

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
Supreme Court of Pennsylvania,
Eastern District**

—◆—
**BRIEF OF THE PENNSYLVANIA ASSOCIATION
FOR JUSTICE AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

—◆—
RUXANDRA M. LAIDACKER
Counsel of Record
CHARLES L. BECKER
KLINE & SPECTER, P.C.
1525 Locust Street
Philadelphia, PA 19102
(215) 772-1000
andra.laidacker@klinespecter.com

*Counsel for Amicus Curiae
Pennsylvania Association
for Justice*

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INTEREST OF THE *AMICUS CURIAE*

The Pennsylvania Association for Justice is a non-profit organization with a membership of over 2,000 men and women of the trial bar of the Commonwealth of Pennsylvania. Since 1968, the Association has promoted the rights of individuals by advocating the right to trial by jury, full and just compensation, and the maintenance of a free and independent judiciary. Whether a foreign corporation subjects itself to the general jurisdiction of Pennsylvania's courts under 42 Pa.C.S. § 5301(a)(2) by registering as a foreign corporation under 15 Pa.C.S. § 411 concerns the Association's members and everyone who seeks a remedy in Pennsylvania's courts. The Association respectfully presents this *amicus curiae* brief for the Court's consideration.¹

◆

SUMMARY OF ARGUMENT

Under Pennsylvania law, when a foreign corporation chooses to register with Pennsylvania's Department of State under 15 Pa.C.S. § 411, the corporation also subjects itself to the general jurisdiction of Pennsylvania's courts under 42 Pa.C.S. § 5301(a)(2)(i). This approach also has a long history in statutes that extend

¹ All counsel of record have consented in writing to the filing of this *amicus curiae* brief. No party's counsel authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

back nearly to the enactment of the Fourteenth Amendment. Rooted in a corporation's voluntary acts, this roadmap for general jurisdiction comports with long-standing principles of Due Process, and is neither unreasonable nor unjust. The decision of the Supreme Court of Pennsylvania should be reversed.

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ARGUMENT

I. A foreign corporation's choice to submit to the general jurisdiction of Pennsylvania's courts comports with long-standing principles of Due Process.

Under Pennsylvania law, a corporation subjects itself to Pennsylvania's general jurisdiction in three distinct situations:

- (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
- (ii) Consent, to the extent authorized by the consent.
- (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S. § 5301(a)(2). Each prong illustrates a different pathway by which a corporation may subject itself to Pennsylvania's general jurisdiction. Each pathway refers to a different set of affirmative decisions and choices that the corporation may make.

Working backwards, Section 5301(a)(2)(iii) subjects a corporation to Pennsylvania’s general jurisdiction based on the corporation’s decision to generally conduct business within the Commonwealth. This Court has described the parameters of this version of general jurisdiction in such cases as *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017). As those cases make clear, general jurisdiction based on a theory of “conducting general business” is confined to corporations who either have incorporated or have their principal place of business in the forum. *See Daimler*, 471 U.S. at 138. If a corporation is “at home” by virtue of those choices, the forum court may “hear any and all claims against them.” *Id.* at 128.

Section 5301(a)(2)(ii) refers to another kind of affirmative action to manifest acceptance of Pennsylvania’s general jurisdiction. Under Section 5301(a)(2)(ii), a corporation simply may “consent” to general jurisdiction in Pennsylvania. 42 Pa.C.S. § 5301(a)(2)(ii). The statute does not define “consent,” but that word generally refers to the concept of assent, approval, or agreement. *See “Consent,” Merriam-Webster.com Dictionary, Merriam-Webster.*² Consent may include forum-selection agreements that bind parties in particular disputes or classes of disputes. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,

² Available at: <https://www.merriam-webster.com/dictionary/consent> (last viewed July 6, 2022).

Inc., 473 U.S. 614, 629-30 (1985); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 66 (2013). Corporations may also consent to subject themselves to a forum's personal jurisdiction in a particular case based on a variety of affirmative acts. *Burger King Corp.*, 471 U.S. at 473 n.14; *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *Adam v. Saenger*, 303 U.S. 59, 66 (1938); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30 (1917).

Section 5301(a)(2)(i) refers to yet another affirmative action that triggers acceptance of Pennsylvania's general jurisdiction: the filing of papers with the Commonwealth's Department of State. A corporation may file to incorporate as a Pennsylvania corporation under 15 Pa.C.S. §§ 1301-1311, or register as a foreign corporation under 15 Pa.C.S. §§ 401-419. A corporation taking either step thereby subjects itself to Pennsylvania's general jurisdiction. 42 Pa.C.S. § 5301(a)(2)(i).

