No. 21-1168

IN THE

Supreme Court of the United States

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ROBERT MALLORY

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Respondent.

——— ♦ ———

On Writ of Certiorari to the Pennsylvania Supreme Court

——— ♦ ———

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP")[1] is a nonprofit that advocates for the interests of insurance policyholders.

Public officials, insurance regulators, academics, and journalists routinely seek UP's input on insurance and related legal matters. UP's executive director, Amy Bach, has been appointed to twelve consecutive terms to officially represent consumers at the National Association of Insurance Commissioners ("NAIC"). UP is also a member of the Federal Advisory Committee on Insurance to the U.S. Treasury and a regular participant before the National Association of Insurance Legislators. UP routinely files amicus briefs on issues affecting its membership. See, e.g., *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 314 (1999).

UP's interest "isn't with settling on the right outcome in th[is] case[]." *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1039 (2021) (GORSUCH, J., concurring in the judgment). Rather, it lies in helping the Court "mak[e] sense of [its] personal jurisdiction jurisprudence" and to help "sort out a responsible way to address [current] challenges . . . in light of the Constitution's text and the lessons of history." *Id.* The history of the question presented is, in large part, a history of insurance disputes. Those decisions may not dictate who wins this case, but they should inform the reasons the Court gives for its judgment.

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[1] The parties have filed blanket consents to amicus briefs in this case. Rule 37.3(a). No party or their counsel authored this brief, in whole or in part. Nor has any person besides amicus, its members, or its counsel made any monetary contribution intended to fund its preparation or submission. Rule 37.6.

SUMMARY OF THE ARGUMENT

Consent-by-registration laws prevent disputes in cases where the minimum-contacts test might ultimately be satisfied. Their validity beyond that context is the question before the Court.

The Court last addressed those issues over a century ago. *Pa. Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Ex parte Schollenberger*, 96 U.S. 369 (1877). The decision below read these cases as conflicting with the Court's modern general-jurisdiction decisions, and so it held the older ones must be obsolete.

That rationale is erroneous, even if the result was not. The *Pennsylvania Fire* rule emerged from a unique context, and it is viable and valuable in that context. It involves the States' interest in supervising insurance companies. The Court has long recognized insurance law as the exception to conventional rules of federalism. As a result, it should be neither surprising nor suspicious that insurance disputes yield unique personal-jurisdiction rules.

Thus, the Court need not overrule or limit any of its cases to decide this one. Instead, as it has done many times before, the Court should simply acknowledge and affirm the distinct insurance-law interests animating *Pennsylvania Fire*. Petitioner does not cover that aspect of the issue. We submit this brief to fill the gap.

The premise of insurance is simple. The policyholder pays a sum certain (the premium) in exchange for the insurer's promise to indemnify its customer against a larger, uncertain loss. By collecting premiums from a large pool of subscribers—not all of whom

will suffer loss—the company ensures it will be able to indemnify those that do.

This service is crucial to modern society, but it carries its own enormous risk. Insurers who collect too little in premiums risk insolvency. They standardize their forms so that they are identical across the country. This makes risk predictions more accurate—but as a result, those terms are largely nonnegotiable by customers. That creates an incentive to draft lopsided or confusing policies so that the insurer can collect substantial premium but avoid the risk.

One key answer to these risks has always been government supervision. Since the Founding, Congress and this Court have assumed or insisted that the States perform that task. As a result, State governments and State courts are almost entirely responsible for licensing and supervising insurers.

Consent-by-registration laws are a critical part of that framework: they allow policyholders to sue the insurer anywhere it does business, without regard for suit-based contacts. That, in turn, discourages insurers from waging procedural wars of attrition against those who can least afford it. And it keeps insurers from "escap[ing] out the back [door]" when a State court has an interest in construing the *language* of a policy, even if the claim itself arises out of the State. *Ford*, 141 S. Ct. at 1039 (GORSUCH, J., concurring in the judgment).

In short, if the statute here is unconstitutional, then it is because Norfolk Southern is not an insurer—rather than because *Pennsylvania Fire* is wrong. That case does no mischief in the insurance context. If the Court affirms, it ought to simply distinguish that case. Otherwise, it risks upsetting centuries-old reliance interests undergirding state insurance law.

ARGUMENT

I. The unique status of insurers in our economy and federal system.

A. Benjamin Franklin had his hands in everything, including the founding of our insurance system. *State Insurance Regulation: History, Purpose & Structure* at 1, NAT'L ASS'N OF INS. COMM'RS (last visited June 29, 2022) [*State Insurance Regulation*].[2] In 1752, he helped organize the Pennsylvania Contributionship for the Insurance of Houses from Loss by Fire—a company still in existence today. *Id.*

Insurance is a transaction by which one party pays a sum certain (the premium) in exchange for the insurer's promise to compensate (or indemnify) it for a loss that may not occur. 1 COUCH ON INSURANCE 3D § 1:6. To meet these obligations, the insurer must collect premiums from a wide pool of policyholders, not all of whom will suffer loss, so that it can "accept each risk at a slight fraction of the possible liability upon it." *Grp. Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979) (quotations omitted).

