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 PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

Stephen E. Sachs is the Antonin Scalia Professor of Law at Harvard Law School. He teaches and writes about civil procedure, constitutional law, and conflict of laws, and he has an interest in the sound development of these fields.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution of the United States provides in relevant part:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * * ."

Article IV, Section 2, Clause 1 of the Constitution provides:

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Harvard Law School provides financial support for activities related to faculty members' research and scholarship, which may help defray the costs of preparing this brief. (The Law School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Section One of the Fourteenth Amendment to the Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Relevant statutory provisions have been set out by the petitioner.

SUMMARY OF ARGUMENT

This case presents the question whether the Fourteenth Amendment's Due Process Clause prohibits Pennsylvania from requiring corporations to consent to general jurisdiction in order to do business there. See Pet. *i*. The answer to that question is no. Neither this Court's precedent nor the original Fourteenth Amendment forbids Pennsylvania from requiring such consent, nor from exercising jurisdiction once consent is secured.

What may invalidate Pennsylvania's requirement, however, is the Court's modern doctrine on the "dormant" component of the Commerce Clause, which is currently thought to restrict state laws imposing serious burdens on out-of-state economic actors. The difference between due process and dormant commerce matters: substantive requirements of the Fourteenth Amendment may not be relieved by Congress or by treaty, while dormant-commerce restrictions might be. The Court should

not limit state jurisdiction under a mistaken due process theory that in passing also limits the authority of Congress (and of the President and Senate). Instead, the regulation of interstate corporate activity should be left up to the Interstate Commerce Clause, to be addressed by the state courts on remand.

1. Pennsylvania's registration requirement and its exercise of jurisdiction do not violate due process. The governing precedent is clear on the matter, see *Pa. Fire Ins. Co. of Phila.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), and this precedent should not be overruled. In particular, the modern case law on general jurisdiction, from *International Shoe Co*. v. *Washington*, 326 U.S. 310 (1945), through *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), down to the present day, is in no conflict with *Pennsylvania Fire*. These modern cases are explicitly limited to jurisdiction over *un*consenting defendants. One may respect the force of these precedents without expanding them to cover defendants whose consent has been granted, albeit grudgingly—and without overruling other precedents along the way.

2. *Stare decisis* aside, *Pennsylvania Fire* should not be overruled for the simple reason that it appears to have been correct. The Fourteenth Amendment did not impose substantive rules of jurisdiction, hidden (as if by invisible ink) within the words "due process of law." It required only that a state court *have* jurisdiction under applicable sources of law, including principles of general and international law, which have long recognized consent as an appropriate ground for the exercise of jurisdiction. *Pennoyer* v.

Neff, 95 U.S. 714, 733, 735 (1878); see generally Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1297–1300 (2017); Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1723–26 (2020).

These principles applied equally to corporations such as respondent Norfolk Southern Railway Co. American courts traditionally understood corporations as creatures of state law, lacking in their own right the privileges and immunities of citizens. *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 178–82 (1869), *overruled on other grounds*, *United States* v. *Se. Underwriters Ass'n*, 322 U.S. 533 (1944). States could deny corporate privileges to foreign corporations altogether, or they could extend these privileges by statute or by comity; they could also impose restrictions on the local exercise of these privileges, such as by requiring consent to suit via the appointment of agents for service of process. See *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 586–91 (1839); *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407–09 (1856); *Pennsylvania Fire*, 243 U.S. at 95–96. Courts in this period may have disagreed about the breadth of jurisdiction to which an illegally unregistered corporation, doing business in a state without permission, could be "deemed" to have consented. Compare *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 8, 22–23 (1907) (specific jurisdiction only), with *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 268–69 (1917) (Cardozo, J.) (general jurisdiction). But they did not disagree on what would happen if a corporation really did register, as Norfolk Southern

has, under a statute making registration a ground for general jurisdiction. Such requirements were not regarded as unconstitutional conditions, but as lawful regulations of the corporate form.