This Court frequently has approved the exercise of general jurisdiction over a foreign corporation based on registration or appointment of an agent for service under a state statutory scheme. The Court started considering these issues even before the enactment of the Fourteenth Amendment. *See, e.g., Nierbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) ("state legislation and consent of parties may bring about a state of facts" that authorize a court to take cognizance of a case); *Louisville & N.R. Co. v. Chatters*, 279 U.S. 320, 331 (1929) (Louisiana statute requiring

appointment of agent for purposes of service by a foreign corporation doing business was valid, even when it permitted suit in Louisiana by persons injured outside the State); *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921) (Ohio statute requiring foreign corporation to appoint agent for purposes of service as condition for filing financial report necessary for the ascertainment of taxes due was valid); *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Milling Co.*, 243 U.S. 93, 96 (1917) (Missouri statute requiring foreign corporation to appoint the State's superintendent of the insurance department as agent for service as condition for obtaining a business license was "voluntary act" that complied with Due Process); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (the defendant subjected itself to the general jurisdiction of the Michigan courts through registration as a foreign company); *Ex parte Schollenberger*, 96 U.S. 369, 377-78 (1877) (Pennsylvania statute requiring foreign corporations to appoint agent for service as condition for transacting business in the Commonwealth was valid); *Baltimore & O.R. Co. v. Harris*, 79 U.S. 65, 80-84 (1870) (Maryland corporation licensed in 1831 to do business in the District of Columbia by an act of Congress was subject to suit in the District of Columbia by service upon its agent, as permitted by a federal statute enacted in 1867); *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407-08 (1855) (preceding enactment of the Fourteenth Amendment, judgment entered in Ohio against Indiana corporation was valid, where the Indiana corporation appointed agent for service pursuant

to Ohio statute as condition for transacting business in Ohio).

This Court has not overruled this important line of cases. To be sure, in *Goodyear, Daimler* and *Tyrrell*, this Court addressed general jurisdiction in the context of assessing whether a corporation’s business operations in a forum were so continuous and systematic as to render the corporation at home in that forum—in essence, the landscape of Section 5301(a)(2)(iii). But those cases did not involve corporate actions evidencing submission to general jurisdiction either through express agreement or compliance with statutory provisions—the landscapes of Sections 5301(a)(2)(i) or (ii). So cases such as *Nierbo*, *Pennsylvania Fire*, and *Schollenberger* remain good law, alongside the distinct *Goodyear-Daimler-Tyrrell* line of cases. Collectively, they show the long provenance of registration as a valid method for triggering general jurisdiction—a history that goes back to the dawn of the Fourteenth Amendment.

II. The assertion of Pennsylvania’s general jurisdiction over foreign corporations that choose to register with the Department of State is not unreasonable or unjust.

In *Compagnie des Bauxites*, the Court explained that because “the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.” *Compagnie des Bauxites*, 456 U.S. at 703. The right “may be intentionally

waived, or for various reasons a defendant may be estopped from raising the issue.” *Id.* at 705-06. Significantly, there is nothing “unique” about the requirement of personal jurisdiction that prevents it from being established or waived like any other rights. *Id.* Rather, a litigant may submit to a forum’s authority through a “variety of legal arrangements.” *Id.* at 703. These legal arrangements most typically occur among private parties. In particular, a forum-selection clause that has been achieved through a “freely negotiated” agreement and that is not “unreasonable and unjust” is consistent with Due Process. *Burger King Corp.*, 471 U.S. at 473 n.14.

States also may establish legal arrangements whereby a corporation assents to general jurisdiction by affirmative act. *Compagnie des Bauxites*, 456 U.S. at 703-05. In *Cherry*, this Court explained that “what acts of the defendant shall be deemed a submission to a court’s power is a matter upon which States may differ.” *Cherry*, 244 U.S. at 29-30. With respect to evaluating those different approaches, this Court has explained that Due Process provides a “flexible standard” rather than a “technical conception with a fixed content unrelated to time, place and circumstances.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Int’l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945) (“Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”).

Against this backdrop, this Court has said that Due Process permits a State to specify the conditions under which a foreign corporation may operate within the State. One such condition may be that the foreign corporation submits to the general jurisdiction of the State by some affirmative step that expressly or impliedly manifests assent. *See, e.g., Adam*, 303 U.S. at 66. These conditions are consistent with Due Process when they ensure “orderly administration of the laws,” and give “a degree of predictability to the legal system” such that potential defendants may structure their conduct within the forum with a baseline understanding as to when their conduct will and will not render them liable to suit. *World-Wide Volkswagen*, 444 U.S. at 294, 297. In particular, arrangements created by rule or statute conditioned on an affirmative act by a foreign corporation place the foreign corporation on notice that “conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there.” *Id.* at 297; *see, e.g., Adam*, 303 U.S. at 66 (plaintiff-foreign corporation submitted to jurisdiction of court for purposes of cross-claim); *McDonald v. Mabee*, 243 U.S. 90 (1917) (defendant may submit to jurisdiction of court by appearance); *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495 (1956) (defendant may submit to jurisdiction of court on the basis of a stipulation); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (defendant may submit to jurisdiction of court by appointing agent for purposes of service).