The dryness of these statements should not mask their importance. Disasters are a fact of life. The value of insurance, simply stated, is to prevent those disasters from driving its victims into poverty. See Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 627 (1999). Franklin's Contributionship illustrates the enormous benefits of a well-run insurance industry: by

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[2] https://www.naic.org/documents/consumer_state_reg_brief.pdf

promoting aggressive fire-safety standards—and refusing to insure buildings that would not comply—the company helped Philadelphia avoid the massive fires that plagued other large cities at the time.

B. The genius of the insurance product comes with serious public risks. By its nature, "an insurance company's real costs are not known until an insurance policy matures and all claims are paid." Randall, 26 FLA. ST. U.L. REV. at 627. As a result, "the insurance business tends toward extreme competition in pricing," and it is almost impossible for ordinary consumers to evaluate an insurer's solvency. *Id.* If the insurer fails to collect enough premiums to pay claims when due, the harm to policyholders—who count on insurers to protect them—is usually "devastating." *Id.*

Because so many insurers are massive, highly capitalized creatures, they also enjoy enormous leverage over counterparties. In the words of one State's high court: "[T]he insurer drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or we do not buy insurance." *Am. States Ins. Co.* v. *Kiger*, 662 N.E.2d 945, 947 (Ind. 1996) (quotations omitted). That leverage creates a danger that insurers will draft the policy in confusing ways, to maximize the cases where the insurer collects the premium but escapes the risk.

Insurers also enjoy great leverage when called upon to perform their end of the deal. The policyholder performs (i.e., pays the premium) before it receives anything of real value. The insurer, in contrast, receives the entire value of the contract before it must do anything. Indeed, the very nature of insurance assumes that, in most cases, the insurer will *never* do anything besides deposit a check. Thus, for an insurer, taking a

hard line on claims has little downside. It can take advantage of the time value of money and try to settle the claim at a discount: in general, the most it will ever have to do is pay the claim.

Because of these hazards, "[g]overnment has always had a special relation to insurance." *Osborn* v. *Ozlin*, 310 U.S. 53, 65 (1940). Contracts of insurance "have greater public consequence than contracts . . . whose effect stops with the individuals." *German All. Ins. Co.* v. *Lewis*, 233 U.S. 389, 413 (1914). In the Court's words, insurance "has come to be considered a matter of public concern" and must "be controlled by the public for the public good." *Id.* at 413-15 (quotations omitted). Those are striking propositions for a *Lochner*-era decision. But they underscore the "definite and old" tradition of State insurance supervision. *Id.* at 415.

For the first part of our history, States regulated insurers through a patchwork of corporate and statutory law through their authority over corporate charters. 1 STEMPEL ON INSURANCE CONTRACTS § 2.07 (3d ed. 2007). After the devastating New York Fire of 1835, States enacted laws setting mandatory insurance reserves. *Lewis*, 233 U.S. at 412. In 1851, New Hampshire enacted the first comprehensive insurance-regulatory law and appointed the first State insurance commissioner. *State Insurance Regulation*, at 1; Randall, 26 FLA. ST. U. L. REV. at 629-30.

The insurance industry challenged these laws as unconstitutional soon after the Fourteenth Amendment was ratified. *Id.* at 630-31; 1 COUCH ON INS. 3D § 2:4. Fearing the total deregulation of the insurance market, this Court held that "[i]ssuing a policy of insurance is not a transaction of commerce," effectively leaving all insurance regulation where it was before:

with the States. *Paul* v. *Virginia*, 75 U.S. 168, 183 (1868); 1 COUCH ON INS. 3D § 2:4 & n.2. "For three-quarters of a century" after *Paul*, "state authority over insurance regulation was unquestioned" and by the 1940s, "was fairly comprehensive." Randall, 26 FLA. ST. U. L. REV. at 632.

Since 1910, insurers have also been excluded from federal bankruptcy. *Vallely* v. *N. Fire & Marine Ins. Co.*, 254 U.S. 348, 352 (1920); 11 U.S.C. § 109(b)(2). Instead, State receivership laws govern insurer insolvency. 1 COUCH ON INS. 3D § 5:18. Those laws generally preempt federal law because they are enacted "for the purpose of regulating the business of insurance." *U.S. Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 499-506 (1993) (quoting 15 U.S.C. § 1202(b)).

