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

REPLY BRIEF

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

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REPLY BRIEF

The petition presents a recurring and important issue of federal constitutional law that has divided state and federal courts across the country. Norfolk Southern agrees (at 8) that, even narrowly construed, there is currently a 4-5-2 split in the federal circuits and a 3-4-6 split in state supreme courts on the question presented. Norfolk Southern does not dispute that the question presented is deeply important. And Norfolk Southern agrees that, if the Court decides to resolve this broad and important split, the Court should grant the petition here rather than in *Cooper Tire*. *See* Petition, *Cooper Tire & Rubber Co. v. McCall*, No. 21-926 (U.S. Dec 20, 2021). As Norfolk Southern explains (at 2), *Cooper Tire* "does not cleanly raise the question presented, and a decision there may not finally resolve the fundamental constitutional question." The problems that plague *Cooper Tire* are absent here, so it is "undeniably true" (at 9) that "this case [is] a better vehicle than *Cooper* [*Tire*]."

Norfolk Southern nonetheless asks this Court to deny review because it speculates (at 12) that "nothing stops" courts "from revisiting their precedent in light of intervening authority from this Court." Specifically, Norfolk Southern argues that *Daimler* and *Goodyear* constitute intervening authority that will somehow make a deep division among state and federal courts evanesce. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). But those cases did not even purport to address the question presented, which focuses on jurisdiction based on a defendant's consent. And the courts that have held that such jurisdiction is constitutionally sound have recognized that it is

analytically distinct from jurisdiction based on contacts. *See, e.g.*, *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 89 (Ga. 2021); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990). There is thus no reason to believe that they would reverse course based on *Daimler* and *Goodyear*.

That is especially true because a long line of this Court's never-overruled cases concludes that a corporation can—without any constitutional impropriety—consent to jurisdiction in a state's courts when it chooses to register to do business in the state. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1037 & n.3 (2021); *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917). And this Court has made clear time and again that it will not overrule its precedent by implication. *See* Pet. at 25. For that reason, not a single circuit court that had upheld a registration statute before *Daimler* and *Goodyear* has reversed its position in their wake. *See* Pet. at 13–20. There was a deep split in authority before *Daimler* and *Goodyear*. There remains a deep split in authority eight and ten years removed from *Daimler* and *Goodyear*. That is long enough to confirm that the die is cast. Only this Court can harmonize the lower court's disparate interpretations of the Due Process Clause.

The Court should grant the petition here.

ARGUMENT

I. Respondent Concedes the Existence of a Broad Split.

Norfolk Southern does not dispute that dozens of state and federal courts are divided on the question presented. It concedes that the supreme courts of Pennsylvania and Georgia have issued conflicting decisions in the last six months. It concedes that numerous other state supreme courts previously issued similarly conflicting decisions. And it concedes that almost every federal court of appeals has done the same. Its only attempts (at 11) to narrow that expansive split are to argue that the D.C. Circuit's decision was based on a federal registration statute and that the Federal Circuit reached the issue in a concurrence. Even discounting those two circuits, it has conceded a deep 3-4-6 split among over a dozen state courts and 4-5-2 split among eleven federal circuit courts. That broad division undoubtedly warrants this Court's review.

II. Respondent and Business Amici Agree that the Split Involves an Issue of Great Importance.

Norfolk Southern nowhere denies that the petition presents an issue of immense constitutional importance. Nor could it. Norfolk Southern's position on the question presented implicates grave federalism issues, as it would impose a federal rule stripping states of their longstanding authority to require corporations' consent to their jurisdiction in exchange for the privilege of doing business within their borders. Conversely, corporate defendants profess a strong (albeit legally unfounded) interest in being able to do business in a state without agreeing to submit to

the jurisdiction of that state's courts. *See, e.g.*, Reply Brief for Petitioners, at 3*, Cooper Tire & Rubber Co. v. McCall*, No. 21-926 (U.S. Mar. 11, 2022). Indeed, the Chamber of Commerce of the United States—which describes itself as "the world's largest business federation," representing "300,000 direct members and indirectly represent[ing] the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country"—filed a brief in *Cooper Tire* to explain that the question presented "is undeniably important for the Nation and its businesses." Brief for the Chamber of Commerce of the United States of America and Product Liability Advisory Council, Inc. as Amici Curiae in Support of Petitioner, at 3, No. 21-926 (U.S. Jan. 22, 2022).

