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 THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its over 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

This case is of acute interest to AAJ and its members. If upheld, the decision below would in many cases deprive persons harmed by foreign corporations of practical legal recourse while effectively granting immunity to major corporations who would face no unfair hardship in being required to defend in the courts of a state where they have chosen to conduct business.

SUMMARY OF ARGUMENT

1. Pennsylvania's statute, allowing foreign corporations to do business in the Commonwealth and maintain actions in its courts in exchange for consent to general jurisdiction, comports with due process, as anchored in and defined by our constitutional history.

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

Those procedures that were settled and accepted usages at the time the Fourteenth Amendment was adopted, and not otherwise barred by the Constitution, necessarily conform with the due process guarantee.

The advent of the corporation as a creature of state law presented an obstacle to those seeking legal redress for harms caused by companies incorporated in other states. Following this Court's guidance, when the Fourteenth Amendment was adopted in 1868, many states had enacted legislation requiring foreign corporations, as a condition of transacting business in the state, to register and appoint an agent to receive service of process. Those affirmative consents were widely construed as conferring what is now termed "general jurisdiction." As widely accepted and settled usage in 1868, jurisdiction based on consent statutes satisfies the Due Process Clause of the Fourteenth Amendment.

2. Alternatively, jurisdiction based on compliance with consent statutes like Pennsylvania's satisfies the Fourteenth Amendment Due Process Clause because such compliance constitutes knowing and voluntary waiver of the foreign corporation's due process right not to be subject to the judicial power of a forum lacking personal jurisdiction. Parties commonly agree in advance to submit to the jurisdiction of a particular court, and this Court has held such agreements generally enforceable. Similarly, this Court has, in an unbroken line of precedents from prior to *Pennoyer* to the present day, strongly and consistently upheld state consent statutes like the Pennsylvania enactment at issue here.

Because consent is entirely separate and independent from "presence" as a basis for personal jurisdiction, this Court's expansion of specific jurisdiction in *International Shoe* did not alter its approval of general jurisdiction based on compliance with consent statutes. This Court has continued to cite to its precedents upholding such statutes with approval.

Nor did this Court in *Daimler* "drastically alter[]" its due process analysis. This Court has carefully and explicitly restricted its "at home" limit on general jurisdiction to corporations that have not consented. In fact, general jurisdiction based on a corporation's choice to register under a state's consent statute is entirely consistent with this Court's "at home" jurisprudence. The states where a corporation has chosen to incorporate or to locate its principal place of business are "paradigm" places where the exercise of general jurisdiction is proper, precisely because they are voluntary choices of a corporation seeking to structure its conduct and obtain predictability in where it may be subject to jurisdiction. There is no reason why the corporation should not be permitted to consent to general jurisdiction by registering in many states in order to avail itself of the benefits of a domestic corporation wherever it conducts substantial business.

Norfolk Southern's decision to exchange consent to general jurisdiction for the benefits of a domestic corporation was clearly knowing and voluntary. There is no question that the company was well aware of the conditions attached to registering to do business and that is had the full opportunity to decline Pennsylvania's invitation. Norfolk Southern was motivated to consent; it was not compelled to do so. Nor was that decision the product of an "unconstitutional condition." Doing business in Pennsylvania cannot be

viewed as vital to Norfolk Southern's business, particularly in view of the exception for conducting interstate commerce. Nor can the inability to maintain lawsuits in Pennsylvania courts be classified as an intolerable burden, particularly in view of the exceptions to the prohibition and the availability of a federal diversity action as an alternative forum.

3. Consent statutes do not infringe on sister states' ability to try cases against their corporate citizens. Many corporations have little connection with their states of incorporation apart from a drop box. Additionally, interstate federalism also values the interests of states in providing their residents with access to their courts to redress harms caused by out-of-state corporations.

The lower court's speculation that consent statutes could require corporations to defend in states which have no legitimate interest in the dispute does not support a blanket prohibition. State and federal courts already possess the authority under common law or statute to decline to exercise jurisdiction on grounds of *forum non conveniens*, which allows courts to exercise jurisdiction with flexibility and fairness under the circumstances. Striking down consent statutes will lock the courthouse doors for many injured victims, including residents of forum states who were injured elsewhere. At the same time, it will effectively grant immunity from accountability to corporations who would suffer no undue burden by being required to respond in states where they have chosen to conduct business.

ARGUMENT

I. CONSENT EXPRESSED BY REGISTRATION TO DO BUSINESS AND APPOINTMENT OF AN AGENT TO RECEIVE SERVICE WAS AN ACCEPTED BASIS FOR JURISDICTION OVER FOREIGN CORPORATIONS IN 1868 AND COMPORTS WITH THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS.