The Court overruled *Paul* in 1944. *United States* v. *Se. Underwriters Ass'n*, 322 U.S. 533, 539-53 (1944). Congress, however, preferred things the way they were. "In reaction to *South-Eastern Underwriters*, Congress moved quickly, enacting the McCarran–Ferguson Act to restore the supremacy of the States in the realm of insurance regulation." *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 40 (1996) (quotations omitted). Little has changed since then.

C. In sum, since 1789, insurance has been regulated almost exclusively by the States. *State Insurance Regulation*, at 1-2. The NAIC has identified many benefits of state-centric regulation. *Id.* "State systems are accessible and accountable to the public and sensitive to local social and economic conditions." *Id.* at 2. "State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept." *Id.* And although insurers originally opposed

state regulation, the industry's "strong and long-standing" preference is now to maintain it. Randall, 26 FLA. ST. U. L. REV. at 672.

The current structure also provides enormous financial benefits to States. In 2000, States collected more than $10.4 billion in revenue from insurance sources. *State Insurance Regulation*, at 2. Roughly 8.4% of that money went to actual insurance regulation; the other 91.6% (or more than $9.6 billion) was deposited in State general funds. *Id.*

Except as specifically preempted by federal laws such as ERISA, State insurance regulation is comprehensive. Generally, an insurer may only sell insurance within a State if it secures a license to do so. 1 COUCH ON INS. 3D §§ 2:22, 3:21. To secure that license, the insurer must consent to the State's regulation of everything from the insurer's name and capitalization to its handling of realized profits. *Id.* §§ 2:20-37. States set insurance rates, enforce solvency and reserve requirements, impose licenses, supervise commissions paid to brokers, and monitor claims handling. Randall, 26 FLA. ST. U. L. REV. at 629.

States also have the general power to "approve or disapprove" policy forms, insist on the inclusion (or exclusion) of terms, and require a certain level of readability. 1 COUCH ON INS. 3D § 2:26. Regulators will often inquire about why insurers are changing their forms and decline to approve them unless the insurer provides a satisfactory explanation. These inquiries are often directed to rating issues—if the insurer is providing less coverage, then it must accept less in premium. E.g., *Morton Int'l* v. *Gen. Acc. Ins. Co.*, 629 A.2d 831, 875-76 (N.J. 1993).

An insurer's failure to provide "full disclosure" to State regulators—even another State's regulators—can lead State courts to disregard those provisions in litigation brought by policyholders. *Id.* In this process, too, the States rely on each other. *Id.* at 853 (surveying statements to regulators in Georgia, Kansas, Virginia, and Puerto Rico and considering amicus briefs from Delaware, Pennsylvania, West Virginia, and Indiana on the same issues). The determination of those issues in one State has powerful ramifications in other States. *Ala. Plating Co.* v. *U.S. Fid. & Guar. Co.*, 690 So. 2d 331, 334 & n.2 (Ala. 1996) (overruling a prior case enforcing an exclusion, in part, because of *Morton*).

II. This Court has almost always upheld States' use of consent-by-registration laws to supervise insurers.

Petitioner's statutory appendix is rife with insurance-specific laws for a good reason.[3] Consent-by-registration laws are some of the oldest methods of American insurance regulation. In many cases, States imposed these rules on insurers before they did so for other corporations. See Pet'r Br. 14, 16-18, 38-39. The insurance-law aspects of those cases explain how the *Pennsylvania Fire* rule came to be.

[3] Searching Petitioner's 274-page statutory appendix for the word "insurer" or its derivatives yields about *three hundred* results. The Court should look closely at the differences—in timing, wording, and detail—between the insurance statutes and the regular ones.

A. Nearly 200 years ago, an Indiana insurer refused to pay a judgment rendered against it in Ohio, on a policy insuring property in Cincinnati. *Lafayette Mut. Ins. Co.* v. *French*, 59 U.S. 404, 405-06 (1855). In response, the policyholder pointed to an Ohio law requiring all foreign insurers to agree that "service of process on [a] resident agent . . . shall be 'as effectual as though the same were served on the principal.'" *Id.* at 406. The insurer argued that "it could have no existence out of [Indiana], and, consequently, could not be sued in Ohio." *Id.* at 405. As a "person[] not amenable to the jurisdiction rendering the judgment[]," the insurer claimed that the Ohio judgment was not subject to full faith and credit. *Id.* at 406.

The Court disagreed. Although the insurer could not "pass personally beyond the limits of [Indiana]," it also could not do business in Ohio without "the consent, express or implied, of the latter State." *Id.* at 407. "This consent may be accompanied by such conditions as Ohio may think fit to impose" subject to any restrictions imposed by federal law. *Id.* The Court found nothing "unreasonable in itself" about forcing an insurer "transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed." *Id.* at 407.