Section 5301(a)(2)(i) falls exactly within this framework. The statute provides that corporations subject themselves to Pennsylvania’s general jurisdiction by the act of filing a registration statement under 15 Pa.C.S. § 411. In turn, Section 411 makes clear that a corporation has latitude to determine (a) whether registration is even implicated by the corporation’s activities in the Commonwealth; and (b) whether to register regardless of those activities. At all times, the corporation decides how and whether to proceed.

This focus on the corporation’s choice is apparent from the registration statute. Initially, the statute provides that a foreign corporation “may not do business” in Pennsylvania until it registers with the Department of State. 15 Pa.C.S. § 411(a). However, the statute then sets forth a long list of activities that are *not* “doing business” in Pennsylvania. These include the vast category of “doing business in interstate or foreign commerce.” 15 Pa.C.S. § 403(a). This expansive list makes clear that only certain forms of intrastate commercial activity may implicate the registration requirement of Section 411. The statute’s narrow focus is highlighted by the Comment to Section 403, which explains that the “typical conduct” requiring registration by a foreign corporation is limited to “maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes.” *Id.*

There is no enforcement mechanism, and no sanction for failure to register. Instead, as the Pennsylvania Department of State explains, it remains entirely “up to the association to determine whether its activities require it to register with the Department of State.” See Department of State Foreign Registration Statement, “DSCB:15-412-Instructions: Who Should File this Form.”³ The only potential cost for corporations who fall within the ambit of the registration statute (but who do not register) is that they forego the ability to commence a civil action in the Commonwealth. 15 Pa.C.S. § 411(b). Yet even that modest cost is easily cured. The corporation need only register before starting litigation. *Id.* So the supposed limitation imposes barely any limit at all.

The Committee note following Section 411 supports the broad latitude provided to foreign corporations concerning whether to register. “The purpose of subsection (b) is to induce foreign associations to register without imposing harsh or erratic sanctions. Often the failure to register is a result of inadvertence or bona fide disagreement as to the scope of 15 Pa.C.S. § 403, which is necessarily imprecise; and the imposition of harsh sanctions in those situations is inappropriate.” 15 Pa.C.S. § 411, Committee cmt. The overall message is clear. Pennsylvania’s registration statute leaves to foreign corporations the decision whether to

³ Available at: <https://www.dos.pa.gov/BusinessCharities/Business/RegistrationForms/Documents/Updated%202017%20Registration%20Forms/Foreign%20Associations/15-412%20Foreign%20Registration%20Statement.pdf> (last viewed July 6, 2022).

register with the Department of State. Nobody puts the proverbial gun to the corporation's proverbial head. Instead, when Norfolk Southern Railway registered, it had clear notice that it was subjecting itself to suit in the Commonwealth. It also could have withdrawn the registration at any time under 42 Pa.C.S. § 415. Under these circumstances, the assertion of general jurisdiction is hardly unreasonable or unjust. Instead, it comports fully with the minimum requirements of Due Process. *Burger King Corp.*, 471 U.S. at 473 n.14.

III. Pennsylvania's long history of requiring corporations to submit to the general jurisdiction of Pennsylvania courts underscores that its current jurisdiction scheme comports with Due Process.

At the dawn of corporate law in Pennsylvania, a corporation had to be created by a special law of the General Assembly that specifically brought the corporation into existence. Between 1800 and 1860, the General Assembly created 2,320 private corporations by special acts, not including cemetery corporations and social affinity-group corporations known as "hall" corporations. See William Miller, "A Note on the History of Business Corporations in Pennsylvania, 1800-1860," *The Quarterly Journal of Economics*, Vol. 55, No. 1 (Oxford University Press Nov. 1940), at 153 & n.9. In 1840 and 1849, the General Assembly enacted statutes that permitted certain types of corporations to incorporate without special legislative enactment. See *id.* at 153

n.1. But for the most part, corporations could be summoned into existence only by a special legislative act.

