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

BRIEF OF AMICUS CURIAE CIVIL PROCEDURE PROFESSORS IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI[1]

Amici are law professors who teach civil procedure, including personal jurisdiction, which is the subject of this case. Helen Hershkoff, Arthur R. Miller, and John E. Sexton teach at New York University Law School; Alan B. Morrison teaches at George Washington University Law School. The law schools are listed for identification purposes only. Amici have no pecuniary or other interest in the outcome of this case.

Amici argue that the Due Process Clause of the federal Constitution does not preclude states from conditioning registration to do business on the company's consent to personal jurisdiction. Amici believe, however, that constitutional limits to that authority may be based on the Dormant Commerce Clause and in particular this Court's decision in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). Because not all the facts that properly bear on the answer to the jurisdicitonal question under *Pike* are in the record, amici submit that the proper remedy is to vacate and remand and, accordingly, submit this brief in support of neither party.

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[1] No person other than the amici has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. Petitioner and respondent have filed blanket consents to the filing of amicus briefs..

INTRODUCTION & SUMMARY OF ARGUMENT

Personal jurisdiction litigation today is all about forum shopping by both plaintiffs and defendants, for which this Court has become the referee. In *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011), this Court rejected the effort of North Carolina residents, whose children died in a bus crash in France, to maintain suit in the North Carolina state courts against the foreign companies that allegedly caused their deaths. Then, in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), this Court refused to allow Argentine citizens to sue the German parent of an Argentine corporation in a California federal court for injuries that occurred in Argentina.

The same result occurred when plaintiffs sought a favorable state forum for companies with substantial business in the forum, but the claim had no connection to the forum state. Thus, in *BNSF Ry. Com v. Tyrell,* 137 S. Ct. 1549 (2017), the Court refused to allow two employees of the defendant railroad, who were non-residents of Montana, and whose injuries occurred in other states, to sue the railroad in the Montana state courts that were thought to be friendly to railroad workers. And, in *Bristol-Meyer-Squibb Co. v. Superior Court,* 137 S. Ct. 1773 (2017), the Court blocked 592 out-of-state plaintiffs from joining 86 in-state plaintiffs who had sued defendant in California, because their injuries occurred oustide

California, even though the claims of both the in-state and out-of-state plaintiffs were identical. Similarly, when it was the defendant that was seeking to use personal jurisdiction to force the plaintiffs to bring suit in an inconvenient forum, the Court also said "no" in *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021). The Court there rejected the effort of Ford to require plaintiffs, whose injuries occurred in the forum states where they also resided, to file their cases in other states, either where Ford was incorporated, where it had its principal place of business, or where it had designed or manufactured the allegedly defective vehicle.

Whatever the questions once were regarding the territorial reach of the state courts, *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945), established that state courts have broad, but not unlimited, powers to adjudicate claims against out-of-state defendants, as long as doing so is "reasonable and just according to our traditional conception of fair play and substantial justice." That principle has proven to be too open-ended to provide meaningful guidance to litigants and the lower courts, especially in light of global and virtual markets. Accordingly, this Court has developed a number of approaches to personal jurisdiction designed to provide answers to particular applications of that general principle. At issue here is the principle enabling courts to exercise personal jurisdiction over a defendant who has consented to be sued in the forum state, in this case, as a result of having registered by statute to

do business there, which amici refer to as registration jurisdiction.

Petitioner here filed suit in a Pennsylvania state court against respondent Norfolk Southern Railway, which was incorporated and had its headquarters in Virginia. Petitioner alleged that he developed colon cancer as a result of his exposure to asbestos while working for respondent in both Virginia and Ohio. He also worked for respondent in Pennsylvania and lived there until his retirement which roughly coincided with the discovery of his cancer. The complaint does not allege that the cancer resulted from petitioner's work for respondent in Pennsylvania. Because respondent has 2,278 miles of track and operates eleven rail yards and three locomotive repair shops in the state (Pet. at 3), it was required to register with the state and to consent to personal jurisdiction in its courts over suits against it. 42 Pa. Stat. § 5301(a)(2)(i). Moreover, under section 5301(b), that consent specifically includes "any cause of action … whether or not arising from acts enumerated in this section," *i.e.*. it includes acts occurring outside of Pennsylvania.