3. The Fourteenth Amendment's jurisdictional regime was upended by turn-of-the-century Commerce Clause jurisprudence. As the Court's use of the dormant commerce doctrine expanded, states could no longer exclude out-of-state corporations from doing business in their states. See *Int'l Textbook Co.* v. *Pigg*, 217 U.S. 91, 107–14 (1910). As a result, they could no longer justify their jurisdictional requirements on the basis of consent. Instead, the grounds for jurisdiction over out-of-state corporations evolved from consent to an ambiguous notion of corporate "presence." See *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 579, 587–89 (1914). This rule was itself subject to varying dormant commerce limits, which sometimes invalidated registration statutes similar to Pennsylvania's, see, *e.g.*, *Davis* v. *Farmers Coop. Equity Co.*, 262 U.S. 312, 316–18 (1923), and sometimes allowed them, see, *e.g.*, *Denver & Rio Grande W. R.R. Co.* v. *Terte*, 284 U.S. 284, 286–87 (1932), until those limits were overshadowed by the changes wrought by *International Shoe*.

As it is understood today, the dormant commerce doctrine may turn out to forbid Pennsylvania from requiring consent to general jurisdiction, on the ground that this requirement unduly burdens interstate commerce. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Indeed, the sorts of policy concerns over economic interference that Norfolk South-

ern raises, see BIO 16, 18–19, are classic dormant commerce concerns, and they are most appropriately addressed under that heading.

Even if Pennsylvania's requirement turned out to be invalid, it would matter a great deal whether the reason for its invalidity sounded in dormant commerce or due process. Most importantly, under current doctrine, Congress may relieve states of dormant commerce limits via federal legislation. See *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018). If it chose, Congress could enact a uniform national rule, whether to protect a defendant like Norfolk Southern or to ensure access to a convenient forum to a plaintiff like petitioner Robert Mallory. With respect to transnational corporations in particular, the federal government might also recognize various forms of jurisdiction by treaty. The Court should not pretermit the political branches' consideration of these questions by deciding the case on a mistaken due process claim instead.

4. Today's dormant commerce doctrine might or might not be consistent with the original Constitution, either in general or as applied to the case of state registration statutes. In any case, neither the judicial doctrine nor the original law of dormant commerce need be addressed here. These issues are not within the question presented; they may not be adequately briefed; and they may not have been fully preserved in the courts below. The best course for this Court is to resolve the split in authority justifying the grant of certiorari, to vacate the wrongly reasoned judgment of the Pennsylvania Supreme Court,

and to remand the case for further proceedings, in which any preserved issues of dormant commerce may be addressed in the first instance.

ARGUMENT

I. Consent to jurisdiction under a registration statute is effective under *Pennsylvania Fire* and the Court's recent precedents.

For more than a century, this Court's precedents have maintained that a state may, without violating the Due Process Clause, condition corporate registration on consent to general jurisdiction. The defendant in *Pennsylvania Fire* had agreed to such jurisdiction, as required by a Missouri statute; its consent was just as effective as "[i]f it had appointed an agent authorized in terms to receive service in such cases," and neither the statute nor its application "deprive[d] the defendant of due process of law." 243 U.S. at 95.

A. The primary argument offered for overruling *Pennsylvania Fire* today is that it has been implicitly abandoned by the Court's modern doctrines on due process and personal jurisdiction. See BIO 14, 18–19. But as Mallory points out, Pet. Br. 29–31, the Court's modern cases have in fact left this question precisely as they found it. In describing the requirements of "'traditional notions of fair play and substantial justice,'" *International Shoe* explicitly limited its discussion to cases in which "no consent to be sued or authorization to an agent to accept service of process has been given." 326 U.S. at 316–17 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

Later cases have reemphasized the legitimacy of "express or implied consent" as a ground for personal jurisdiction. *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). They have authorized parties to "stipulate in advance to submit their controversies for resolution within a particular jurisdiction." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). And they have distinguished "explicit consent," which "support[s] exercise of the general jurisdiction of the State's courts" as to matters "based on activities and events elsewhere," from the "more limited form of submission" represented by contact-based specific jurisdiction. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 880–81 (2011) (plurality opinion).

Even the most recent cases limiting the scope of general jurisdiction, namely *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), and *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011), discussed only "general jurisdiction appropriately exercised 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). Thus, in applying *Daimler*'s standard, *BNSF Railway Co.* v. *Tyrrell* explicitly declined to consider the alternative argument that the defendant had "consented to personal jurisdiction in Montana." 137 S. Ct. 1549, 1559 (2017).

