, Petitioner asks this Court to review a decision that straightforwardly applies this Court's precedents, and that every other recent lower court decision agrees with—except for one case that may have a very short shelf life. The Court should decline that invitation.

That said, if the Court is inclined to review the due process question now, it should do so in this case, not in *Cooper*, where a petition is also pending. Because *Cooper* depends on the quirks of Georgia law just noted, it does not cleanly raise the question presented, and a decision there may not finally resolve the fundamental constitutional question. Thus, if the Court intends to decide this question, it should grant the petition here and hold *Cooper*. At a minimum, if the Court grants the *Cooper* petition, it should grant this petition too.

STATEMENT OF THE CASE

A. Pennsylvania's registration regime.

Like every other state, Pennsylvania requires an out-of-state corporation to register with the state before doing business there. A foreign corporation "may not do business in this Commonwealth until it registers" with the Pennsylvania Department of State. 15 Pa. Cons. Stat. § 411(a). But unlike every other state, Pennsylvania explicitly treats this mandatory registration as consent to general personal jurisdiction. By statute, a company's "qualification as a foreign corporation" is deemed "a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over" the corporation. 42 Pa. Cons. Stat. § 5301(a)(2)(i). Thus, "any cause of action may be asserted against" a registered corporation, "whether or not arising from acts" that otherwise support jurisdiction. *Id.* § 5301(b).

Failing to register is "unlawful[]." Pet. App. 54a n.20. It also precludes a corporation from suing—but not from being sued—in Pennsylvania's state courts. An out-of-state corporation "doing business in this Commonwealth may not maintain an action or proceeding in this Commonwealth unless it is registered." 15 Pa. Cons. Stat. § 411(b). Thus, a corporation can avoid "consenting" to general jurisdiction in Pennsylvania only by violating the statutory obligation to register, see *id.* § 411(a), and thereby forsaking its right to seek redress in the state's courts, *id.* § 411(b).

B. Proceedings below.

Petitioner Robert Mallory sued Norfolk Southern in the Pennsylvania Court of Common Pleas under the Federal Employers' Liability Act (FELA), 45 U.S.C.

§§ 51–60. He alleged that, while working for Norfolk Southern in Ohio and Virginia between 1988 and 2005, he was exposed to harmful carcinogens. Pet. App. 12a. When he sued, Petitioner lived in Virginia. *Id.* at 2a. Virginia was also Norfolk Southern's home: Norfolk Southern is a Virginia corporation whose principal place of business was then in Norfolk, Virginia. *Id.* at 12a. (Norfolk Southern's headquarters is now in Atlanta.) Indeed, this dispute has no apparent connection to Pennsylvania at all. *Id.* at 45a. Thus, there was just one possible basis for personal jurisdiction: Norfolk Southern's registration to do business in the Commonwealth.

This registration, the trial court held, was not a sufficient basis to exercise jurisdiction under the Due Process Clause. Pet. App. 65a. The court recognized that "a foreign corporation may consent" to jurisdiction, *id.* at 70a, but it held that Norfolk Southern did not do so voluntarily. Pennsylvania's regime "forc[ed] foreign corporations to choose between consenting to general jurisdiction in Pennsylvania or for[]going the opportunity to conduct business in Pennsylvania." *Id.* at 74a. "Faced with this Hobson's choice, a foreign corporation's consent to general jurisdiction in Pennsylvania can hardly be characterized as voluntary." *Id.* at 78a. This conclusion, the trial court explained, tracks this Court's "repeated admonishment that the Due Process Clause prohibits a state from claiming general jurisdiction over every corporation doing business within its borders." *Id.* And, the court noted, Pennsylvania's regime "encroaches our sister-states' power to render verdicts against their corporate citizens." *Id.* at 81a.

The Pennsylvania Supreme Court unanimously affirmed. It too recognized that "consent to jurisdiction . . . is an independent basis for jurisdiction, as-

suming that the consent is given voluntarily." Pet. App. 6a. But the court reasoned that "compliance with Pennsylvania's mandatory registration requirement does not constitute voluntary consent." *Id.* at 3a. Thus, Pennsylvania's statutory scheme "violates the Constitution." *Id.* at 42a. The court gave four reasons for that conclusion.