Because of Pennsylvania's registration statute, it was not necessary for petitioner to seek to establish specific jurisdiction over respondent. Whether petitioner's claim sufficiently relates to respondent's conduct in Pennsylvania was not asked and the courts below did not resolve that question. Because respondent was not incorporated in Pennsylvania and did not have its principal place of business there, general

jurisdiction was plainly lacking under this Court's decision in *Daimler*, absent a showing of "exceptional circumstances. However, the Court in *Daimler* did not consider whether compliance with a state registration statute satisfied that condition. For those reasons, petitioner relied on registration jurisdiction as a basis for personal jurisdiction, but the Pennsylvania Supreme Court ruled that its courts could not constitutionally exercise that form of jurisdiction over petitioner's claim because of the Due Process Clause. Pet. App. at 42a. That ruling was required, according to that court, because petitioner was trying to obtain general jurisdiction over respondent, and *Daimler* precluded state courts from exercising jurisdiction over claims that do not arise in the forum state, unless the defendant is "at home" in the forum state, and respondent is not at home in Pennylvania.

To the extent that the court below concluded that registration jurisdiction is never a constitutional basis for jurisdiciton, that ruling was in error. In cases in which the plaintiff's claim has a substantial connection to the forum state, even if less than required to obtain specific jurisdiction, registration jurisdiction, to which the defendant has consented, can provide a traditional and valid basis to secure personal jurisdiction. As amici read the opinion of the Pennyslvani Supreme Court, it declared that the Pennsylvania registration jurisdiction is facially invalid, even though there are cases like *Cooper Tire & Rubber Co.* v. *McCall*, 863 S.E.2d 81 (Ga. 2021), *petition for cert. pending*, No. 21-926, discussed below, in

which there are more than sufficient contacts with the forum state to defeat an as-applied challenge to the law.

Amici do not contend that there are no limits to the reach of registration jurisdiction, and hence decisions like *Pa. Fire Ins. Co. of Phila.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), in which the claim has no relation to the forum state, should be overturned. However, amici also believe that the Dormant Commerce Clause and this Court's decision in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), in particular its inquiry into the relative burdens and benefits of the state law, rather than the Due Process Clause, are the preferred method of analysis. In this case, both parties and the lower courts proceeded on an all-or-nothing basis (as the law appeared to be at the time) in resolving the jurisdictional quesiton. As a result, although the lower courts erred in concluding that registration jurisdiction was always unconstitutional, the record is not sufficient to determine the comparative benefits and burdens of allowing the use of the Pennysylvania registration jurisdiction statute in this case. Accordingly, the Court should vacate the judgment below and remand to allow the record to be supplemented and for the Pennsylvania state courts to make the *Pike* determination.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE VACATED AND REMANDED.

The Due Process Clause Does Not Bar Registration Jurisdiction.

Respondent and the court below appear to take the position that a state court may obtain personal jurisdiction over a claim that arose wholly outside the forum state *only* if that court has general jurisdiction, *i.e.,* when the defendant is "at home" in the forum state because it is incorporated in that state or has its principal place of business there. *Daimler AG v. Bauman,* 571 U.S. 117, 122, 127 (2014). That position is plainly incorrect.

The clearest example of a court with general jurisdiction over a defendant not at home in the state is *Burnham v. Superior Court,* 495 U.S. 604 (1990). The defendant was domiciled in New Jersey, where he lived with his wife until she moved to California. The husband was personally served in California, and this Court upheld the lower court ruling that it had general jurisdiction over him, against a Due Process challenge that the court could not adjudicate his wife's claims for divorce, alimony, and child support.