B. In the absence of any explicit erosion, Norfolk Southern suggests (see BIO 18) that *Pennsylvania Fire* was implicitly overruled in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). There the Court required "all

assertions of state-court jurisdiction [to] be evaluated according to the standards set forth in *International Shoe* and its progeny," and it "overruled" any "prior decisions [which] are inconsistent with this standard." *Id.* at 212 & n.39.

In candor, *Shaffer*'s holding has itself proved something of an "anomaly," *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018), more honored in the breach than the observance. Most famously, the Court in *Burnham* v. *Superior Court* upheld jurisdiction based on in-state service of process, primarily on the ground of its traditional acceptance in American jurisprudence, see 495 U.S. 604, 616–22 (1990) (opinion of Scalia, J.); *id.* at 628 (White, J., concurring in part and concurring in the judgment); *id.* at 640 (Stevens, J., concurring in the judgment), despite the obvious incompatibility of tag jurisdiction with the standards of *International Shoe*, see *id.* at 622–27 (opinion of Scalia, J.).

More importantly, however, "the standards set forth in *International Shoe*" cannot be construed in isolation from what the Court in *International Shoe* actually *said*. If the text of *International Shoe* deliberately declined to disturb the rules on consent to jurisdiction, then applying the "standards" of *International Shoe* would not disturb those rules either.

C. At their core, Norfolk Southern's arguments are focused not on the jurisdictional consequences of consent once granted, but on Pennsylvania's right to *demand* consent in exchange for registration, and on the validity of a consent granted only to meet such

demands. For the same reason, those arguments are not based on the actual holding of *Daimler*, but on *Daimler*'s underlying policy concerns. If it would be "unacceptably grasping" for a state to impose general jurisdiction whenever a corporation "engages in a substantial, continuous, and systematic course of business," *Daimler*, 571 U.S. at 138 (citation and internal quotation marks omitted), then why would it not be equally "grasping" for Pennsylvania to require consent to general jurisdiction in exchange for a legal right to do that very same business?

The answer is that, in personal jurisdiction cases as in many other corners of the law, formal consent matters. A private landowner, despite having the lawful right to exclude trespassers, could not simply post a "No Trespassing" sign with the proviso that "All Technical Trespassers Owe Me Liquidated Damages of $10,000" and reliably expect it to be enforced. But the same landowner could put up a similar sign with the proviso "But I Will Sell You a Permanent Easement for $10,000," along with a box of form contracts and a pen, and then enforce any signed contracts against parties who actually sign them. In the same way, a state which may not *impose* general jurisdiction on out-of-state corporations, simply because they have done local business in violation of a registration statute, might well seek actual consent to jurisdiction before giving those corporations *permission* to do local business.

The due process holding of *Daimler* addresses the sort of jurisdiction a state may unilaterally impose. It does not address the sort of jurisdiction to which a

defendant may effectively consent, and it especially does not address the sorts of benefits that a state may offer in exchange. For suppose that Pennsylvania repealed its current statute and enacted a new one, offering $5 to any corporation willing to subject itself to the general jurisdiction of the Commonwealth's courts. There is no reason why this arrangement would violate *Daimler*, even though it plainly might have the effect of expanding Pennsylvania's general jurisdiction beyond what the state would otherwise enjoy (and even though it might encounter some other constitutional objection, such as the unconstitutional conditions argument rejected *infra*). *Daimler* itself says nothing about the range of acceptable inducements for a defendant's consent, just as it says nothing to undermine the state's exercise of jurisdiction once consent has been secured.

At this point we are haggling over the price. The only question left is which inducements for consent the state might have a right to offer or to withhold—and particularly whether Pennsylvania, unlike a private landowner, lacks a right to exclude outsiders in the first place. These issues are currently addressed by the dormant commerce doctrine. They have nothing to do with due process, let alone with *Daimler*, which thus fails to resolve this case. Having been left intact by subsequent cases, *Pennsylvania Fire* is still entitled to respect as a matter of *stare decisis*, as Mallory explains at length. Pet. Br. 31–34.