Schollenberger is similar. 96 U.S. at 370, 376-77. Confronting an insurance-specific Pennsylvania law, the Court issued a writ of mandamus ordering the trial court to exercise jurisdiction over such insurers. *Id.* The Court explained the law in terms of a bargain: The insurers had, "in express terms, in consideration of a grant to the privilege of doing business within the State, agreed that they may be sued there." *Id.* at 376.

The Court reached these issues under the Fourteenth Amendment over a century ago. *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 602, 604-05 (1899). Like the State laws in *French* and *Schollenberger*, Tennessee required insurers, specifically, to appoint an agent for the purpose of accepting service of process—and by extension, to agree to be sued there. *Id.* at 605. The insurer in *Spratley* had ceased writing new life-insurance policies in Tennessee but had continued collecting premiums on old ones. *Id.* at 607. It received a claim under once such policy and sent its adjustor from Connecticut to investigate. *Id.* at 608.

The adjustor apparently tried to strong-arm Mrs. Spratley into accepting a discount, because she sued almost immediately. *Id.* Her process server tagged the adjuster with the summons before he got on a train back to Connecticut. *Id.* The insurer ignored the suit, took a default judgment, and resisted collection. *Id.*

The Court found that enforcing the judgment "would not be taking the property of the company without due process of law." *Id.* at 609. Without deciding whether the law would be enforceable where service was made on "any agent . . . no matter what character of agent the person might be," the Court pointed out that this case involved an *insurance adjustor* authorized to investigate and settle a claim. *Id.* at 610. "Entering the State with this authority, and acting in this capacity . . . we think it a proper case in which the law would imply . . . the power to receive service of process in the case which he was attending to." *Id.* at 612. That, itself, constituted due process of law. *Id.* at 610. Cf. *Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604, 622-23 (1990) (plurality opinion of Scalia, J.) (recognizing this as one of the "enduring traditional notions of fair play and substantial justice") (quotations omitted).

The Court reached a similar conclusion a few years later. *Pa. Lumberman's Mut. Fire Ins. Co.* v. *Meyer*, 197 U.S. 407, 414-16 (1905). The insurer had sold a fire policy on the subject building in New York, but it insisted that it could only be sued in Pennsylvania, where it was incorporated. *Id.* The policyholder countered that the insurer had a director residing in New York and that personal service on him was sufficient. *Id.* at 417-18. The Court agreed with the policyholder, pointing out that the director's residence would "add to the confidence of possible insure[d]s with the company in that state, and in that way to secure more business therein than would otherwise be the case." *Id.* at 418. The Court also assumed that service on the director "would certainly result in notice to the company itself." *Id.*

The upshot of *Spratley* and *Meyer* is that the Fourteenth Amendment did not alter the States' preexisting rights "to impose such terms as [they] may see fit upon a corporation of this kind, [i.e., an insurer]," as part of the bargain by which the State "will permit the [insurer] to do business within its borders." *Spratley*, 172 U.S. at 621; *Schollenberger*, 96 U.S. at 376. A State has a significant interest in "secur[ing] to its citizens a remedy in the domestic forum upon this very important class of contracts." *Meyer*, 197 U.S. at 418.

B. The Court decided *Pennsylvania Fire* against this backdrop. There, a policyholder sued an Arizona insurer in Missouri over a policy insuring property in Colorado. 243 U.S. at 94-95. Missouri law required every insurer to name the "Superintendent of the Insurance Department" as the insurer's agent for service of process "so long as [the insurer] should have any liabilities outstanding in the state." *Id.* at 94. The insurer complained that applying the statute to a policy

with no connection to Missouri violated the Fourteenth Amendment. *Id.*

Again, the Court disagreed. *Id.* at 95. Despite the absence of suit-related contacts in Missouri, the application of the statute "did not deprive the defendant of due process of law even if it took the defendant by surprise." *Id.* The insurer had agreed, with the State, that its policyholders could sue it there. *Id.* "[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts." *Id.* at 96.

The decision below reasoned that this logic was abrogated by *International Shoe* and by the Court's recent general-jurisdiction decisions. Pet. App. 6a-11a, 48a-52a (citing, among other things, *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014)). But even after *International Shoe*, the Court twice upheld State laws compelling out-of-state insurers to provide similar consent. *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 652 (1950); *Watson* v. *Empl'rs Liab. Assur. Corp.*, 348 U.S. 66, 72-74 (1954). And it later rebuffed an insurer's argument that it could not be sued in a State where it had no contacts, pointing out that its predecessor-in-interest had sold the policy to a resident of the forum. *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 221-22 (1958).