A further basis for securing general jurisdiction over an out-of-state defendant occurs when the defendant consents to be sued in that state. Under the law of Pennsylvania, a company that registers is not made amenable to suit in that

state simply because it registered: when it registers it also signs a consent, as required by state law, to be sued in Pennsylvania. Amici do not understand either the Pennsylvania Supreme Court or respondent to argue that consent can never be the basis for obtaining personal jurisdiction, and if they did, they would be facing a long history of contrary precedent.

For example, in *Pennoyer v. Neff,* 95 U.S. 714, 735 (1877), this Court stated that, in certain circumstances, non-residents could be required "to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted . . . and provide . . . that judgments rendered upon such service may . . . be binding upon the non-residents both within and without the State." Subsequently, this Court again acknowledged consent as a basis for personal jurisdiction, noting that there are a "variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court [including] constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures.'" *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982).

Moreover, no one questions that a forum-selection clause in a contract can confer personal jurisdction under its terms, regardless of where the conduct giving rise to the claim took place. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). In addition, under federal (and most state) rules and statutes, if a defendant fails to raise a

defense of lack of personal jurisdiction in a timely manner, the defense is forfeited, no matter where the claim arose. *See* Federal Rules of Civil Procedure 12(b)(2) and 12(h)(1).

Shaffer v. Heitner, 433 U.S. 186 (1977), did not change the Court's approach to consent jurisdiction, even as it set constitutional limits on the validity of quasi-in rem jurisdiction as a basis for imposing personal liability on an out-of-state defendant who owns property in the forum-state. To the contrary, the opinion repudiated the contention made by defendants in some registration jurisdiction cases that the combination of *International Shoe* and *Shaffer* cuts back on all methods of obtaining personal jurisdiction over non-residents for out-of-state claims other than at-home general jurisdiction: "The immediate effect of this departure from Pennoyer's conceptual apparatus was to *increase* the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Id.* at 204 (emphasis added).

What is most significant about *Shaffer* for this case is the response of the Delaware legislature and the Delaware courts to this Court's decision. Within 13 days of the decision, the Delaware legislature enacted 10 Del. Code § 3114 (a), which provides that every non-resident who becomes a director of a Delaware corporation shall "be deemed thereby to have consented to the appointment of the registered agent of such corporation … as an agent upon whom service of process may be made in all civil actions or

proceedings brought in this State … in any action or proceeding against such director… for violation of a duty in such capacity." The constitutionality of that statute was upheld in *Armstrong v. Pomerance,* 423 A. 2d 174 (Del. 1980), even though the claims in that case did not arise out of defendant's conduct in Delaware and so arguably lacked a sufficient connection with Delaware if that is required. The important point, however, is that if Due Process were violated unless plaintiffs could fit their claims under either general or specific jurisdiction, statutes like section 3114, utilizing a form of consent similar to that at issue here, would be unconstitutional.

A holding that Due Process voids consent in all cases, as respondent broadly suggests, would contravene many decisions of this Court and require that major areas of the law that rely on variants of consent as a basis for jurisdiction be recast. For example, the contract provision at issue in *Carnival Cruise Lines, supra,* required a passenger who was injured on a cruise ship in Pacific waters to sue only in Florida. If respondent's consent to register and be sued in Pennsylvania does not allow this suit, the contract in *Carnival Cruise Lines* would have been per se invalid Yet this Court upheld that forum selection provision, finding that the chosen forum was reasonable, 499 U.S. at 591-93, which is an important element of the concept of registration jurisdiction advanced by amici.