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.* (quoting *Daimler*, 571 U.S. at 127). Norfolk Southern plainly is not at home in Pennsylvania. *Id.* at 45a. To nevertheless assert general jurisdiction over the company—based on "the mere completion of the act of registering"—would thus violate "*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.* at 53a–54a.

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 connection to the Commonwealth that was filed by a nonresident against a foreign corporation that is not at home here." *Id.* at 47a–48a. Upholding Pennsylvania's scheme would thus "limit[ ] . . . the sovereignty

of all its sister states" by seizing the ability to try cases in which they have a greater interest. *Id.* at 47a (citation omitted).

Third, the court explained, this Court's "*Pennoyer* era" decisions, like *Pennsylvania Fire Insurance Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), do not support Pennsylvania's current regime. Those cases were decided "when courts applied a territorial approach to general jurisdiction," which was displaced by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Pet. App. 48a.

Fourth, the court held that Norfolk Southern did not "voluntarily, knowingly, and intelligently waive[ ] its due process liberty interest." Pet. App. 51a. Under "the unconstitutional conditions doctrine, the government 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 even if a corporation "conduct[ed] business in Pennsylvania unlawfully without registering," it "would be compelled to surrender its constitutional guarantee to access to the [state] courts." *Id.* at 54a n.20. Such "coerced consent . . . is not voluntary." *Id.* at 57a.

REASONS FOR DENYING THE PETITION

I. After *Daimler*, courts overwhelmingly agree that consent-by-registration is unconstitutional.

Petitioner asserts that review is warranted because the decision below "directly conflicts" with the Geor-

gia Supreme Court's recent decision in *Cooper* and "further cement[s] a well-entrenched split." Pet. 8–9. That significantly overstates the disagreement among the lower courts. Although the decision below disagreed with *Cooper*, *Cooper* turns on an apparently unique quirk of Georgia law, which the Georgia Supreme Court asked the state legislature to reconsider. And every other post-*Daimler* state high court or federal appellate decision agrees with the decision below. Whatever minimal disagreement survived *Daimler* does not warrant this Court's intervention.

1. In *Cooper*, a Florida resident sued a Delaware-incorporated, Ohio-based tire company for injuries sustained in a one-car accident in Florida. 863 S.E.2d at 83. His suit also named the Georgia resident who drove the car and the Georgia car dealership that sold it. *Id.*

The Georgia Supreme Court held that the tire company was "subject to the general jurisdiction" of the Georgia courts. *Id.* at 84. That was so even though Georgia law "does not expressly notify out-of-state corporations that obtaining authorization to transact business in this State . . . subjects them to general jurisdiction." *Id.* at 90. Rather, the court concluded that its prior holding in *Allstate Insurance Co.* v. *Klein*, 422 S.E.2d 863 (Ga. 1992)—"that Georgia courts may exercise general personal jurisdiction over any out-of-state corporation that is 'authorized to do or transact business in this state at the time a claim arises'"—served to "notify out-of-state corporations that their corporate registration will be treated as consent to general personal jurisdiction." *Cooper*, 863 S.E.2d at 83, 90. And the court believed that this Court's decision in *Pennsylvania Fire*, which appeared to approve a consent-by-registration scheme

three decades before *International Shoe*, "remains binding." *Id.* at 84–90; but see *infra* pp. 17–19.

Cooper's result thus conflicts with the decision below. And the court below was (rightly) "unpersuaded" by *Cooper*'s reasoning. Pet. App. 33a n.13. But the Georgia court's outlier decision does not warrant this Court's intervention. Both *Cooper* and *Klein* depended on a bizarre loophole in Georgia law whose correction may obviate this shallow post-*Daimler* split.

Under Georgia law, an out-of-state corporation is either a "nonresident," subject to *specific* personal jurisdiction, or a "resident," subject to *general* personal jurisdiction. The dividing line is registration to do business. A corporation "not authorized to do or transact business" in Georgia is a "nonresident." *Cooper*, 863 S.E.2d at 87 (quoting Ga. Code Ann. § 9-10-90). Thus, a corporation that *is* registered to do business is either a resident—and is thus subject to general jurisdiction in the state—or is not subject to jurisdiction in Georgia at all. *Id.* at 91. *Cooper* and *Klein* both relied on this key fact, explaining that rejecting consent-by-registration would mean that "a potentially large swath of out-of-state corporations . . . could fall into a class exempt from all personal jurisdiction—specific and general—in this State simply because they are authorized and registered to do business here." *Id.* at 91–92; see *id.* at 87 ("The definition of 'nonresident' . . . formed the basis for our first holding in *Klein*.").