AAJ addresses this Court on the central issue in this case: Whether Pennsylvania courts may assert general jurisdiction over Norfolk Southern based on the foreign corporation's express statutory consent to general jurisdiction, given in exchange for authorization to do business in the state. AAJ disputes the lower court's central premise – that this Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), "dramatically altered" its traditional due process analysis of general jurisdiction. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 565 (Pa. 2021). AAJ contends that consent statutes like Pennsylvania's afford due process, as anchored in and defined by our constitutional history.

A. Procedures that Were Accepted Practice in State Courts When the Fourteenth Amendment Was Adopted Satisfy Due Process.

Due process is not measured by judges' subjective notions of fairness, in the manner of the maligned "Chancellor's foot." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund., Inc.*, 527 U.S. 308, 332-33 (1999) (Scalia, J.) (quoting Joseph Story, 1 Commentaries on Equity Jurisprudence § 19). Nor is it

"what nine judges consider 'fair' and 'just.'" *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1036 n.2 (2021) (Gorsuch, J., concurring). The right question is "what the Constitution as originally understood requires." *Id.* The anchor of due process, this Court has made clear, is history.

The Founders who sought to ensure that government would render "due" process naturally looked to the procedures that were already familiar to them – to "those settled usages and modes of proceeding existing in the common and statute law." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). In this case, the question is whether Pennsylvania's consent-to-jurisdiction statute comports with the Due Process Clause of the Fourteenth Amendment. The answer, this Court has stated, is that this basis for general jurisdiction "must be taken to be due process of law, if it can show the sanction of settled usage" at the time the Fourteenth amendment was adopted in 1868. *Hurtado v. California*, 110 U.S. 516, 528 (1884).

The Due Process Clause of the Fourteenth Amendment has not "displaced the procedure of the ages." *Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934), and does not require the states to dispense with "an ancient and familiar method of procedure." *Corn Exch. Bank v. Coler*, 280 U.S. 218, 223 (1930) (quoting *Ownbey v. Morgan*, 256 U. S. 94, 112 (1921)).

For example, the Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), determined that the traditional procedure giving broad discretion in awarding punitive damages to properly instructed juries does not offend procedural due process. "[T]he common-law method for assessing punitive damages

was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method." *Id.* at 17-18. It "is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Id.* at 28 (Scalia, J., concurring).[2] *See also Johnson v. United States*, 135 S. Ct. 2551, 2572 (2015) (Thomas, J., concurring) (The due process clause "guarantee[s] usages and modes of proceeding existing in the common and statute law.").

The same due process standard applies to the rules governing in personam jurisdiction in state court. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Court had "no doubt" that the phrase due process of law includes "legal proceedings according to those rules and principles which have been established in our systems of jurisprudence." *Id.* at 733. As Justice Scalia has explained, when a novel procedure is introduced,

> [T]he Due Process Clause requires analysis to determine whether traditional notions of fair play and substantial justice have been offended. But a doctrine of personal jurisdiction

[2] This Court approved review of punitive damage awards for excessiveness as a matter of substantive due process, based on pre-Fourteenth Amendment practice. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). "Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts" since the late eighteenth century. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994).

> that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

Burnham v. Superior Court, 495 U.S. 604, 622 (1990) (plurality) (internal citation and quotation marks omitted).[3] Justice Scalia therefore concluded that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619.

B. State Courts Based Jurisdiction over Foreign Corporations on Statutory Registration To Do Business and Appointment of an Agent To Receive Service of Process When the Fourteenth Amendment Was Adopted.

In the early nineteenth century, the corporation was a relatively new force in the American economy, making possible the increased productivity and prosperity of the Industrial Revolution, but also leaving preventable death and injury in its wake. *See* Lawrence M. Friedman, A History of American Law 409-11 (1973). In both England and America, corporations could be held liable for their torts. Joseph Kinnicut

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[3] Justice Stevens agreed, *Burnham*, 495 U.S. at 640 (Stevens, J., concurring), citing to his concurrence in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which stated that the Due Process Clause does not "invalidat[e] other long-accepted methods of acquiring jurisdiction over persons *with adequate notice*." *Id.* at 219 (Stevens, J., concurring) (emphasis added). With that proviso, the quoted excerpt from *Burnham* represents a holding of the majority.

Angell & Samuel Ames, A Treatise on the Law of Private Corporations Aggregate 221 (1832). But the activities of corporations often extended across state lines, and many early plaintiffs seeking legal redress faced daunting obstacles to establishing jurisdiction over corporations that were formed under the laws of other states.