Similarly, this Court's consistent interpretations of the Federal Arbitration Act, 9

U.S.C. § 2, which applies only when both parties consent to arbitration, could not stand in cases like *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In that case, the plaintiffs "consented" to arbitration only after having purchased the product at issue. As a result, the consent was given at a time that failed to provide a reasonable opportunity to object to the forced waiver of their constitutional rights to sue in court before a jury of their peers.[2]

Nothing in *Daimler* bars the use of registration as a basis for personal jurisdiction. There is no mention of registration statements in *Daimler*. *Daimler* considered only whether a court may exercise general jurisdiction when an entity "has not consented to suit in the forum.'" 571 U.S. at 129. It did not resolve the separate question of whether consent to jurisdiction via a business registration statute that unambiguously gives notice to the registrant comports with Due Process. Moreover, Due Process is primarily a procedural protection that assures that a party receives reasonable notice and a meaningful opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). *See also Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) setting forth the three interests that must be considered when deciding whether the procedures required by Due Process have been satisfied. But here respondent makes no claim of a denial of any procedural protections: it argues instead that Due

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[2] *See* Brief of Appellees, *Concepcion v. AT&T Mobility LLC*, No. 08-56394, 2009 WL 2494187 (9th Cir. filed Mar. 9, 2009) (Statement of Facts).

Process gives it the substantive right to keep the case out of the Pennsylvania courts despite its having consented to be sued there.

The best evidence that the Due Process Clause is not a proper basis for respondent's claim that it cannot be sued in Pennsylvania in this case is this Court's decision in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992). At issue there was a North Dakota law that required out-of-state companies that made substantial sales to North Dakota residents to collect the North Dakota use tax imposed in lieu of a sales tax when a product was sent from another state. A prior decision in *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753 (1967), had found a similar statute to be unconstitutional as a violation of both the Due Process and the Dormant Commerce Clauses. However, the Court in *Quill* ruled that Due Process was no barrier, although the Dormant Commerce Clause still rendered the law invalid.

In both *Quill* and this case, there are no procedural flaws in the law under cases such as *Mullane* or *Mathews,* but rather a substantive objection to the power of the state to take certain regulatory action that will affect conduct outside the state. Therefore, as in *Quill,* Due Process is not a proper basis for challenging registration jurisdiction generally or as applied to this case. As we now show, if there is a problem with a plaintiff using registration statutes to sue over claims

against a non-resident business, the proper way to challenge those applications is under the Dormant Commerce Clause.[3]

The Dormant Commerce Clause Does Not Generally Bar the Exercise of Registration Jurisdiction.

Apparently recognizing that a defendant's actual consent, freely give, suffices for personal jurisdiction, respondent argues that it had no choice but to sign the Pennsylvania registration statement and consent in order to do business there. Amici assume that, as a practical matter, because respondent wanted to derive benefits from the Pennsylvania market, it had no choice but to register. For that reason, the Court should treat the Pennsylvania statute as if it read, "Corporations that do business in the Commonwealth are subject to suit in the courts of the Commonwealth arising out of their business, regardless of where the claim arose." But as amici show below, because there are many cases in which the application of both the actual Pennsylvania statute and the hypothetical one would be constitutional, the Court should examine them as applied and not as facial challenges. *See Wash.*

[3] For a discussion by one of the amici as to why the Dormant Commerce Clause is generally the preferable way to analyze all efforts by state courts to exercise personal jurisdiction over non-resident businesses, see Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 De Paul L. Rev. 517 (2019).

State Grange v. Wash. State Republican Party, 552 U.S. 443, 449–51 (2008) (discussing preference for as- applied over facial challenges). Accordingly, the question under the Dormant Commerce Clause is whether the law is constitutional based on the facts of the claim at issue.[4]

Because Pennsylvania's registration requirements do not discriminate against non-resident corporations, they are valid unless they fail the standard set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

This Court further explained its test this way:

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[4] In its brief in opposition (at 15), respondent invokes the unconstitutional conditions doctrine as a basis for holding that there is no personal jurisdiction over it, on the theory that Pennsylvania cannot require non-resident companies to "consent" to be sued in the state as a condition of doing business there. In our view, given the facts of this case, that argument is no more than an alternative statement of the claim under the Dormant Commerce Clause, which is a better suited vehicle for analyzing that defense. This brief does not address other situations in which the unconstitutional conditions doctrine may impose independent constraints on state authority.