II. As an original matter, *Pennsylvania Fire* was correctly decided.

Pennsylvania Fire should also not be overruled because it was correct. Under the rules of general and international law that the Fourteenth Amendment enforced, parties may consent to a state's jurisdiction, whether by appearing in court or by agreeing to do so in advance—such as by appointing an agent with adequate authority to receive the court's process. Each state at the Founding controlled its own corporate law, so an out-of-state corporation had no automatic right to exercise corporate privileges outside its state of incorporation. Other states could limit their mutual recognition of these privileges, including by demanding the appointment of an agent with authority to receive service. Historical disputes over the *implicit* authority of unregistered corporate agents, who claimed to exercise corporate privileges without first obtaining the state's permission, did not undermine the widespread agreement on the *explicit* authority of agents who had been properly appointed by statute. Nor were such statutes seen as unconstitutional conditions—among other reasons, because the consent to jurisdiction they exacted had *satisfied* the relevant constitutional rule, rather than merely waiving it.

A. The original Due Process Clause did not itself set out grounds on which state courts may exercise jurisdiction. Rather, the Fourteenth Amendment required only that state courts *have* jurisdiction, as derived from some appropriate source of law. Absent a federal statute pursuant to enumerated powers, the limits applied by *Pennoyer* and its progeny were

drawn from rules of general and international law, which American courts had applied since the Founding (and even before). See *Pennoyer*, 95 U.S. at 722 (describing "well established principles of public law respecting the jurisdiction of an independent State over persons and property"); *id.* at 733 (describing Fourteenth Amendment due process as requiring jurisdiction, both of the person and of the subject matter); Sachs, Pennoyer *Was Right*, *supra*, at 1269–1313; Sachs, *Unlimited Jurisdiction*, *supra*, at 1717–27; Brief of Stephen E. Sachs as *Amicus Curiae* in Support of Petitioner in No. 16-405, pp. 21–28.

Under "the international law as it existed among the States in 1790," *D'Arcy* v. *Ketchum*, 52 U.S. (11 How.) 165, 176 (1851), a state could obtain jurisdiction over a defendant only in a limited number of ways. Most obviously, a defendant might willingly appear in court and "voluntarily ma[k]e defence," eliminating any need to inquire into the state's power to compel appearance. *Id.* at 175. Or if the defendant were a citizen or resident of the state, subject to its "legislative jurisdiction," *id.* at 176, the state might have enacted a statute commanding certain categories of defendants to appear. If neither of these were available, it would be necessary to have the defendant served with the court's process, *id.*, within the state's own borders, see *Pennoyer*, 95 U.S. at 722. But a party could always "appoint an agent or representative in the State to receive service of process," and it could agree that such service would "be binding upon the non-resident[]" for jurisdictional pur-

poses "both within and without the State." *Id.* at 735.[2]

B. These principles had special application to out-of-state corporations. In the days before general incorporation laws, states might jealously guard the right to incorporate. Six Pennsylvanians who wanted to run their backyard wheat farms under the corporate form would have to look to Pennsylvania's legislature for permission. A charter from Virginia would not, of its own force, give them the right to own Pennsylvania property or to enter Pennsylvania contracts—much less to do so in the name of an artificial entity, for which no single individual might be responsible. See *Bank of Augusta*, 38 U.S. at 586–88. Unlike natural persons, who as citizens have a con-

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[2] While the current status of these rules under international law is less clear, it is hard to say that the scope of jurisdiction is any *less* expansive today. Compare Restatement (Fourth) of the Foreign Relations Law of the United States § 422, reporter's note 1 (Am. L. Inst. 2018) (suggesting that "modern customary international law generally does not impose limits on jurisdiction to adjudicate"), with Restatement (Third) of the Foreign Relations Law of the United States pt. IV, ch. 2, intro. note (Am. L. Inst. 1987) ("The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement."), and Sachs, *Originalism and Personal Jurisdiction: Some Hard Questions*, Volokh Conspiracy (Dec. 9, 2020), https://bit.ly/3qNrtXq ("[S]ince at least 1945 (and likely somewhat before), U.S. courts hearing personal jurisdiction cases haven't been *trying* to articulate principles of general law; so we might have to look to the period before *International Shoe*, when last they toiled in the fields of general law, to know what rules were left in place.").

stitutional right to exercise the privileges and immunities of citizens in other states, see U.S. Const. art. IV, § 2, cl. 1., an "invisible, intangible, and artificial being" like a corporation was "certainly not a citizen," and it could only sometimes and only indirectly assert "the rights of [its] members." *Bank of the U.S.* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (Marshall, C.J.). A corporation could not carry with it across state borders the special legal privileges of acting in its own name (contracting, holding property, suing or being sued, etc.), unless the new state should choose to let in the "foreign" corporation. See *Paul*, 75 U.S. at 180–82.