This Court initially deemed a corporation to be a mere fiction, with "no legal existence out of the boundaries of the sovereignty by which it is created." *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839). However, the Court also made clear that a state's permission for foreign corporations to transact business in the state and sue in its courts is a matter of "comity," which a state may withdraw if "repugnant to its policy, or . . . injurious to its interests." *Id.* at 592. *See also Paul v. State of Virginia*, 75 U.S. 168, 181 (1868) (Authorization to conduct business within a state "may be granted upon such terms and conditions as those States may think proper to impose."), overruled on other grounds, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

This Court came to recognize that, due to the "great increase in the number of corporations of late years, and the immense extent of their business," the "exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice." *St. Clair v. Cox*, 106 U.S. 350, 355 (1882). To hold such entities accountable, "the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein." *Id.* In fact, prior to 1868, "[i]n many of the States there [were] legislative enactments requiring foreign corporations to appoint resident agents, on

whom service of process may be made, in order to entitle them to transact business within the State." *March v. Eastern R.R. Co.*, 40 N.H. 548, 582 (1860).[4]

This Court in *Baltimore & O. R. Co. v. Harris*, 79 U.S. 65, 74 (1870), noted that such legislation had been enacted in New York in 1849, in Pennsylvania in 1849, and by Congress for the District of Columbia in 1867. In Massachusetts, an 1851 statute required every "foreign corporation, before transacting any business within this state, to appoint . . . some person resident therein their attorney, and provid[e] that service of process upon such attorney shall be deemed to be sufficient service upon" the corporation. *See Thayer v. Tyler*, 76 Mass. 164, 169 (1857). Another New York statute was adopted in 1853, "making the appointment of an attorney or agent in this State upon whom process in suits against the company may be served a prerequisite to its doing business in the State, [so that] it thereby submits itself to the jurisdiction of the State courts." *Gibbs v. Queen Ins. Co.*, 63 N.Y. 114, 114 (1875). The court in *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417 (1869), upheld a Maine statute that required every foreign fire insurance company in the state to instruct its agents to accept service of lawful processes against the company and to consent to the

[4] Some states during this period deemed foreign corporations to have impliedly consented to the state's jurisdiction solely by doing business through its agents within the state. *See* Gerard Carl Henderson, The Position of Foreign Corporations in American Constitutional Law 80-81, 92-93 (1918). Amicus is concerned here only with the more common type of state law which, like the Pennsylvania law at issue here, premised jurisdiction on the corporation's *express* consent.

jurisdiction of state courts based on that service. *Id.* at 420-21.[5]

The Indiana Supreme Court in *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 270, 275 (1876), made reference to an 1854 consent statute. *See also Leonard v. USA Petroleum Corp.*, 829 F.Supp. 882, 887 (S.D. Tex. 1993) ("Since 1845, Missouri has required foreign insurance companies to register with the state to do business and appoint an agent for service of process."). Alabama similarly required insurers to file written consent that service of process upon its designated agent shall be valid service upon the company and "waiv[e] all claims of error by reason of such service." Revised Code of Alabama §§ 1180, 1190 (A.J. Walker, 1867).

In sum, general jurisdiction based on the actual consent of foreign corporations, expressed by their actions in registering to do business and appointing agents to receive service, was one of the "settled usages and modes of proceeding existing in the common and statute law" when the Fourteenth Amendment was adopted. Jurisdiction based on compliance with such consent statutes therefore comports with due process. Most certainly they are constitutionally valid when the defendant had sufficient notice and where defending in the forum court imposes no intolerable burden.

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[5] Valid service of process throughout the relevant time was necessary and sufficient for proper jurisdiction. *See D'Arcy v. Ketchum*, 52 U.S. 165, 174 & 176 (1850).

II. THE DUE PROCESS RIGHT TO BE SUED IN A COURT WITH PERSONAL JURISDICTION IS A PERSONAL RIGHT THAT MAY BE EXPRESSLY WAIVED BY COMPLIANCE WITH STATUTORY REGISTRATION REQUIREMENTS.

A. A Corporation's Act of Registering To Do Business and Appointing an Agent To Receive Service May Constitute Express Waiver of Its Due Process Right To Personal Jurisdiction If State Law So Provides.

In addition to the clear constitutionality of consent statutes as "settled usages and modes of proceeding" at the time the Fourteenth Amendment was adopted, consent statutes may also be upheld as based on the foreign corporation's knowing and voluntary waiver of jurisdictional due process objections.

1. This Court has long upheld personal jurisdiction based on registration and express consent to general jurisdiction.

The due process right not to be subject to a tribunal lacking in personal jurisdiction is "an individual right," which "can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Registration to do business is one of the "variety of legal arrangements," *id.*, that states have used to incentivize foreign corporations to consent to the jurisdiction of their courts in exchange for the benefits of transacting business there.

This Court has recognized that "parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction," and, if not unreasonable or unjust, such stipulated consent "does not offend due process." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (By prior agreement, "a party may validly consent to be sued in a jurisdiction where he cannot be found."); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (similar). Contractual express waivers are broadly enforced. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).