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.*

Applying that standard, the burden for Norfolk Southern to defend in Pennsylvania is minimal. It is a major railroad that has extensive facilities in Pennsylvania, and its Virginia headquarters are only about 300 miles from the court where the case was filed. It will surely have no difficulty obtaining qualified counsel since it has to defend other suits involving Pennsylvania accidents on a regular basis. And because petitioner was exposed to respondent's asbestos in both Virginia and Ohio, at least some fact witnesses will have to come from out-of-state no matter where the case is tried.

On the benefits side, the record is silent on why petitioner chose to sue in Pennsylvania. It does reveal that he worked and lived there before he learned that he had colon cancer. Presumably, some of his medical or other witnesses reside there, but in the absence of further evidence for the selection of this forum, the courts cannot decide the balancing required by *Pike*.

In any event, this Court's decision in *South Dakota v. Wayfair, Inc*, 138 S. Ct. 2080 (2018), confirms that the Dormant Commerce Clause does not bar the Pennsylvania courts from using

registration jurisdiction to enable them to adjudicate many claims against out-of-state defendants. The Court there reversed its prior ruling in *Quill* and upheld South Dakota's law that required large out-of-state sellers like Wayfair to collect sales taxes on their shipments into South Dakota and to remit them to the state in the face of a Commerce Clause challenge. There can be no question that the law imposed *some* burdens and costs on the sellers, but it also served two important purposes: it raised substantial revenues, and it protected in-state sellers from the unfair advantage that out-of-state sellers had because they did not have to charge the sales tax.

The benefits from laws like Pennsylvania's registration statute can be seen by looking at the facts in *Cooper Tire & Rubber Co.* v. *McCall*, 863 S.E.2d 81 (Ga. 2021), *petition for cert. pending*, No. 21-926, which involves a Georgia similar law, and which is being held for this case. The 2016 injury in *Cooper* occurred in Florida to a Florida resident who was a passenger in a car owned and driven by one defendant who was a Georgia resident. The allegedly defective Cooper tire was installed on the car when it was sold to the Georgia driver by a local Georgia car dealer defendant, who could only have been sued in Georgia. *Id.* at 83. Although Cooper does not design or manufacture tires in Georgia, it maintains an enormous regional distribution facility in Albany, Georgia which is the sixth-largest warehousing building in the entire State. From 2013 to 2017, Cooper distributed approximately 2,500,000 tires through this facility,

and during those same years, sold more than 1,000,000 tires in Georgia.[5]

Had the accident happened in Georgia, there is no doubt that, after *Ford Motor Co, supra,* Cooper could have been sued in Georgia. But its burden of proving that its tire was not defective will be no different in Georgia in that case than if the accident had happened in Georgia. The practical reason that plaintiff chose Georgia as the forum in *Cooper* is that Georgia is the only state where all three defendants – driver/owner, car dealer, and tire manufacturer – can be joined in a single lawsuit. And the strategic reason for defendant Cooper to try the case in any place but Georgia is to avoid its liability by pointing to the empty defendant's chair, where the car dealer should be sitting, which would enable it to shift the blame to the dealer, just as the dealer will try to do to Cooper if the case is tried in Georgia without Cooper.[6]

Wayfair is important for another reason: Wayfair argued that, if the South Dakota law at issue were upheld, that holding would support laws that harmed small sellers or permit states to enact burdensome and complex laws that would result in substantial burdens on commerce. The Court's response was that the Commerce Clause is sufficiently flexible in its ability to respond to those

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[5] Brief in Opposition in *Cooper Tire* No. 21-926 at 7.