Of course, states often did give foreign corporations permission to exercise corporate privileges within their borders, whether by statute or as a matter of comity. *Bank of Augusta*, 38 U.S. at 588–91. Typically they might extend this permission on various statutory conditions, such as a requirement to appoint local agents for service of process and to consent to jurisdiction in certain cases. See *Lafayette*, 59 U.S. at 407; *Pennoyer*, 95 U.S. at 735–36; Pet. Br. 14–25.

Occasionally a corporate agent would enter a state without permission and claim to make contracts or to purchase property on the corporation's behalf. When this happened, the courts would regard as done what ought to have been done: that the corporation had "authorized" this agent "to act for [it] in reference to the suit," as well as "to receive service of process in suits founded on such contracts." *Lafayette*, 59 U.S. at 407. As the Court later explained in

Old Wayne, if an out-of-state corporation did business in Pennsylvania without permission, it would be "deemed to have assented to any valid terms prescribed by that commonwealth as a condition of its right to do business there," and it would be "estopped to say that it had not done what it should have done in order that it might lawfully enter that commonwealth and there exert its corporate powers." 204 U.S. at 21–22. The corporation therefore "may be held to have assented to the service * * * in respect of business transacted by it in that commonwealth." *Id.* at 22.

Because this authority of the agent to receive service was a matter of fairness and implicit consent, rather than of actual agreement, its scope was often a matter of dispute. While courts agreed that corporate agents could receive process in suits founded on the exercise of local privileges, roughly analogous to today's specific jurisdiction, see *Lafayette*, 59 U.S. at 407; accord *St. Clair* v. *Cox*, 106 U.S. 350, 356 (1882), some argued that the implied authority ended there. As in the example of the landowner's "No Trespassing" sign, they refused to assume a corporation's consent to an unusually broad statutory authority for its agent; Justice Harlan, for example, declined to recognize any such implicit authority in suits over "business transacted in another state." *Old Wayne*, 204 U.S. at 23; accord *Simon* v. *S. Ry. Co.*, 236 U.S. 115, 130 (1915). Other courts held that the implied authority could go as far as the state's statutes required. (Otherwise, the defendant would be better off for having violated the registration requirement.)

Thus Justice Cardozo concluded that a local agent could be served in a cause of action with "no relation in its origin to the business here transacted," for "the validity of the service is independent of the origin of the cause of action." *Tauza*, 220 N.Y. at 268–69.

This dispute over *implicit* consent, which was noticed by contemporary commentators, see Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv. L. Rev. 1, 5–6 (1898), did not extend to a corporation's *explicit* consent through actual compliance with a registration statute. Actual registration was generally taken to confer as broad an authority on the agent as the registration statutes provided. See *id.* at 18–19. In 1915, Judge Learned Hand explained that "there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business." *Smolik* v. *Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150–51 (SDNY 1915). While an "imputed" consent imposed by a court "for purposes of justice" would extend only so far "as justice requires," the "actual consent in the cases at bar has no such latitudinarian possibilities," and must have as "wide [an] application" as "the words used." *Id.* at 151; see also *Bagdon* v. *Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 436 (1916) (Cardozo, J.) (distinguishing a case in which "the defendant had declined to file a stipulation"—as in *Old Wayne*—from one in which a court must "ascertain the meaning and define the effect of a stipulation which it *has* filed"), *abrogated by Aybar* v. *Aybar*, 37 N.Y.3d 274 (2021); accord *Rish-*

miller v. *Denver & R.G.R. Co.*, 134 Minn. 261 (1916) (collecting cases).

This was the precise logic followed by Justice Holmes in *Pennsylvania Fire*. The imputed consent to the agent's authority was "justified by holding the corporation estopped to set up its own wrong as a defense," and so might be limited to actions arising out of local business. 243 U.S. at 96 (citing *Smolik*, 222 F. at 151). But "when a power actually is conferred by a document," *id.*, it extends as far as that document's language permits, and the lower court's "construction" of the document "did not deprive the defendant of due process of law," *id.* at 95. The Court explicitly reapproved this holding in 1929, noting that a corporation could not be sued on out-of-state causes of action "unconnected with any corporate action by it within the jurisdiction"—"*unless* it has consented," citing *Pennsylvania Fire* and *Smolik* as authority for this exception. *Louisville & Nashville R.R. Co.* v. *Chatters*, 279 U.S. 320, 325 (1929) (emphasis added). And when *International Shoe* dismissed the "legal fiction that [a corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents," 326 U.S. at 318, it was similarly careful not to disturb the case of *actual* consent, *id.* at 317.