During this time-period, Pennsylvania became the home of railroad, coal mining, oil, forestry, and other major industries that transformed the economy of the Commonwealth and the nation. These developments prompted political change as well, as people became concerned about the political influence of those industries on the General Assembly. Pennsylvanians previously had adopted constitutions in 1776 and 1790. In 1874, concerned about the growing influence of railroads and other corporations within state politics, Pennsylvanians adopted a new constitution whose primary innovations involved reforming the General Assembly—in particular, what kinds of legislation the General Assembly could enact, and how legislation could be enacted. Rosalind L. Branning, *Pennsylvania Constitutional Development* (University of Pittsburgh Press 1960) at 21, 37. These new constitutional provisions included specific prohibitions on laws “[c]reating corporations, or amending, renewing or extending the charters thereof,” and on laws “[g]ranting to any corporation, association or individual any special or exclusive privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track.” PA. CONST. art. III, § 7 (1874). The 1874 Constitution also included a chapter dedicated entirely to “private corporations” that was aimed at rationalizing and encouraging sound business practices, meeting expectations of investors and business partners, and curbing abuses by corporate entities that could lead to financial losses and ruinous personal injuries. *See* PA.

CONST. art. XVI, §§ 1-13 (1874). Among other things, Section 5 of Article XVI provided that “[n]o foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served.” PA. CONST. art. XVI, § 5 (1874).⁴

In 1874, the General Assembly gave statutory effect to these constitutional amendments by adopting the Commonwealth’s first general incorporation statute pertaining to private corporations. *See* Act 32 of Apr. 29, 1874, Pub. Law 73. That year, the General Assembly also enacted a law that governed the basis upon which foreign corporations could conduct business in Pennsylvania. *See* Act 33 of Apr. 22, 1874, Pub. Law 108. Under this law, foreign corporations could conduct business in Pennsylvania upon appointment of an agent for service of process—in other words, the exercise of general jurisdiction:

Section 1. *Be it enacted, &c,* That from and after the passage of this act, no foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

Section 2. It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the

⁴ Pennsylvanians did not retain Article XVI when enacting the 1968 Constitution, which is the Commonwealth’s current constitution.

office of the secretary of the commonwealth a statement . . . showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein. . . .

Id. at §§ 1-2.

In 1911, the General Assembly amended the 1874 foreign corporations law. *See* Act 283 of June 8, 1911, Pub. Law 710. The revised statute maintained the requirement that foreign corporations appoint an agent for service of process. The law also required foreign corporations to register with the Secretary of the Commonwealth, and, doubling down on the principle of general jurisdiction, provided for the appointment of the Secretary as an authorized agent for service of process. The key portions are as follows:

Section 1. *Be it enacted, &c,* That the term “foreign corporation,” as used in this act, shall mean every corporation which has been established, organized, or chartered under laws other than those of the Commonwealth.

Section 2. Every such foreign corporation, before doing any business in this Commonwealth, shall appoint, in writing, the Secretary of the Commonwealth and his successor in office to be its true and lawful attorney and authorized agent, upon whom all lawful processes in any action or proceeding against it may be served; and service of process on the Secretary of the Commonwealth shall be of the same legal force and validity as if served on it. . . . The power of attorney . . . shall

contain a statement showing the title and purpose of said corporation, the location of its principal place of business within the Commonwealth, and the post-office address within the Commonwealth to which the Secretary of the Commonwealth shall send by mail any process against it served on him. . . . [T]he said power of attorney and statement shall be filed in the office of the Secretary of the Commonwealth. . . .

Id. at §§ 1-2.

In 1976, Pennsylvania enacted its current jurisdiction statute that provides for general jurisdiction over foreign corporations that have registered with the Department of State. *See* Act 142 of July 9, 1976, Pub. Law 586, § 2, codified at 42 Pa.C.S. § 5301. This development made even more clear that a foreign corporation choosing to register with the Department of State also was choosing to subject itself to Pennsylvania’s general jurisdiction. *Id.* In 1988, the General Assembly revised the structure of Pennsylvania’s laws pertaining to foreign corporations, now codifying them within a larger statutory scheme in a chapter titled “Qualifications.” Act 177 of Dec. 21, 1988, Pub. Law 1444, as amended, codified as 15 Pa.C.S. §§ 4121-31. Pennsylvania further revised its foreign registration law in 2014, moving key provisions to where they now are codified at 15 Pa.C.S. §§ 401-19. *See* Act 172 of Oct. 22, 2014, Pub. Law 2640, effective July 1, 2015.

With those revisions, Pennsylvania continues its long-standing approach of providing foreign corporations with the latitude to submit (or not submit) to the Commonwealth's general jurisdiction based on whether the corporation chooses to register with the Department of State. Pennsylvania's approach has been consistent with this Court's cases extending back to before enactment of the Fourteenth Amendment. Pennsylvania's approach remains consistent with Due Process today.

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CONCLUSION

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

Respectfully submitted,

RUXANDRA M. LAIDACKER

Counsel of Record

CHARLES L. BECKER

KLINE & SPECTER, P.C.

1525 Locust Street, 19th Floor

Philadelphia, PA 19102

(215) 772-1000

andra.laidacker@klinespecter.com

Attorneys for Amicus Curiae

Pennsylvania Association

for Justice

Dated: July 8, 2022