[6] The factual scenario and the reason why the plaintiffs in *Aybar v. Aybar,* 177 N.E.3d 1257 (N.Y. 2021), wanted the case brought in New York are the same as in *Cooper*: there was a New York tire dealer who had sold the tire in question who could not be used in Virginia where the accident occurred.

fact-specific situations, and hence there was no need to bar South Dakota from enforcing its otherwise fair and reasonable law. 138 S. Ct. at 2098-99. As in *Wayfair*, the Dormant Commerce Clause in this context is also sufficiently flexible to respond to cases at the center of respondent's arguments, where the defendant would face significant hardship from being haled into a Pennsylvania court, or where the claims have no connection to its conduct in the forum state. However, Pennsylvania's registration jurisdiction is constitutional on its face, although in some cases the facts may support constitutional concerns where the "burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The facts of two registration jurisdiction cases from this Court illustrate how the Dormant Commerce Clause, when applied under existing doctrine, would produce reasonable results. In *Ex parte Schollenberger,* 96 U.S. 369 (1877), a citizen of Pennsylvania, brought suit in the Circuit Court of that state against certain foreign insurance companies, based on policies which they had severally issued on his property in Pennsylvania, relying for jurisdiction on their consents filed in order to do business in the state. Those facts would give rise to no Dormant Commerce Clause problem. By contrast, in *Pa. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917), that Clause, as interpreted in *Pike,* would bar the suit from being brought in Missouri by a Colorado corporation regarding property in Colorado, that was insured by an Arizona

insurance company that was registered to do business in Missouri, because the burden of defending in that state exceeded any legitimate benefit from allowing the Colorado plaintiff to sue there.

In fact, a number of cases cited by respondent in its brief in opposition involve blatant forum shopping on the part of the plaintiff, as evidenced by the lack of any connection between the claim made and the forum chosen. These include *State ex rel. Norfolk S. Ry. Co. v. Dolan,* 512 S.W.3d 41 (Mo. 2017), where an Indiana citizen who worked for the defendant in Indiana, which is where he was injured, but nonetheless sued the railroad in Missouri, and *DeLeon v. BNSF Ry.* Co., 426 P.3d 1 (Mont. 2018), which involved three railroad cases where non-residents of Montana sued there for injuries that occurred in other states.

Similarly, in a suit involving wrongful exposure to asbestos, the plaintiffs chose to sue in Delaware (where they had similar suits against other companies that were incorporated there), even though plaintiffs were Georgia residents, the defendant was a Georgia corporation, and the exposure took place in Florida. *Genuine Parts* Co. *v. Cepec,* 137 A.3d 123 (Del. 2016). *See also Brown v. Lockheed-Martin Corp.,* 814 F.3d 619 (2d Cir. 2016) (multiple exposures to asbestos outside the forum state by plaintiff's father).

Another case that attempted to use registration jurisdiction to secure a favorable

forum is *Budde v. Kentron Hawaii, Ltd.,* 565 F.2d 1145, 1146 (10th Cir. 1977), where the claim was described as one

> for damages based on personal injuries sustained as a result of the defendants' negligence, where the plaintiff is a citizen of Louisiana, the two corporate defendants are incorporated in Hawaii and Pennsylvania, respectively, with each corporation qualified to do business in Colorado, and the cause of action is not based on the business activity carried on by either corporation within the State of Colorado, but rather on an accident which occurred in Viet-Nam.

In some cases, the plaintiffs seek to use the defendant's registration in their home state to sue for a claim that arose elsewhere. *Pittock v. Otis Elevator Co ,* 8 F.3d 325 (6th Cir. 1993) (injury in Las Vegas elevator to Ohio couple). In others, such as *Ratliff v. Cooper Laboratories, Inc.,* 444 F.2d 745, 746 (4th Cir. 1971), the plaintiffs did not use registration jurisdiction to obtain a convenient forum, but "for the sole purpose of availing themselves" of the forum state's statute of limitations statute because the limitation periods had run in the other states with a connection with the claims at issue.