C. Traditional registration requirements like these were not seen as, and are not, unconstitutional conditions. Norfolk Southern argues that the registration requirement forbids its intrastate Pennsylvania operations unless it submits to Pennsylvania's jurisdiction, improperly "deny[ing] a benefit to a per-

son because he exercises a constitutional right." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (citation and internal quotation marks omitted); see BIO 15. But the unconstitutional conditions doctrine is an ill fit for consent to personal jurisdiction. The constitutional right at issue is not a right to be free of lawsuits in Pennsylvania; it is a right not to be deprived of life, liberty, or property on the basis of a jurisdictionless judgment, for such a judgment fails to qualify as due process of law. See *Scott* v. *McNeal*, 154 U.S. 34, 46 (1894); *York* v. *Texas*, 137 U.S. 15, 20–21 (1890). The Fourteenth Amendment does not supply its own substantive jurisdictional rules; all it requires here is *jurisdiction*, as provided by certain other sources of law. So Norfolk Southern's consent to that jurisdiction, and its conferral of authority on an agent to receive service in this case, means that the requirements of due process have been *satisfied*, not waived away in exchange for a government benefit. (Were Pennsylvania to give out free ice cream on the steps of its capitol, that would not unconstitutionally burden an absent party's constitutional right to travel to other states, where there is no ice cream to be had; the right in question is satisfied by a party's making its own choice of whether to be in Harrisburg that day, and Pennsylvania is not obliged to be neutral as to distributing ice cream at home or elsewhere.)

In developing the unconstitutional conditions doctrine, the Court routinely distinguished between conditions requiring the waiver of federal rights and a party's consent to personal jurisdiction so as to satis-

fy federal due process—even when that consent had been exacted by law. For example, when it rejected conditions on a corporation's right to remove to federal court, as guaranteed by federal law, *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892), the Court in the same breath cited approvingly (*id.* at 207–08) its prior decision in *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U.S. 138 (1884), enforcing a registration requirement that provided for general jurisdiction. (*Woodworth* let the husband of a New York decedent sue a Massachusetts company on a Michigan insurance policy in his new home of Illinois, on the sole basis that the company had been required to consent to jurisdiction there. 111 U.S. at 138–40, 144–47.) *Denton* made clear that a state could not deny a corporation the right to remove into federal court, because federal substantive law stood in the way: "Congress * * * has made citizenship in the state, with residence in the district, the sole test of jurisdiction in this class of cases." 146 U.S. at 208. But a state statute might well "subject the corporation * * * to the jurisdiction of any appropriate court of the state," which no federal substantive rule forbade. *Id.* at 207.

Consent to personal jurisdiction need not meet the "voluntary, knowing, and intelligent" waiver standard cited by the Pennsylvania Supreme Court. Pet. 51a (citing *Brady* v. *United States*, 397 U.S. 742, 748 (1970)). For example, a forum selection clause buried in the fine print of a consumer contract, see, *e.g.*, *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 590–94 (1990), might equally subject a private party

to the jurisdiction of a faraway state, but these clauses are not generally thought to offend due process, see *Burger King*, 471 U.S. at 472 n.14. Likewise, a party which signs a contract containing a fine-print arbitration agreement "on page nine" might have to abide by the award, see *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996), although absent the agreement it might have a constitutional right to its day in court.

Applying the unconstitutional conditions doctrine as Norfolk Southern suggests would make a hash of other familiar features of the litigation process. State or city governments routinely offer various litigation benefits in exchange for consent to jurisdiction—offering, for example, to drop Count II of a civil complaint in exchange for a defendant's withdrawing its jurisdictional objection to Count III. Or a plaintiff with a constitutional right to file suit in state court might nonetheless face the condition that it accept that court's jurisdiction over counter- or cross-claims, see *Adam* v. *Saenger*, 303 U.S. 59 (1938); such jurisdiction is recognized as "the price which the state may exact as the condition of opening its courts to the plaintiff." *Insurance Corp. of Ireland*, 456 U.S. at 704 (quoting *Saenger*, 303 U.S. at 68). The unconstitutional conditions doctrine does not forbid the state to exact a similar consent for the privilege of doing local business, assuming that the state may attach conditions to that privilege at all.