An intricate and highly effective system of state-by-state insurance regulation has flourished under the law as it now stands. The system has been so fair that the Court has not needed to hear an insurer's challenge to those statutes since the 1950s. But if the Court affirms without retaining the *Pennsylvania Fire* rule for insurance disputes, it will call this system into ques-

tion, risk fracturing the States' ability to supervise insurers, and likely impair policyholders' ability to protect themselves.

III. Even if it affirms, the Court should retain *Pennsylvania Fire* for insurance cases.

The nagging concern in general-jurisdiction cases is over-inclusiveness. This case is an example. Mr. Mallory lives in Virginia. Pet. App. 2a. Norfolk Southern is a Virginia corporation. *Id.* The injuries occurred in Ohio and Virginia. *Id.* What is this case *doing* in Pennsylvania? And if the Court ratifies *Pennsylvania Fire* here, what will come next?

Those questions are weighty. But there is at least one easy solution here. Decades ago, at a time when the sixty-hour workweek violated employees' liberty to contract, the Court still affirmed the States' ability to fix insurance rates. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 414-16 (1914). Even the *Lochner*-era Court was not concerned this would "subjec[t] to regulation every act of human endeavor and the price of every article of human use." *Id.* at 415. The Court was satisfied that it had "confine[d] [its] decision to the regulation of the business of insurance," referencing the "definite and old" principles recognizing insurance as "essentially different from ordinary commercial transactions." *Id.* at 414-15.

That reasoning should give the Court comfort here. *Pennsylvania Fire* is an insurance case. It deals with relationships that are "essentially different" than those presented by this Court's modern general-jurisdiction cases. The Court can ratify *Pennsylvania Fire* for insurance companies without worrying that it will undermine due process in other contexts.

A. The interests animating this Court's general-jurisdiction cases do not apply to insurers.

Important interests—including federalism, notice, tradition, and reasonableness—may point toward a victory for Norfolk Southern here. However, all four interests support retaining *Pennsylvania Fire* for insurance disputes.

1. In specific-jurisdiction cases, the Court has described the Due Process Clause as an "instrument of interstate federalism," under which "the sovereignty of each state . . . implies a limitation on the sovereignty of all its sister States." *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780-81 (2017) (cleaned up). In *Bristol-Myers*, that principle stopped California from usurping another State's right to hear particular *disputes*. *Id.* In a general-jurisdiction case, the logic goes, federalism might stop Pennsylvania from seizing total control over a *defendant* who is really Virginia's responsibility. Pet. App. 47a-49a.

However compelling that logic might be on these facts, it loses all force in *Pennsylvania Fire*'s original context: insurance law. The federalism dynamics in those disputes—how the States relate to each other and how they relate to the defendant—are fundamentally different. For two reasons, they are not "a mere intermeddling in affairs beyond [a State's] boundaries which are no concern of hers." *Watson*, 348 U.S. at 72.

a. First, the States have long regulated insurance, without federal oversight, through mutual respect and cooperative federalism. This distinguishes it from most areas of interstate relations and explains why *Pennsylvania Fire* came out the way it did.

The Founders knew from experience that the States were inclined towards economic warfare. THE FEDERALIST, NOS. 6-8, 11, 22 (Hamilton). The Reconstruction Congress lived through a much darker version of interstate conflict. They proposed and preserved the national government to constrain that impulse. Those principles drive this Court's efforts to police "unlawful intrusion" by one State into the sovereign interests of another in ways that threaten to "upset the federal balance." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

But insurance is the exception that proves this rule. Since 1789, either common practice, this Court, or Congress have insisted that States exercise plenary control over insurance companies. 1 COUCH ON INS. 3D § 2:4. Thus, modern insurance law looks like something the Articles of Confederation would have imagined: individual States, in cordial consultation with one another, setting rules for a major sector of the national economy.

The system coheres because the States have never treated it like a suicide pact. They work hard to promote uniformity and to minimize faction. Randall, 26 FLA. ST. U. L. REV. at 627-28. The possibility of Congressional intervention curbs the worst forms of state self-interest. This system, a product of "the premises and unique genius of our Constitution," *Nicastro*, 564 U.S. at 884 (plurality opinion), means that the standard language of an insurance policy sold in Virginia is materially identical to language sold by the same company in Pennsylvania.

Thus, in the insurance context where *Pennsylvania Fire* was decided, the Due Process Clause has little role as an "instrument of interstate federalism." *Bristol-Myers*, 137 S. Ct. at 1781. The States' relationship with each other is inherently cooperative, not competitive, and it is nearing its second century of success.

b. Second, the States care about the behavior of insurers whom they choose to license, regardless of where the conduct occurs. To be sure, Pennsylvania might care about the general behavior of Norfolk Southern, but only in the limited sense that, "as many a curbstone philosopher has observed, everything is related to everything else." *Ford*, 141 S. Ct. at 1033 (ALITO, J., concurring in the judgment) (cleaned up). But States' interest in foreign insurers is far more concrete and intimate.