Thus, the un-"workability" of rejecting consent-by-registration was a central factor in *Cooper*. See *id.* at 91–92. And the court candidly acknowledged "the tension between *Klein* and recent United States Supreme Court precedent," urging the Georgia General Assembly to "preemptively" address this issue "by modifying the governing statutes to enable Georgia

courts to exercise specific personal jurisdiction over out-of-state corporations whether they are authorized to do business in this State or not, provide for general jurisdiction where appropriate, or otherwise tailor this State's jurisdictional scheme within constitutional limits." *Id.* at 92. Justice Bethel also concurred specifically to call "the General Assembly's attention to the peculiar and precarious position of the current law of Georgia," noting the "meaningful chance that the current law of Georgia will, at some point, be found to be inconsistent with the requirements of federal due process." *Id.* (Bethel, J., concurring).

Petitioner acknowledges all of this, arguing that these quirks of Georgia law make this case a better vehicle than *Cooper*. Pet. 27–33; *infra* § III. That is undeniably true—but these points also show that *Cooper* is an unsound foundation for this Court to intervene to resolve this strange decisional split. Cf. Sup. Ct. R. 10(b). The Georgia Supreme Court all but admitted that its decision was a stop-gap designed to avoid opening an intolerable loophole in the state's jurisdictional regime, and called for the state legislature to revise the statutory scheme to negate these problems. See 863 S.E.2d at 91–92. If the legislature takes up that invitation, the conflict between *Cooper* and the decision below may well evaporate. Just as the Court often declines to resolve a split when an outlier court might correct its own decision, it should not rely on *Cooper* to establish a review-worthy split here.

2. *Cooper* aside, there is no real post-*Daimler* disagreement. That is true in both state high courts and the federal courts of appeals.

As to state courts, Petitioner points out that the Kansas and Minnesota Supreme Courts have upheld

consent-by-registration as consistent with due process. Pet. 10 (citing *Merriman* v. *Crompton Corp.*, 146 P.3d 162, 177 (Kan. 2006); *Rykoff-Sexton, Inc.* v. *Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 91 (Minn. 1991)). But those decisions predate both *Goodyear* and *Daimler*, which confirm that their reasoning is now untenable.

For example, the Kansas court relied heavily on the Delaware Supreme Court's holding in *Sternberg* v. *O'Neil*, 550 A.2d 1105 (Del. 1988), that "express consent by registration" accords with *International Shoe*. See *Merriman*, 146 P.3d at 175–76. But as Petitioner admits, the Delaware Supreme Court no longer follows that rule. See Pet. 12. In 2016, the Delaware court explained that, before *Daimler* and *Goodyear*, "it was still tenable to rely on [this Court's older] cases for the principle that a state could exercise general jurisdiction over a foreign corporation that complied with a state registration statute." *Genuine Parts Co.* v. *Cepec*, 137 A.3d 123, 138 (Del. 2016). But no longer. Decisions like *Sternberg* (and thus like *Merriman*) were "fundamentally undermined by *Daimler* and its predecessor *Goodyear*." *Id.* at 126. Post-*Daimler*, the Kansas and Minnesota courts may well reevaluate their precedent, just as the Delaware court did.

All the other state cases Petitioner collects agree with the decision below. See Pet. 10–12. These cases—which almost all post-date *Daimler* and thus have the benefit of its reasoning—either hold directly that "the exercise of personal jurisdiction based on consent by registration violates the Due Process Clause," see *id.* at 10, or apply constitutional avoidance to hold that state law should not be construed to assert general jurisdiction based on registration alone, see *id.* at 11–12. *Cooper* is thus the *only* post-*Daimler* state supreme court decision to break from

the consensus, and it did so for unique reasons that cry out for legislative intervention. This is not the stuff of an "intractable" split among state high courts. *Contra id.* at 13.