Such consents may also be submitted to state governments in exchange for the right to transact business there. This Court has consistently upheld statutes offering that bargain to foreign corporations. This Court's first such decision following the adoption of the Fourteenth Amendment was *Harris*, 79 U.S. at 81-82. Plaintiff Harris was injured in a collision in Virginia due to the alleged negligence of the railroad, a Maryland corporation. Harris brought suit in the District of Columbia, relying on a federal statute requiring the railroad, as a condition of extending its track into D.C., to accept service of process upon its agent. This Court found it well-settled that a foreign corporation "may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there." *Id.* at 81 (citing *Lafayette Ins. Co. v. French*, 59 U.S. 404, 405 (1855)).

Although *Pennoyer* determined that due process limited "presence" jurisdiction to the forum state's ter-

ritorial limits, the Court also recognized that a defendant could waive its due process rights, including by a voluntary submission to the court's authority, "assented to in advance." 95 U.S. at 733. For example, a state may "require a non-resident [who desires to carry on activities within the state] to appoint an agent or representative in the State to receive service of process and notice in legal proceedings." *Id.* at 735.

That was precisely the case in *Ex parte Schollenberger*, 96 U.S. 369, 376-77 (1877), decided the same year as *Pennoyer*. This Court upheld jurisdiction over foreign insurance companies, based on a Pennsylvania statute that required such corporations, as a condition to doing business in the Commonwealth, to file a stipulation agreeing that service of process upon its designated in-state agent would be valid and effective to establish jurisdiction in Pennsylvania courts. This Court explained that, by filing the requisite stipulation, defendants "have *in express terms* . . agreed that they may be sued there," a condition that is "not unreasonable." *Id.* at 376 (emphasis added).

This Court again upheld a state consent statute in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), upholding the jurisdiction of Missouri courts over an Arizona corporation in a suit arising out of loss of insured buildings in Colorado. The defendant had appointed an agent authorized to receive service, as required by the Missouri statute, which had been construed by the Missouri Supreme Court to confer general jurisdiction. *Id.* at 95. Justice Oliver Wendell Holmes, writing for a unanimous Court, stated that appointment of an agent specifically authorized to accept service of process on behalf of the corporation constitutes express consent ju-

risdiction, even over causes of action arising elsewhere. *Id.* at 95-96. By voluntarily appointing the agent as prescribed by the statute, general jurisdiction "actually is conferred," and not "presumed" or "a mere fiction." *Id.* at 96. The Court explained further in *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S. 213 (1921), that jurisdiction based on "implied" consent was limited to "liability incurred within the State," but that general jurisdiction would be upheld where "the state law either expressly or by local construction . . . extend[s] to suits in respect of business transacted by the foreign corporation elsewhere." *Id.* at 215-16.

The Court next addressed this issue in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), where a Delaware corporation was sued by a non-resident of New York in federal district court in New York. The Court there held that, under New York's consent statute, Bethlehem's voluntary appointment of an agent for service of process constituted "actual consent by Bethlehem to be sued in the courts of New York," and therefore in the federal courts of New York. *Id.* at 175.

2. This Court has not rejected personal jurisdiction based on express consent.

The Pennsylvania Supreme Court indicated that this Court's strong precedents may be brushed aside as *Pennoyer*-era "relics" that were overruled by *International Shoe*, *Mallory*, 266 A.3d at 554-55; and were "'decided in the era dominated by *Pennoyer*'s territorial thinking.'" *Id.* at 567 (quoting *Daimler*, 571 U.S. at 138 n.18). The court below plainly misreads both *International Shoe* and *Daimler*.

International Shoe, of course, expanded the scope of state court jurisdiction permitted by the Due Process Clause. The Court there made no mention of *Harris* or *Pennsylvania Fire* or *Nierbo*, and it had no occasion to do so. Its concern was enlarging the scope of "presence" jurisdiction beyond the territorial limits of the forum. *See Ford Motor Co.*, 141 S. Ct. at 1024. At the same time, Chief Justice Stone, writing for the Court in *International Shoe*, left no doubt that "consent" jurisdiction, as where statutory "authorization to an agent to accept service of process has been given," remained an unquestionably valid basis for general jurisdiction. *International Shoe v. State of Wash.*, 326 U.S. 310, 317 (1945).[6]

As Justice Scalia later explained, the argument embraced by the Pennsylvania court in this case – that *International Shoe* swept aside the preexisting traditional bases for jurisdiction – would be "unfaithful to both elementary logic and the foundations of our due process jurisprudence." *Burnham*, 495 U.S. at 619 (plurality opinion). Sufficient forum contacts are relevant to asserting jurisdiction over "a *nonconsenting* defendant who is not present in the forum." *Id.* at 618 (emphasis added).