Consider the details of the Missouri statute in *Pennsylvania Fire*. It required the insurer to submit to suit in Missouri on any insurance claim "so long as it should have *any liabilities outstanding in the state*." 243 U.S. at 94 (emphasis added). The statute's premise goes to the heart of why we regulate insurers: they collect premiums nationwide in order to spread risk. Because losses are by their nature contingent and unknown, one State's residents may be hit harder than others. A "manifest" state concern is ensuring that the company's assets are fairly assembled, allocated, and sufficient to pay in a disaster. *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 414 (1914).

This Court's decision in *Fabe*, 508 U.S. 491, illustrates the strength of that interest. There, the Treasury asserted first priority to an insolvent insurer's assets, invoking 31 U.S.C. § 3713. *Id.* at 493. Ohio, whose law governed the insurer's liquidation, assigned those

claims fifth priority, behind policyholders' claims—meaning that the United States was unlikely to be paid at all. *Id.* The Court held that the Ohio statute controlled because it regulated the "business of insurance," specifically because "it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims." *Id.* at 505-06.

Or consider what the Court said in *Lewis*. There, Connecticut fixed the rates an insurer could charge for its policies. 233 U.S. at 405. The insurer complained that such an act "is a taking of private property for a public use." *Id.* The Court disagreed, reasoning that "contracts of insurance may be said to be interdependent." *Id.* at 414. "They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance or credit, the companies becoming the depositories of the money of the insured." *Id.* Insurers possess "great power" and thus are "charged with great responsibility." *Id.* In short, insurance policies are different from ordinary contracts "whose effect stops with the individuals." *Id.* at 413. Their effect necessarily reaches outside the State where any particular dispute arises. *See id.*

Thus, to the extent an Arizona insurer had liabilities outstanding in Missouri, that State and its courts cared deeply about what the insurer is doing in other States, including Colorado. *Pennsylvania Fire*, 243 U.S. at 94-95. The contracts are standardized; if the insurer is breaching them in Colorado, then it will probably do the same in Missouri. Losses paid in Colorado mean less money for losses in Missouri. Insurance-company misbehavior in one State directly and immediately affects the rights of citizens in *every* State where the insurer is licensed and does business. It is a

risk inherent in the product they sell, and it is the very reason the States regulate them.

That interest is more oblique in the context of defendants like Norfolk Southern. Certainly, Pennsylvania might be frustrated if tort judgments in Virginia reduced assets available for its own tort plaintiffs. But Norfolk Southern's business is to run trains, not pay tort judgments. In contrast, "the primary purpose of the insurance company itself" is "the payment of claims made against policies." *Fabe*, 508 U.S. at 506; *Watson*, 348 U.S. at 72 ("[Louisiana] has a similar interest in policies of insurance which are designed to assure ultimate payment of [tort] damages."). That additional degree of relatedness is why the unusual facts of *Pennsylvania Fire* did not raise any federalism concerns in 1917. They should not create similar concerns today.

2. Setting federalism aside, the main basis for *Daimler*'s general-jurisdiction rule was predictability and clarity. 571 U.S. at 137. They give defendants the ability "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit" on any claim. *Id.* at 139 (cleaned up). "A corporation that operates in many places can scarcely be deemed at home in all of them," and in such a universe, prediction and planning becomes difficult. *Id.* at 133-39 & n.20.

In other words, *Daimler* was concerned about notice, one "[f]undamental requirement of due process." *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). In that sense, it finds the exercise of jurisdiction unconstitutional precisely because of, not in spite of, its tendency to "ca[tch] the defendant by surprise." *Pennsylvania Fire*, 243 U.S. at 95.

Here, again, insurers are different. As *Schollenberger* and *Pennsylvania Fire* demonstrate, insurers have long been subject to these registration statutes. Courts have also construed them, for decades, as the insurer's consent to be sued by their policyholders in that State on any insurance claim. Given that insurers can choose exactly where they sell policies, this is neither surprising nor unfair to them. In any event, despite these registration statutes, insurers generally retain the ability to easily "lessen or avoid exposure to a given State's courts" on a case-by-case basis. *Ford*, 141 S. Ct. at 1025.