Petitioner's federal cases reflect a similar pre- and post-*Daimler* dynamic. See Pet. 13–20. The petition cites no post-*Daimler* federal appellate decision upholding a state consent-by-registration regime.

Petitioner aligns the D.C. Circuit with *Cooper* based on *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019). Pet. 13, 18–19. But *Sealed Case* involved a *federal* law requiring foreign banks to consent to the jurisdiction of U.S. courts as a condition of opening U.S. branches. 932 F.3d at 922–23. That nationwide scheme raises no federalism concerns of the sort implicated here. See Pet. App. 47a, 53a. In any event, the banks in *Sealed Case* apparently did not contend that this regime violated due process because their consent agreements were involuntary. They argued merely that (i) exercising jurisdiction under their agreements required "a reasonable showing that someone actually violated" U.S. law, and (ii) the subpoenas at issue were overbroad because they sought records kept abroad. See 932 F.3d at 923–24. The D.C. Circuit thus considered none of the arguments raised here.

Petitioner fares no better with *Acorda Therapeutics Inc.* v. *Mylan Pharmaceuticals Inc.*, 817 F.3d 755 (Fed. Cir. 2016). As Petitioner admits, the majority there "found the court had personal jurisdiction over the defendant without expressly addressing the relevance of a state registration statute." Pet. 19; see 817 F.3d at 764 (finding "specific personal jurisdiction" and thus not reaching general jurisdiction). Only the concurring judge would have "reach[e]d the question of general jurisdiction," 817 F.3d at 764 (O'Malley, J.,

concurring), so *Acorda* is not circuit precedent on the question presented here. In any event, *Acorda* arose out of Delaware, whose Supreme Court has now interpreted the state statutory regime not to assert general jurisdiction based on registration, so the concurrence's analysis addressed a defunct regime. See *Genuine Parts*, 137 A.3d at 141–44.

Every other federal court of appeals decision cited in the petition either pre-dates both *Daimler* and *Goodyear* or agrees with the decision below. See Pet. 13–19. And even the pre-*Daimler* cases endorsing consent-by-registration are not numerous. Petitioner puts the Third, Eighth, Ninth, and Tenth Circuits in that camp, but the Ninth Circuit's discussion was dicta. The court suggested that consent-by-registration is permissible, but that conclusion was irrelevant to the outcome because the court found that Montana law did not actually impose such an arrangement. *King* v. *Am. Fam. Mut. Ins. Co.*, 632 F.3d 570, 573, 578 (9th Cir. 2011); see also Pet. 17; *DeLeon* v. *BNSF Ry.*, 426 P.3d 1, 8–9 (Mont. 2018) (declining to adopt a consent-by-registration scheme on avoidance grounds and rejecting the argument that *King* counseled a contrary result).

That leaves just three circuits' rulings—the most recent from 1991, see *Bane* v. *Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), and the earliest from 1977, see *Budde* v. *Kentron Haw., Ltd.*, 565 F.2d 1145 (10th Cir. 1977); see also *Knowlton* v. *Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990); Pet. 13, 15, 16–18. And again, nothing stops these courts from revisiting their precedent in light of intervening authority from this Court, as other courts have now done.

Emphasizing that one of these courts is the Third Circuit, Petitioner asserts a split between federal and state courts in Pennsylvania. True, *Bane* held, in a

case arising from Pennsylvania, that "registration by a foreign corporation [permissibly] carries with it consent to be sued in Pennsylvania courts." 925 F.2d at 640. But "*Bane* was issued well before the Supreme Court clarified the limits of general jurisdiction in *Daimler*." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp. 3d 532, 543 (E.D. Pa. 2019) (declining to follow *Bane* because "the constitutional regime under which *Bane* was decided has been superseded"). That some district courts in Pennsylvania disagree about *Bane*'s continued vitality (Pet. 20–21) is not a reason for this Court to intervene; it is a reason for the Third Circuit to revisit its rule in an appropriate case.

In sum, Petitioner is wrong to claim that "[f]urther percolation" cannot resolve this split. Pet. 20. Most of the courts to address this question, before or after *Daimler*, agree with the decision below. The *only* contrary post-*Daimler* decision is *Cooper*, which the state high court explicitly asked the legislature to moot by amending Georgia law. And the few courts that endorsed consent-by-registration pre-*Daimler* have yet to revisit those rulings in light of this Court's guidance. There is no "entrenched" post-*Daimler* split that warrants certiorari. *Contra id.* at 9.