III. Respondent Agrees that this Case is a Better Vehicle to Address the Issue than *Cooper Tire*.

Norfolk Southern agrees (at 9) that it is "undeniably true" that "this case [is] a better vehicle than *Cooper* [*Tire*]." It agrees (at 20–21) that "this case raises *only* the core constitutional question" and that "[t]his case cleanly presents [that] question." Accordingly, it agrees (at 20) that "if the Court . . . take[s] up the issue now, it should grant the petition in this case and hold *Cooper* [*Tire*]." The respondent in *Cooper Tire* concurs. *See* Brief in Opposition, at 4, *Cooper Tire & Rubber Co. v. McCall*, No. 21-926 (U.S. Feb. 22, 2022) ("The Court will have a superior vehicle to review this issue in the case of *Mallory*.").

The only party in either case that thinks otherwise is Cooper Tire. In its reply, it curiously contends (at 3) that the idiosyncratic features of Georgia law and the

case-specific facts in *Cooper Tire* somehow render it "more likely to conclusively resolve the question presented." That is incorrect.

First, Cooper Tire misunderstands (at 10–11) why the oddities in Georgia law could complicate this Court's resolution of the question presented. All agree that unknowing consent could not form the basis of a court's personal jurisdiction under the Due Process Clause. The Georgia Supreme Court itself recognized that the Georgia statute "does not expressly notify out-of-state corporations that obtaining authorization to transact business . . . subjects them to general jurisdiction in our courts." *Cooper Tire*, 863 S.E.2d at 90 (citation omitted.). The court further recognized that the decades-old case that held that it did "may not have been well-explained." *Id.* at 91. By contrast, no one can deny that Pennsylvania's registration statute puts defendants on clear, express notice. *See* Pet. at 28-30.

Second, Cooper Tire makes the bizarre argument (at 12) that the fact-bound nature of its case makes it more appropriate for this Court's review. It correctly notes that the Pennsylvania Supreme Court's decision did not depend on Norfolk Southern's contacts with the state, only on its consent. It then contrasts (at 12) that simplicity with *Cooper Tire*, in which it contends the Court would have "occasion to address jurisdiction based on corporate registration plus case-specific contacts." And it argues that this distinction is somehow a reason to grant its petition. Not so. Those "case-specific contacts" provide another potential ground justifying the exercise of jurisdiction in that case, and thus are precisely a reason for this Court to grant the petition here.

Cooper Tire recognizes as much in disputing (at 12) McCall's argument that "jurisdiction can rest on a mix-and match combination of registration and case-specific contacts that are inadequate to support specific jurisdiction." The presence of that additional dispute proves the point. To test the validity of consent via a registration statute, the cleanest possible vehicle is not one in which the parties are arguing over the sufficiency of a "mix-and match combination of registration and case-specific contacts" but, rather, is one in which the statute, and the statute alone, offers the only possible way for a court to find jurisdiction and thus to wield judicial power. All agree that this petition is such a vehicle. And all agree that *Cooper Tire* is not.

If the Court rules in favor of the respondent here, then every assertion of personal jurisdiction based on a registration statute, including the many that are less clear than Pennsylvania's, is unconstitutional. And if, by contrast, the Court rules for petitioner, it will reconfirm the meaning of the Constitution that has guided state and federal courts since the Fourteenth Amendment was ratified. Either way, the Court should grant this petition to decisively answer the question presented.