As a matter of commercial self-interest, insurers vet their policyholders' operations, including the locations where the risk may travel. William C. Hoffman, *Personal Jurisdiction over Alien Insurance Companies: The Territory-of-Coverage Rule*, 26 TORT & INS. L.J. 703 (1991). They can, and frequently do, limit the geographic areas where they will provide coverage for underwriting or business reasons. *Id.*

"In other words, an insurer is not at the mercy of the insured owner's unilateral choice of destination in the same way a seller of chattels is at the mercy of the buyer." *Puerto Rico* v. *SS Zoe Colocotroni*, 628 F.2d 652, 670 (C.A.1 1980). "The commercial interest of the insurer in knowing the contacts of its insured" generally means that "an insurer should foresee being sued in a jurisdiction where its insured has substantial contacts." *Eli Lilly & Co.* v. *Home Ins. Co.*, 794 F.2d 710, 721 (C.A.D.C. 1986) (Edwards, Scalia & Wright, JJ.).

If the insurer wishes to avoid a certain State's courts, then it can eliminate it from the coverage territory. To the extent the insurer feels compelled to offer coverage in a State because of customer demands or

other business reasons, that is not the kind of compulsion or surprise that offends due process. In short, the unique power of insurers to unilaterally avoid any given State diminishes any notice concerns arising from insurance-specific consent-by-registration laws.

3. At other points, the Court has relied on the traditional effects of certain corporate acts. *Nicastro*, 564 U.S. at 880 (plurality opinion of Kennedy, J., joined by THE CHIEF JUSTICE, Justice Scalia, and Justice THOMAS). "Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—[] indicates general submission to a state's powers," and thus supports general jurisdiction. *Id.*

This inference obtains regardless of whether a statute spells out the consequences of the corporate act. By virtue of longstanding "traditional practice" and common law, the act itself makes it "proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." *Id.* at 881. Insurance licensing supports an even stronger inference.

a. Obtaining an insurance license involves a significant concession of liberty to the State. *Supra*, § I.C. The insurer must submit to controls over its reserves, prices, profits, and solvency. *Id.*; 1 COUCH ON INS. 3D §§ 2:22 & n.2, 2:24, 2:27-29. It must file its financial statements and consent to the periodic inspection of its books and records. *Id.* § 2:25. It generally must obtain preapproval to sell each of its products in each State. *Id.* § 2:26. And it can be barred from giving discounts or rebates to its customers. *Id.* § 2:32. The refusal to consent to these conditions—or the violation of them—is almost universally recognized as a basis to deny or revoke a license. *Id.* §§ 2:23, 3:23.

These concessions are knowing and voluntary in a way Norfolk Southern's was not. An insurer can be licensed in one State, all of them, or any combination it chooses. Their business is unrestricted by geography—unlike Norfolk Southern, who would be put through great cost if its trains had to avoid Pennsylvania. For an insurer, the only consequence of refusing licensure is a smaller territory and lower revenue, not additional expense. Thus, unlike Norfolk Southern's consent (which was tepid at best), an insurer's consent "is actual and real, since it has in fact assented to be so sued" in exchange for the privilege of selling insurance in the forum. 1 COUCH ON INS. 3D § 3:33.

b. This voluntary surrender of liberty is incompatible with a due process objection. The Court made this observation in pointed terms in *Osborn*, 310 U.S. at 65-66. "Government has always had a special relation to insurance." *Id.* at 65. "The state may fix insurance rates, it may regulate the compensation of agents, it may curtail drastically the area of free contract" and may "control[] the expenses of insurance companies." *Id.* at 65-66 (citations omitted).

"In light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business" or "take the whole business . . . under its control." *Id.* at 66 (quotations omitted). "If the state, as to local risks, could thus preempt the field of insurance for itself," the Court concluded, the State "may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards." *Id.*

For the same reasons discussed above, that interest cannot "be judged by abstracting an isolated contract . . . from the organic whole of the insurance business, the effect of that business on [the State], and [the State's] regulation of it." *Id.* at 63. Like States of incorporation or principal place of business, an insurer's registration and licensure with a State "indicates general submission to a State's powers" on insurance issues and has always been a "traditional" basis for exercising general jurisdiction. *Nicastro*, 564 U.S. at 880.

4. Finally, some Justices have indicated they would stick to a "holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness." E.g., *BSNF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (SOTOMAYOR, J., concurring in part and dissenting in part). That test avoids the "serious inequities" of forcing plaintiffs "to sue in distant jurisdictions" even where the company has a pervasive presence in the forum State. *Id.* at 1560-61.

a. These insurance statutes easily pass muster under a holistic reasonableness test. Insurers who seek licensure by a State and do extensive business there cannot reasonably complain about being sued there, regardless of the cause of action. The basic structure of the insurance business mitigates any unfairness.

One example suffices. Suppose a national insurer, (ACME Insurance Company) is licensed in Pennsylvania sells liability insurance to thousands of Keystone State residents and businesses. To do so, it generally will negotiate retainers with locally admitted attorneys (at steep discounts on their normal hourly rates) so that it is ready to provide the promised defense. It also needs to be ready to litigate the coverage disputes that

arise from those cases, and so it establishes relationships with those attorneys too.