II. The decision below is correct.

The decision below also does not warrant review because it is correct. It properly adheres to the "two sets of values" underlying this Court's personal-jurisdiction decisions—"treating defendants fairly and protecting 'interstate federalism.'" See *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 & n.2 (2021).

First, the Pennsylvania Supreme Court correctly explained that allowing consent-by-registration would "eviscerate[]" the due-process protections this Court recognized in *Goodyear* and *Daimler*. Pet. App. 26a–27a. These cases made clear that a corporation is subject to general jurisdiction—it is "essentially at home"—only where it is incorporated or headquartered and, "in an exceptional case," perhaps in another place where its operations are "so substantial and of such a nature as to render the corporation at home." *Daimler*, 571 U.S. at 139 & n.19. To "approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business,'" this Court explained, would be "unacceptably grasping." *Id.* at 137–38.

As a result, "a state cannot claim, consistent with due process, general jurisdiction over every corporation doing business within its borders." Pet. App. 54a. Yet that would be exactly the result of upholding consent-by-registration. Every state already requires an out-of-state corporation to register before doing business there. *Id.* at 41a. On Petitioner's view, each state could simply add an explicit consent provision, "rendering every national corporation subject to the general jurisdiction of every state," *id.* at 54a—"precisely the result that the Court so roundly rejected in *Daimler*," *Brown* v. *Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016). Indeed, consent-by-registration "could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*, so long as it had registered." *Id.* In turn, "*Daimler's* ruling would be robbed of meaning by a back-door thief." *Id.* The court below correctly rejected that result. See Pet. App. 54a.

Petitioner's response misses the point. He says the court below mistakenly applied the rules for "*non*-consenting" corporations instead of those governing "*consenting* defendant[s]." Pet. 23. But that begs the question. No one disputes that "a defendant may consent to a court's exercise of personal jurisdiction." *Id.* at 22; Pet. App 51a. The question here is whether Norfolk Southern's consent was voluntary, or instead "coerced." See Pet. App. 54a. And on that score, Petitioner simply ignores the principle—correctly applied below, *id.* at 52a–53a—that a state cannot "evade" constitutional limitations "simply by phrasing its demands . . . as conditions" on a "governmental benefit[ ]," *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013); see *Frost & Frost Trucking Co.* v. *R.R. Comm'n of Cal.*, 271 U.S. 583, 593–94 (1926).

Indeed, this Court has held several times that 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 infringed." *Hanover*, 272 U.S. at 507–08 (collecting cases). For example, a state "could not by statute force a foreign corporation to 'agree' to surrender its federal statutory right to remove a state court action to the federal courts as a condition of doing business in" the state. *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 n.10 (1972); *e.g.*, *Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532 (1922); *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892).

That principle applies with even greater force here. *Daimler* and *Goodyear* recognize that corporations have a fundamental due process right not be haled into court anywhere they might do business. The Pennsylvania scheme requires every out-of-state corporation to waive that constitutional right as a condi-

tion of doing business in the Commonwealth. Such a law, "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 and laws of the United States, [is] unconstitutional and void." *S. Pac. Co.*, 146 U.S. at 207.

Petitioner cannot avoid these problems by asserting that the "penalty" for non-registration is not the inability to do business in the state, but the inability to sue in state court. Pet. 24. Doing business in Pennsylvania without registering is "unlawful[]." Pet. App. 54a n.20. In any event, the trade-off Petitioner posits is no less improper. The "right to sue and defend in the courts" is "one of the highest and most essential privileges of citizenship." *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). A state can no more condition the exercise of that right on consent to general jurisdiction than it can condition the right to do business. See *Koontz*, 570 U.S. at 604. Petitioner's contrary view would render both rights a "dead letter." See *id.* at 607.