IV. Respondent's Sole Argument for Denial—That the Broad, Longstanding Split May Dissolve—is Fundamentally Flawed.

Norfolk Southern claims this Court need not resolve the longstanding split because a combination of lower courts' reversing prior precedent and legislative enactments will independently cause the split to dissolve. That speculation does not withstand scrutiny.

1. Norfolk Southern recognizes (at 7) that "*Cooper* [*Tire*]'s result . . . conflicts with the decision below." It nonetheless notes (at 7) that *Cooper Tire* "turns on an apparently unique quirk in Georgia law." It is correct (at 20) that the unique "quirks of Georgia law that *Cooper* [*Tire*] turned on" render it an inferior vehicle for this Court's review of the question presented. *See* Pet. at 27–33. But the fact that *Cooper Tire* is an inferior vehicle for addressing the question presented has no bearing on the fact that it clearly and squarely conflicts with the decision of the Pennsylvania Supreme Court.

2. Pretending that *Cooper Tire* is some outlier opinion, Norfolk Southern then attempts to explain away all the other decisions that reach the same conclusion. On Norfolk Southern's view (at 1), this Court's decisions in *Daimler* and *Goodyear* "answered th[e] question" presented. That is false. In *Daimler* and *Goodyear*—and in *International Shoe* itself—this Court expressly limited its analysis to a court's jurisdiction over *non*-consenting defendants based on the defendants' contacts with the forum state. *See* Pet. at 22–25. This case turns on *what constitutes valid consent*. *Id.* As a result, *International Shoe* and its progeny plainly do not "answer" the question presented. There is accordingly no basis to discount cases decided prior to *Daimler* and *Goodyear* in cataloguing the wide split among the lower courts.

The courts that have upheld jurisdiction by consent via a registration statute confirm that conclusion. They recognize that consent is an *alternative* basis for jurisdiction from a defendant's contacts with and presence in a state. *See, e.g.*, *Cooper Tire*, 863 S.E.2d at 89 ("*Pennsylvania Fire* has not been overruled, nor was it even addressed by the

majority opinions in these cases. . . . [D]uring this same time period, the Court has continued to recognize consent as a proper means of exercising personal jurisdiction over an out-of-state corporation." (citing *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011)); *Knowlton*, 900 F.2d at 1199 ("Consent is the other traditional basis of jurisdiction, existing independently of long-arm statutes."). Those courts have thus considered *and rejected* precisely the argument that Norfolk Southern presses here: that jurisdiction based on registration statutes like Pennsylvania's are constrained by the limits in *International Shoe* and its progeny, including *Daimler* and *Goodyear*. Norfolk Southern's repeated suggestion (at 2, 9, 13)—that the courts that disagree with its view have simply not gotten around to reversing their precedent but will do so in an "appropriate case"—is therefore incorrect.

That conclusion is fortified by this Court's command that lower courts should not "conclude that [its] more recent cases have, *by implication*, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (emphasis added). It is grasping at straws to suggest that lower courts might nonetheless read *Daimler* and *Goodyear* to implicitly overrule the longstanding precedent that culminated in *Cooper Tire*. A decade after *Goodyear* and eight years after *Daimler*, not a single federal court of appeals has validated Norfolk Southern's prediction and reversed its position. *See* Pet. at 13–20. That firmly entrenched circuit split has not and will not simply go away. And the direct conflict between the Georgia and Pennsylvania Supreme Courts in the past few months confirms that the split persists in state courts as well.

This Court must intervene to resolve that division.

V. The Decision Below is Incorrect.

Norfolk Southern never explains how *International Shoe* and its progeny overruled *Pennsylvania Fire*'s holding that jurisdiction may be based on consent-by-registration. It ignores the express language limiting those decisions to defendants who have not consented to the court's jurisdiction. And its shifting arguments about why this Court should now eliminate jurisdiction by consent via a registration statute both lack merit and confirm that the question presented here was neither presented nor answered in *International Shoe*, *Daimler*, *Goodyear*, or any other decision in that line.