To be sure, in future cases courts scrutinizing the exercise of registration jurisdiction under the Dormant Commerce Clause will need to strike the appropriate balance between the parties' competing interests in a favorable forum. In most

of the cases in which registration jurisdiction is relied on, the defendant is a large multistate company for which the burden of hiring counsel and bringing in its expert and fact witnesses is a small portion of the burden of having to defend no matter where the case is tried. Moreover, because these challenges can be made only on an as-applied basis, defendants will have a significant burden to establish the invalidity of being sued there under the standard in *Pike* when they have knowingly consented to be sued in that jurisdiction. But when plaintiffs choose a forum, for which there are no legitimate benefits under *Pike*, in contrast to a case like *Cooper Tire,* the courts will have the necessary tools to curb forum-shopping abuse.

Finally, even if there is registration jurisdiction, defendants may also invoke the doctrine of forum non conveniens as set forth in the Restatement (Second) Conflicts of Law § 84 (1971) to obtain dismissal of their case:

> **Forum Non Conveniens**: A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.

The near universal availability of the doctrine can be seen from an opinion of the Rhode Island Supreme Court, which officially adopted it, after reviewing the laws in all fifty states. *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008).

Not surprisingly, the Pennsylvania Supreme Court has relied on that doctrine to affirm a dismissal of a case against a railroad in which the accident occurred in another state, the plaintiffs were non-residents, and there were no witnesses from the county where the case was filed. *Rini v. New York Cent. R. Co.*, 240 A.2d 372, 373 (Pa. 1968). Indeed, this Court has endorsed the doctrine in a diversity case filed in federal court in New York, where personal jurisdiction was based on a corporate registration statute similar to that relied on here. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). *See also Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981).

Another means for defendants to deal with what they believe to be an improper forum is to remove the case to federal court under 28 U.S.C. § 1441, and then move to transfer under 28 U.S.C. § 1404(a). That path is available for almost all federal question cases, but not this one because Congress has expressly excluded Federal Employer Liability Act cases like this from removal. 28 U.S.C. § 1445. Removal is also available under section 1441 for many diversity cases. It would not, however, be available in a case like *Cooper Tire*, because of the exclusion from removal where there is an in-state defendant because of the express prohibition on such removals in section 1441(b). However, in cases like *Cooper Tire,* the need to join all the defendants in one court provides the strongest justification for plaintiffs to be able to use

registration jurisdiction, while at the same time advancing judicial efficiency through consolidation of related claims in a single forum.

The bottom line is that a properly calibrated use of registration jurisdiction, with the protections of the Dormant Commerce Clause and the availability of other laws that guard against improper forum shopping, satisfy the requirements of the Constitution, and nothing in the Due Process Clause or *Daimler* is to the contrary. Most cases under the Dormant Commerce Clause will be easy to resolve, but for the few that are not, the fact that the defendant has registered to do business and consented to be sued in the forum state should tip the balance under *Pike* in favor of the plaintiff because the party alleging that registration jurisdiction as applied to those facts is unconstitutional will not be able to show that the law imposes burdens that are "clearly excessive in relation to the putative local benefits."

However, because in this case, the benefits of allowing this suit to be brought in Pennsylvania are unclear, the Court should remand the case to enable the Pennsylvania courts to develop the record and to address the determination required to be made under *Pike*. That augmentation could include evidence that petitioner's colon cancer grew internally and manifest itself while he was a Pennsylvania resident and was working for respondent, as well as where he was first treated

for cancer and where his doctors and other witnesses are located. That kind of connection, in addition to respondent's "continuous and systematic" presence in the state, *International Shoe, supra*, 326 U.S. at 317, would be more than enough to satisfy the balancing test in *Pike*.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated, and the case remanded for further proceedings under the Dormant Commerce Clause.

Respectfully submitted,

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