Even more strained is Petitioner's claim that no coercion exists because "Norfolk Southern can withstand the economic loss of the Pennsylvania market." Pet. 25. Even if that were not precisely the choice this Court has condemned—give up your rights or keep out—a federally regulated interstate railroad cannot pack up its tracks and leave if it does not like the local regulatory environment. As Congress and this Court have recognized, railroads are "easy prey" for regulation or taxation because they "cannot easily remove themselves." *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (citation omitted). So too here. And adding insult to injury, a FELA claim like this one can be brought anywhere the railroad is

"doing business," 45 U.S.C. § 56, and cannot be removed from state to federal court, 28 U.S.C. § 1445(a). Petitioner's position thus invites egregious forum-shopping against corporations in general and railroads in particular.

Second, the court below was correct that "Pennsylvania's statutory scheme of requiring foreign corporations to submit to general jurisdiction as a condition of doing business here is contrary to the concept of federalism": "[B]y requiring foreign corporations to submit to general jurisdiction as a condition of doing business here, Pennsylvania's statutory scheme infringes upon our sister state's ability to try cases against their corporate citizens." Pet. App. 47a.

This case, for example, was brought by a Virginia resident against a Virginia-incorporated company, then headquartered in Virginia, based on the plaintiff's alleged exposure to harmful substances in Virginia and Ohio. Virginia plainly has a far more substantial interest in this case than Pennsylvania, which has "no connection whatsoever." Pet. App. 45a; cf. *Ford*, 141 S. Ct. at 1030 (a suit that "involves all out-of-state parties, an out-of-state accident, and out-of-state injuries" does not implicate significant state interests). But if consent-by-registration were permissible, cases like this would be the norm, not the exception. Plaintiffs could sue in whatever forum they think offers the best chance of success, and the states where corporate defendants are incorporated or based, or where the plaintiff's injury actually occurred, would lose the opportunity to set standards and hear cases in which they have a real interest. See *id.* (states have an interest in protecting their residents and "enforcing their own" safety standards).

Third, the court below was also correct that *Pennsylvania Fire*, decided three decades before *Interna-*

tional Shoe, does not control this question. Pet. App. 48a; *contra* Pet. 22.

To start, it is far from clear that *Pennsylvania Fire*'s "brief and rather cryptic opinion" actually holds that registration can be deemed consent to general jurisdiction. See *Viko* v. *World Vision, Inc.*, No. 2:08-cv-221, 2009 WL 2230919, at *7 (D. Vt. July 24, 2009) (collecting scholarly authorities questioning this view). But even if it does, this Court "has cautioned against relying upon cases decided before *International Shoe*," which "were adjudicated in an era when territorial analysis governed" personal jurisdiction. Pet. App. 48a; see, *e.g.*, *Daimler*, 571 U.S. at 138 n.18; *BNSF Ry.* v. *Tyrrell*, 137 S. Ct. 1549, 1557–58 (2017). Those older cases relied on notions of "consent and presence" that "were purely fictional," and "*International Shoe* cast those fictions aside." *Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604, 617–18 (1990) (plurality opinion). Today, as the court below recognized, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," and prior "inconsistent" decisions have been "overruled." *Shaffer* v. *Heitner*, 433 U.S. 186, 212 & n.39 (1977); Pet. App. 48a–49a.

Other doctrinal developments have also undermined *Pennsylvania Fire*'s specific reasoning. As the Court later explained, *Pennsylvania Fire* rested on the assumption that the "power of a State to exclude foreign corporations" includes the lesser power to "imply consent to be bound by the process of its courts" a condition of doing business. *Hess* v. *Pawloski*, 274 U.S. 352, 355 (1927). But even when *Pennsylvania Fire* was decided, this Court was already moving away from the idea that "a State may attach such conditions as it chooses upon the grant of the

privilege to do business." *W. & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657 (1981); see *id.* at 657–65 (tracing the "disintegration" of this idea). It is now well settled that a state generally cannot "discriminate[ ] against . . . nonresident economic actors." *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2461 (2019). And "if 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." Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the in Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 581 (1958). In any event, it is now clear that a state cannot condition the right to do business on the forfeiture of a constitutional right. *Supra* p. 15.

Unsurprisingly, then, many modern cases have concluded that *Pennsylvania Fire*'s holding "cannot be divorced from the outdated jurisprudential assumptions of its era" and "is now simply too much at odds with the approach to general jurisdiction adopted in *Daimler*." *Brown*, 814 F.3d at 638; *accord DeLeon*, 426 P.3d at 8; *Genuine Parts*, 137 A.3d at 137–38. The court below correctly joined this consensus (and *Cooper* was wrong to hold otherwise).