Then suppose ACME is sued in Pennsylvania on an insurance claim that arises outside the State. It may be annoyed by that—but it is not prejudiced. It has Pennsylvania lawyers on speed dial. Though it might be cheaper or more convenient to defend elsewhere, that marginal burden is not the stuff of a due process violation.

b. To the extent particular facts render litigation actually unfair or unreasonable for a particular insurer, the lower courts can be trusted to sort that out. That is the purpose of a holistic reasonableness standard—to let courts decide, on a case-by-case basis, whether or not a company's contacts are extensive enough to justify general jurisdiction. *Tyrrell*, 137 S. Ct. at 1560 (SOTOMAYOR, J., concurring in part and dissenting in part).

B. Overruling *Pennsylvania Fire* would expose States to destructive litigation over their insurance-regulatory systems.

The lesson from all of this is simple. If the statute here is unconstitutional, then it is because Norfolk Southern is not an insurer—rather than because *Pennsylvania Fire* got it wrong. In the context where it was decided, that case is consistent with both *International Shoe* and due process, given the unique and longstanding relationship between States and insurers. The Court should not disrupt that relationship in this case by overruling *Pennsylvania Fire*. That course could expose state regulatory and judicial systems to serious and unnecessary disruptions.

1. Nearly every State has some version of the statutes reviewed in *Pennsylvania Fire* and *Schollenberger*. That is, most States command insurers to appoint a private agent or the Commissioner of Insurance (or her equivalent) "as an agent upon whom process may be served." 1 COUCH ON INS. 3D §§ 2:21, 3:26. As a result of *Pennsylvania Fire*, these statutes are widely understood as permitting the exercise of jurisdiction over the insurer in the State "although the cause of action or the transaction forming its basis originated in another state." *Id.* § 3:33 & n.2.

These regimes are distinct from those "general statutes that pertain to all foreign corporations." *Id.* § 3:26. They also do not "necessarily apply outside the context of 'insurance,' such as to an action for negligence against an insurer." *Id.* § 3:32. The Court has recognized that these statutes have constitutional limits too: where the insurer has *not* actually complied with the statute and appointed an agent within the State, it can only be sued on policies actually sold there. *Id.* § 3:33 & nn.3-4 (citing *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 8 (1907)).

2. The statutes serve a valuable purpose. As *Pennsylvania Fire* and similar cases illustrate, private policyholders are the ones most often enforcing and relying on States' insurance law. If personal-jurisdiction principles might allow insurers an escape from a particular sovereign they dislike, then insurers have the means and motive to litigate jurisdiction in every case. The lower courts have interpreted this Court's decisions as requiring the plaintiff to provide "affirmative proof beyond the pleadings." 4 WRIGHT & MILLER, FED. PRAC. & PROC., CIVIL § 1067.6 (4th ed., Apr. 2022 update). That proof often requires substantial and expensive discovery. *Id.*

Policyholders, even sophisticated ones, can ill afford such wars of attrition—particularly not after suffering a loss which the policy was purchased to cover. Insurers are almost invariably better funded than their adversaries. And as we explained above, the insurance claims relationship is asymmetrical: the policyholder performs before it receives any benefit, and the insurer receives the entire benefit of the contract before it performs. The insurer has every reason to use its superior resources to increase litigation costs anywhere it can, because doing so allows it to settle claims at a discount.

Worse, procedural litigation too often makes it impractical for policyholders to enforce certain policies at all. After all, what good is a $50,000 life insurance policy if the insurer can use personal jurisdiction to increase litigation costs from $30,000 to $60,000? Even if the claim is valid, resisting the denial makes no economic sense. So the policyholder says "forget it"—and the insurer keeps the premium.

Thus, the value of these statutes is identical to that behind most insurance law: preventing insurers from abusing their massive scale and financial power to avoid accountability. See *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 648-49 (1950). By taking jurisdiction off the table entirely, the States incentivize the prompt payment of meritorious claims.

3. The wiser course is to simply leave *Pennsylvania Fire* as the Court finds it—as an insurance case involving unique state interests. Whether those interests are similar enough to warrant reversal here is a difficult question. But in ruling on that question, the Court should be careful to avoid unsettling our insurance-law principles. They are an essential pillars of the States'

cooperative federalism, providing "support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946).

CONCLUSION

If Norfolk Southern prevails in this case, the Court should distinguish, not overrule, *Pennsylvania Fire*. That case is correct and valuable in the insurance context where it was originally decided. To the extent it is unpersuasive here, it is because the context is different, not because *Pennsylvania Fire* was wrong.

Respectfully Submitted,

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