Thus, *International Shoe* left this Court's prior precedents upholding consent-by-registration statutes undisturbed. In fact, only one month after deciding *International Shoe*, the Court upheld a consent statute in *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), stating that by "designating an

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[6] *International Shoe* did reject the reasoning of decisions where a corporation's "consent [was] implied from its presence in the state through the acts of its authorized agents" doing business there. 326 U.S. at 318.

agent to receive service of process" the Delaware corporation had consented be sued in Mississippi. *Id.* at 442. The Court subsequently reaffirmed its consent-statute precedents. *See Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 443 n.4 (1952) (citing *Pennsylvania Fire* with approval); and *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 341-42 (1953) (citing *Neirbo*).

Nevertheless, to the Pennsylvania court, this Court's strong and consistent precedents "do not hold significant precedential weight," *Mallory*, 266 A.3d at 567, because this Court in "*Goodyear* [*Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)] and *Daimler* dramatically altered [its] general jurisdiction analysis." *Id.* at 565.

To the contrary, those decisions limiting general jurisdiction to where a corporation is "at home" are specific applications of "presence" jurisdiction. This Court has been consistently and explicitly mindful of the fact that "consent" jurisdiction is wholly distinct and not at all related to presence or sufficient contacts in the forum. *See, e.g.*, *Burger King Corp.*, 471 U.S. at 472 (Due process requires minimum contacts where the forum "seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there.") (emphasis added); *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("*Absent consent*," personal jurisdiction requires "a constitutionally sufficient relationship between the defendant and the forum.") (emphasis added).

Indeed, both *Daimler* and *Goodyear* explicitly made clear that the Court's "at home" limitation applies only to "general jurisdiction . . . over a foreign

corporation *that has not consented* to suit in the forum." *Daimler*, 571 U.S. at 129 (emphasis added) (quoting *Goodyear*, 564 U.S. at 928). The Court reiterated in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017), that a state may not assert general jurisdiction based solely on a corporation's in-state activity "absent consent."

3. Consent statutes are consistent with this Court's "at-home" jurisprudence.

Pennsylvania's statute, and all state registration statutes under which foreign corporations can expressly choose to submit to the general jurisdiction of a state's courts, is entirely consistent with this Court's recent jurisprudence regarding general jurisdiction.

This Court held in *Daimler* that a nonconsenting corporation may be subjected to all-purpose jurisdiction in a forum where it may be "fairly regarded as at home," generally in its "place of incorporation and principal place of business." 571 U.S. at 137 (citing Lea Brilmayer et al., A General Look at General Jurisdiction, 66 Tex. L. Rev. 721, 728 (1988); and Mary Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 628 (1988)).

This "paradigm" is based on Defendants' due process interest in being able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 139 (quoting *Burger King Corp.*, 471 U.S., at 472). The place of incorporation and principal place of business are not only "easily ascertainable," *id.*,

but, as "corporate equivalents of domicile," *Ford Motor Co.*, 141 S. Ct. at 1024, they are the products of knowing and voluntary choice.

The choice of state in which to incorporate, as Professors Brilmayer et al. explain, is an appropriate basis for general jurisdiction precisely because the decision to incorporate in a particular state is itself a voluntary act of consent to be subject to the jurisdiction of that state, "presumably to obtain the benefits of that state's substantive and procedural laws." 66 Tex. L. Rev. at 733. *See, e.g.,* Lucian Bebchuk, Alma Cohen & Allen Ferrell, Does the Evidence Favor State Competition in Corporate Law?, 90 Calif. L. Rev. 1775 (2002) (a state's anti-takeover statutes and legal protection of managerial interests influence the decision of where to incorporate); Scott D. Dyreng, Bradley P. Lindsey & Jacob R. Thornock, Exploring the Role Delaware Plays as a Domestic Tax Haven, 108 J. Fin. Econ. 751, 761 (2013), *available at* http://ssrn.com/abstract=1737937 (corporations choose to incorporate based on a state's favorable tax law, as well as law affecting investor protections and corporate governance).

The corporation's choice to submit to a state's laws and avail itself of its benefits "justifies general jurisdiction over the corporation," even if it is not otherwise present or active in the state, Brilmayer, 66 Tex. L. Rev. at 733,[7] and even though state statutes governing incorporation typically do not mention consent

[7] A large number of the many corporations incorporated in Delaware "have no office, employees, or actual business operations" in the state at all; "they simply have a dropbox." Heiser, 53 Hous. L. Rev. at 665 & n.162 (2016).

to general jurisdiction. Walter W. Heiser, General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person, 53 Hous. L. Rev. 631, 690 n.222 (2016).

The corporation's choice of a state in which to locate its principal place of business, most often the corporate headquarters, is likewise a "course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion).