First, Norfolk Southern begs the question when it complains (at 14) that "the result of upholding consent-by-registration" would be that state courts would sometimes have personal jurisdiction in cases where the defendant's contacts would be insufficient under *International Shoe* and *Daimler*. That is both true and beside the point: consent and contacts are *alternative* grounds for jurisdiction, and nothing in *International Shoe*, *Daimler,* or *Goodyear* ever suggested otherwise. Moreover, such unabashed, results-driven reasoning may not displace the meaning of the Due Process Clause.

Second, Norfolk Southern attacks a strawman when it argues (at 18) that this Court's cases "decided in the era dominated by *Pennoyer*'s territorial thinking . . . should not attract heavy reliance today." *Daimler*, 571 U.S. at 139 n.18. The "territorial thinking" of *Pennoyer* is irrelevant to the question presented, which does not involve a state's territory but rather a defendant's consent to jurisdiction. Norfolk Southern is similarly misguided in relying on

this Court's observation that, prior to *International Shoe*, its cases extended personal jurisdiction through conceptions 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). There is nothing fictional about Norfolk Southern's clear consent to the Pennsylvania courts' jurisdiction in this case.

Third, Norfolk Southern eventually concedes (at 15) that "[n]o one disputes that 'a defendant may consent to a court's exercise of personal jurisdiction.'" (quoting Pet. at 22). It then argues that "[t]he question here is whether Norfolk Southern's consent was voluntary, or instead 'coerced.'" (quoting Pet. App. 54a). Norfolk Southern is correct that the question presented in this case turns on its consent to the Pennsylvania courts' jurisdiction, and it is free to argue on the merits that its consent was unconstitutionally coerced. But if that is "the question here," then Norfolk Southern has conceded the irrelevance of *Daimler* and *Goodyear*. In those cases, the question of coercion never arose because the defendants never consented to jurisdiction in the first place. Norfolk Southern's argument therefore demonstrates that the "pre- and post-*Daimler* dynamic" it invokes (at 11) to explain away the split among the lower courts is a fiction.

Norfolk Southern underscores the irrelevance of this proposed "dynamic" when it accuses (at 15) Mallory of "ignor[ing] the principle—correctly applied below—that a state cannot 'evade' constitutional limitations 'simply by phrasing its demands . . . as conditions' on a 'governmental benefit[].'" (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S.

595, 606 (2013) (alterations in original)). The inapplicability of that principle here, like the incorrectness of the assertion that Norfolk Southern's consent was coerced, is best addressed in full merits briefing. But the fact that Norfolk Southern must argue that its consent to jurisdiction was invalid—this time on the purported basis that it was extracted as an unconstitutional condition on the exercise of its supposed right to do business in a sovereign state without any restrictions—again demonstrates that the persistent split among the lower courts on the question presented was not, and will not be, resolved by *Daimler* and *Goodyear*. In those cases, as in *International Shoe*, the state had not "conditioned" anything at all on the defendant's agreeing to forgo a right. The courts' assertion of jurisdiction was instead based on the defendants' contacts with the states, not their consent with either constitutional or unconstitutional strings attached.

The flimsiness of Norfolk Southern's argument (at 15) is evident from the fact that it is based on a fifty-year-old footnote, in which this Court observed that "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." (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 n.10 (1972) (emphasis added)). Whatever the force of that conclusion, and whether state rules attempting to restrict removal jurisdiction are constitutionally analogous to ones governing personal jurisdiction, one thing is pellucidly clear: *Daimler* and *Goodyear* do not remotely address that issue. Norfolk Southern's assertion that the doctrine of unconstitutional conditions is relevant here demonstrates that *Daimler*

and *Goodyear* are not. And therefore, the division in state and federal courts has not been—and will not be—resolved by them.

Norfolk Southern's arguments on the merits are both unsupported by this Court's cases and incorrect. The Court should grant the petition to make clear that the proper interpretation of the Due Process Clause permits jurisdiction by consent via a registration statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

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