Fourth, Petitioner argues that the decision below—and perhaps *International Shoe* itself—conflict with the Fourteenth Amendment's original meaning. Pet. 26–27. Petitioner did not make this argument below, and certainly did not challenge *International Shoe*. Regardless, he is mistaken. As his own citations reflect, the late-nineteenth-century cases allowed a state to "impose as a condition" of doing business that a corporation accept service on a designated agent "in any litigation *arising out of its transactions in the State*." *St. Clair* v. *Cox*, 106 U.S. 350, 356 (1882) (emphasis added); see *Ex parte Schollenberger*, 96

U.S. 369 (1878) (federal court in Pennsylvania had jurisdiction over a suit against an out-of-state insurance company on a policy it issued to a Pennsylvania resident for property in Pennsylvania); *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1856) (similar). Even under these old cases, the implied "statutory consent of a foreign corporation to be sued d[id] not extend to causes of action arising in other states," so "claims on contracts, wherever made, and suits for torts, wherever committed," could *not* be filed in "any state in which the foreign corporation might at any time be carrying on business." *Simon* v. *S. Ry.*, 236 U.S. 115, 130 (1915). That is a far cry from the unlimited jurisdictional theory Petitioner urges here.

III. If the Court is inclined to review this issue, this case is a better vehicle than *Cooper*.

For the reasons explained above, this issue does not warrant review at this time. But if the Court is inclined to take up the issue now, it should grant the petition in this case and hold *Cooper*. On this much, the parties agree: This case cleanly presents the question, and it is a better vehicle than *Cooper*. See Pet. 27–33.

In particular, the quirks of Georgia law that *Cooper* turned on are absent here. "Pennsylvania's corporate registration statute is absolutely clear that registration as a foreign corporation constitutes consent to general personal jurisdiction." Pet. 28; Pet. App. 40a–41a. By contrast, Georgia law "does not expressly notify out-of-state corporations that obtaining authorization to transact business in this State and maintaining a registered office or registered agent in this State subjects them to general jurisdiction in our courts." *Cooper*, 863 S.E.2d at 90. The Georgia Supreme Court thus relied on *Klein* to provide what it thought was sufficient notice. See *id.* So *Cooper* pre-

sents another, antecedent question: Can a state judicial decision—which "may not have been well-explained"—"notify out-of-state corporations that their corporate registration will be treated as consent to general personal jurisdiction in Georgia"? *Id.* at 90–91; see Pet. 31. A negative answer to that question would prevent the Court from reaching the underlying constitutional question.

By contrast, this case raises *only* the core constitutional question. For that reason, affirming the judgment here would necessarily resolve cases like *Cooper* too—if a state cannot explicitly condition registration on consent, as Pennsylvania tried to do, it certainly cannot do so implicitly. And as explained above, the Georgia legislature may respond to *Cooper* by revising the statutory scheme at issue there, which could effectively moot that case. See *supra* pp. 8–9; Pet. 32–33. As the *Cooper* respondent explains, "[i]f this Court were to grant [the *Cooper*] Petition, it would necessarily be wading into a Georgia-specific . . . controversy that would be better sorted out by the Georgia legislature." Brief in Opposition at 11, *Cooper Tire & Rubber Co.* v. *McCall*, No. 21-926 (Feb. 22, 2022). And while the *Cooper* petitioner "and the underlying cause of action [there] have strong ties to the forum state of Georgia . . . the underlying controversy in *Mallory* has little connection with Pennsylvania," *id.* at 4—indeed, "there is no connection whatsoever" in this case, Pet. App. 45a. Thus, if the Court is inclined to review this question, it should use this case as the better vehicle for doing so. At a minimum, if the Court grants the *Cooper* petition, it should grant the petition here as well.

CONCLUSION

For these reasons, the Court should deny the petition. But if the Court is inclined to review this issue now, it should grant the petition in this case and hold *Cooper*. Alternatively, if the Court is inclined to grant the *Cooper* petition, it should grant this petition too.

Respectfully submitted,

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