This Court termed the notion of subjecting an unconsenting corporation to general jurisdiction in many states based on "substantial, continuous, and systematic" business activity in those states as "unacceptably grasping." *Daimler*, 571 U.S. at 138. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 139 n.20. But clearly a corporation can structure its primary conduct so as to knowingly and voluntarily *consent* to general jurisdiction in the courts of many states, thereby availing themselves of the benefits of favorable treatment under the laws of multiple states.

B. Norfolk Southern's Compliance With Pennsylvania's Registration Requirement Constitutes a Voluntary, Knowing and Intelligent Waiver of the Due Process Right To Be Sued "At Home."

The Pennsylvania court correctly recognized that waivers of constitutional rights must be voluntary, knowing and intelligent. *Mallory*, 266 A.3d at 549.

It is clear in this case that Norfolk Southern knowingly and intelligently consented to be subject to the general jurisdiction of Pennsylvania courts. The plain text of 42 Pa. Cons. Stat. § 5301(a)(2)(i) so provides, and a line of state and federal court decisions applying this statute and its predecessor make clear that completing the steps to register to do business in Pennsylvania constitutes consent to the general jurisdiction of its courts. *See, e.g.*, *Webb-Benjamin LLC v. Int'l Rug Grp. LLC*, 192 A.3d 1133 (Pa. Super. Ct. 2018); *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991) (Section 5301(a)(2) "gave Netlink notice that [it] was subject to personal jurisdiction in Pennsylvania and thus it should have been reasonably able to anticipate being haled into court in Pennsylvania.") (internal citation and quotation marks omitted).

Norfolk Southern's consent was voluntary as well. Section 5301(a)(2)(i) offers a foreign corporation the benefits enjoyed by Pennsylvania-incorporated corporations if they agree to be subject to suit as if they were domestic corporations. Norfolk Southern had sufficient notice of the terms of this bargain and the opportunity to walk away. *See Mallory*, 266 A.3d at 569.

The company may well have preferred to be able to transact business in Pennsylvania and gain access to Pennsylvania courts without any corresponding obligations. But due process does not entitle foreign corporations to a free ride.

C. Norfolk Southern's Consent To General Jurisdiction Was Not Coerced by an "Unconstitutional Condition."

Despite these facts, the court below determined that Norfolk Southern's consent was involuntary as a matter of law; it was instead "compelled" by the General Assembly which "impermissibly conditioned the privilege of doing business in Pennsylvania upon a foreign corporation's surrender of its constitutional right to due process in violation of the protections delineated in *Goodyear* and *Daimler*." *Mallory*, 266 A.3d at 569.

As noted earlier, the court below broadly misreads this Court's precedents. The delineated due process right is the right not to be haled into a foreign court involuntarily. Only where the corporation is "at home" is "general jurisdiction appropriately exercised over a foreign corporation that *has not consented* to suit in the forum." *Daimler*, 571 U.S. at 129 (quoting *Goodyear*, 564 U.S. at 928) (emphasis added). Because Norfolk Southern voluntarily consented to general jurisdiction in exchange for the right to conduct its intrastate business in Pennsylvania, the condition is not an unconstitutional one, and the lower court's analysis should have ended there.

The Pennsylvania court erroneously describes the "unconstitutional conditions" doctrine as a blanket rule that "the government may not deny a benefit to a person because that person exercised a constitutional right. " *Mallory*, 266 A.3d at 569 (citing *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583 (1926); and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)). The lower court omitted an essential ele-

ment of the doctrine: the relinquishment of the constitutional right must be "compelled" – not merely "strongly motivated."

The doctrine does not abolish the individual's right to waive a constitutional right in exchange for a benefit they desire. Many everyday activities involve such exchanges, including, for example, allowing one's person and property to be searched without probable cause upon entering federal courthouses. An exchange is not coerced when a person has adequate notice to make an informed choice and to freely accept or reject the government's proposed bargain.

The Pennsylvania court's reliance upon *Frost*, 271 U.S. 583, is misplaced. This Court acknowledged a state's right to impose conditions upon foreign corporations, *id* at 593-94, but struck down California's requirement that a private carrier be subject to common-carrier liability in exchange for the privilege of using the state's highways. The carrier was given no real alternative, but only "a choice between the rock and the whirlpool – an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Id.* at 593.

That is far from the case here. Authorization to transact business in the Pennsylvania market can scarcely be viewed as "vital" to Norfolk Southern's business. In fact, a foreign corporation that chooses not to register is not substantially foreclosed from transacting business in the state. Pennsylvania law lists important activities that are not deemed "doing business" for this purpose, including, most significantly, engaging in interstate commerce. 15 Pa. Cons. Stat. § 403(a). Additionally, none of a non-registered

corporation's intrastate business transactions are rendered void or invalid. *Id.* at § 411(c).

The non-registered corporation is also entitled to nearly all the protections of Pennsylvania law. The primary consequence of failing to register is that the foreign corporation "may not maintain an action or proceeding in this Commonwealth." *Id.* at § 411(b). Such a deprivation cannot be viewed as an "intolerable burden" to a foreign corporation, particularly since federal diversity jurisdiction provides an alternative forum. Norfolk Southern faces none of the unfairness this Court highlighted in *Frost*.

Nor does this Court's decision in *Koontz* support the decision below. In *Koontz*, this Court explained that "the unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." 570 U.S. at 604. The Court made clear, however, that consent statutes are not coercive, citing *Southern Pacific Co. v. Denton*, 146 U.S. 202 (1892). *Id.* at 607. In *Denton*, this Court held a Texas statute that required a foreign corporation to surrender its right to remove any Texas lawsuit against it to federal court was an unconstitutional condition and "vain attempt . . . to alter the jurisdiction" of the national courts. 146 U.S. at 207. But the Court upheld the part of the statute that required the foreign corporation to stipulate that service of process could be made upon its officer, which would "subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state." *Id.* (citing, significantly, *Ex parte Schollenberger*, 96 U.S. 369).

Consequently, scholars have concluded that state consent statutes do not fall afoul of the unconstitutional conditions where: (1) The foreign corporation receives advance notice of the statutory condition; (2) The corporation receives an actual benefit from the exchange; and (3) The condition does not exceed the forum state's sovereign interest (such as surrender of a corporation's right to removal or consent to taxation of its out-of-state property). Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, A New State Registration Act: Legislating A Longer Arm for Personal Jurisdiction, 57 Harv. J. on Legis. 377, 436 (2020).

Through this lens, the assertion of jurisdiction under Pennsylvania's consent statute and similar legislation adopted in other states is clearly reasonable. A foreign corporation knows in advance the price of admission into a state's market and is always free to decline the invitation. Doing so deprives the corporation of no property; it only loses the opportunity of availing itself of business and legal advantages in the state. The Defendant points to no hardship in defending in Pennsylvania courts. Norfolk Southern plainly saw registration in Pennsylvania as a sound business decision on its part. It was not compelled.

III. CONSENT STATUTES SAFEGUARD IMPORTANT STATE INTERESTS, AND STATES ALREADY POSSESS NONCONSTITUTIONAL SAFEGUARDS TO DECLINE ADJUDICATION OF CASES IN WHICH THE STATE HAS NO LEGITIMATE INTEREST.

A. Consent Statutes Advance Important State Interests.

Even absent any hardship on the defendant, the Pennsylvania court held that exercising jurisdiction over Norfolk Southern violates the Due Process Clause and "infringes upon our sister state's ability to try cases against their corporate citizens." *Mallory*, 266 A.3d at 567.

The lower court nowhere explains how this speculative notion warrants striking down Pennsylvania's duly enacted statute. States are not persons protected by the Due Process Clause. Corporate defendants are,[8] but Norfolk Southern, as set forth in Part II above, has knowingly and voluntarily waived its due process rights as to personal jurisdiction.

This Court in *Bristol-Myers Squibb Co. v. Superior Ct. of California*, 137 S. Ct. 1773 (2017), did suggest, as an "abstract matter," that the Due Process Clause may function as an "instrument of interstate federalism," and as "a consequence of territorial limitations on the power of the respective States." *Id.* at 1780 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251

[8] The Due Process Clause also protects "plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429 (1982).

(1958); and citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

However, this Court has made clear, it is only "[t]he law of specific jurisdiction," not general jurisdiction or consent jurisdiction, that "seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *Bristol-Myers*, 137 S.Ct., at 1780). In both *Hanson v. Denckla* and *World-Wide Volkswagen*, this Court addressed only federalism-related limits on specific jurisdiction.

In *World-Wide Volkswagen* in particular, this Court made clear that its focus was on specific jurisdiction over a corporate defendant that was "forced to litigate" in a state with which it has no contacts, ties, or relations." 444 U.S. at 294. (quoting *International Shoe*, 326 U.S. at 319). This Court was not addressing general jurisdiction, which under *Daimler* may be asserted by the state of a corporation's principal place of business or state of incorporation regardless of the interests of other states in adjudicating the dispute. Nor has this Court ever suggested that a corporation may not voluntarily waive its due process rights regarding personal jurisdiction – either by a contractual forum selection provision or by express consent by registration to do business in the forum. Nor has this Court suggested that voluntary consent to the jurisdiction of a particular state's courts, as the lower court contended, "infringes upon our sister state's ability to try cases against their corporate citizens." *Mallory*, 266 A.3d at 567.

Finally, the "principles of 'interstate federalism'" strongly support the constitutionality of consent statutes like Pennsylvania's. *Ford Motor Co.*, 141 S. Ct. at

1030 (quoting *World-Wide Volkswagen*, 444 U.S. at 293). Such statutes do not unfairly favor domestic corporations, but ask only that foreign corporations compete on an equal footing. Federalism also protects the states' "significant interests" in "'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'" *Id.* (quoting *Burger King Corp.*, 471 U.S. at 473). *See also Keeton*, 465 U.S., at 776.

To hold otherwise is to leave many victims of wrongful injury with "no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. . . . The result would be, to a large extent, immunity from all legal responsibility." *Harris*, 79 U.S. at 83-84 (1870). As this Court stated in one of its earliest pronouncements regarding consent statutes:

> A corporation created by Indiana can transact business in Ohio only with [Ohio's] consent. . . . This consent may be accompanied by such conditions as Ohio may think fit to impose. . . . We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum.

French, 59 U.S. at 407.

B. State Courts Possess Common-Law or Statutory Authority To Invoke *Forum Non Conveniens* To Decline To Exercise Jurisdiction over Cases in Which the Forum State Has Little Legitimate Interest.

Nevertheless, the court below struck down § 5301(a)(2) because permitting foreign corporations to choose to submit to general jurisdiction in Pennsylvania could lead a court of the Commonwealth to assert jurisdiction over a case in which the state has "no legitimate interest in a controversy with no connection to the Commonwealth filed by a non-resident against a foreign corporation." *Mallory*, 266 A.3d at 567.

Such a hypothetical concern is hardly "determinative." *Id.* A variety of specific facts surrounding a controversy may support a state's legitimate interests in its adjudication, particularly controversies such as this one, which involves a defendant heavily engaged in interstate transportation, or which involves nationwide distribution and sales of products, as in *Ford Motor Co.*, 141 S. Ct. 1017. *See also Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021) (similar). The Pennsylvania court's broad constitutional intrusion into the jurisdiction of state courts lacks any capacity for nuance or accommodation for varied state interests.

AAJ suggests that the lower court's constitutional response was unnecessary. State law in Pennsylvania and in nearly every other state already provides an effective and non-constitutional safeguard against potentially unfair extensions of personal jurisdiction over causes of action that have little connection to the state. The doctrine of *forum non conveniens* provides

a defendant with the basis for a motion to dismiss on the ground that the case should more appropriately be heard in the court of another jurisdiction.

This Court has recognized that federal courts possess inherent power to dismiss on the ground of *forum non conveniens*, a doctrine which "leaves much to the discretion of the court" to accommodate varied circumstances. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-10 (1947). Congress subsequently codified the doctrine of *forum non conveniens* in 28 U.S.C. § 1404(a), "replac[ing] the traditional remedy of outright dismissal with transfer." *Atlantic Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 60 (2013).

Pennsylvania, as well, has codified the doctrine:

> When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

42 Pa. Cons. Stat. § 5322(e). Pennsylvania courts apply the doctrine of *forum non conveniens*, including in FELA cases, where there are "weighty" reasons that the suit should take place in another state. *E.g.*, *Hovatter v. CSX Transp., Inc.*, 193 A.3d 420, 424 (Pa. Super. 2018). *See also Wright v. Consol. Rail Corp.*, 215 A.3d 982 (2019).

The lower court reached for the broad-gauged due process prohibition unnecessarily. All states have statutes that require a foreign corporation to comply with a registration procedure in order to qualify to

transact business within the state, including the designation of an agent to accept service process. *Heiser*, 53 Hous. L. Rev. at 672. The states vary as to the scope of jurisdiction consented to by the foreign corporation. *Id*. From this Court's earliest reflections on the matter, this determination has allowed each state to pursue "its policy" and its own "interests." *Bank of Augusta*, 38 U.S. at 592. Each state, as well, possesses the tools to decline to exercise jurisdiction over cases in which the state truly has no legitimate interests.

The decision below, if allowed to stand, would sweep away the ability of courts and states to employ flexibility and nuance in pursuit of fairness. It would lock the doors of state courthouses across the country to plaintiffs in a wide range of cases, including those brought by wrongfully injured plaintiffs seeking legal redress in the courts of their own state for harm suffered elsewhere. The lower court's resort to the broad-gauged due process prohibition in this instance plainly did not serve to eliminate any "fundamental unfairness" to the defendant who did not contend that defending this suit in a Pennsylvania court would be at all burdensome. Prohibiting states from asking foreign corporations to consent to jurisdiction represents little more that a gift of "immunity from all legal responsibility" for corporations that operate across state lines. *Harris*, 79 U.S. at 84.

The true objective of this Court's jurisdictional jurisprudence "was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent." *Ford Motor Co.*, 141 S. Ct. at 1039 (Gorsuch, J., concurring). AAJ submits that this objective requires this Court to permit states and state courts to keep their doors open.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the decision below.

Respectfully submitted,

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