An overbroad unconstitutional conditions doctrine would also limit federal legislative power. Congress has occasionally considered bills, such as the "For-

eign Manufacturers Legal Accountability Act," which would require the makers of certain imported goods to appoint agents for service of process and to consent to jurisdiction in certain state courts. H.R. 3737, 116th Cong. § 5(c) (2019). Though such a rule is surely within Congress's commerce power, on Norfolk Southern's view it would require foreign manufacturers to give up their constitutional immunity to jurisdiction as a condition for a government benefit. But the Fourteenth Amendment does not guarantee any substantive immunity to jurisdiction; it merely requires that a state court *have* jurisdiction, which can properly be obtained (among other ways) by the defendant's consent.

III. The continuing validity of Pennsylvania's registration requirement is a matter of dormant commerce, not due process.

The turn-of-the-century growth of the dormant commerce doctrine changed the basis for corporate jurisdiction, limiting a state's ability to exclude out-of-state corporations and to secure their consent to jurisdiction. Under this doctrine, Pennsylvania's registration requirement and its exercise of general jurisdiction over Norfolk Southern may or may not be valid. Crucially, however, if the state law did turn out to be defective on dormant commerce grounds, it could be restored to health by Act of Congress: the political branches would have the final say.

A. The dormant commerce doctrine altered both the theory and the substance of state-court personal jurisdiction. The "consent" theory adopted in *Lafa-*

yette, recognizing a state's power to impose conditions on out-of-state corporations, presupposed the state's greater power to exclude those corporations altogether. By the early twentieth century, however, that presupposition had been severely undermined. Dormant commerce cases limited a state's ability to exclude corporations engaged in interstate commerce. See, *e.g.*, *Pigg*, 217 U.S. at 109–14. And over the course of that century, the Court began to scrutinize quite heavily any law "imposi[ng] * * * more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations," *W. & S. Life Ins. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 668 (1981), under theories sounding in dormant commerce as well as equal protection, see *id.* at 655–56.

Though it was no longer possible to understand corporate jurisdiction wholly as a matter of consent, for some time courts continued to apply the same jurisdictional test in substance, reframing the test to ask whether the out-of-state corporation was "doing business" in a state so as to have established its "presence" there. See, *e.g.*, *Int'l Harvester*, 234 U.S. at 587, 589. This notion of corporate "presence" was even more of a fiction than imputed consent (which at least could stand on the respectable ground of estoppel); it was relentlessly criticized, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 810 (1935), before being discarded in *International Shoe*, 326 U.S. at 318.

In the meantime, some courts had begun to identify substantive dormant commerce limits on corporate jurisdiction. In 1923, the Court in *Davis* invali-

dated a Minnesota statute claiming general jurisdiction over out-of-state railroads with in-state agents, finding that the statute "imposes upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the commerce clause." 262 U.S. at 315. Though it might have approved a narrower statute, providing jurisdiction for injuries inflicted by in-state transactions or on in-state plaintiffs, *id.* at 316–17, the Court thought that "general submission to suit" would "unreasonably obstruct[], and unduly burden[], interstate commerce." *Id.* at 317. Yet the Court also made clear that its due process and dormant commerce tests were distinct: *Davis* explicitly distinguished its interstate commerce holding from similar cases (in the *Pennsylvania Fire* line) that permitted general jurisdiction, for in those cases "the only constitutional objection asserted was violation of the due process clause." *Id.* at 318.

This dormant commerce case law was not uniform, and it faded in importance after *International Shoe*. In 1932, the Court allowed a state court to hear a suit against an out-of-state railroad for an out-of-state accident, because the railroad operated lines in the forum, it had an office and agents there, and (unlike its codefendant) it was licensed to do business there—precisely the situation of Norfolk Southern in Pennsylvania. *Terte*, 284 U.S. at 286–87; see also *Int'l Milling Co.* v. *Columbia Transp. Co.*, 292 U.S. 511, 517–19 (1934) (noting the distinction). Not long thereafter, *International Shoe* rendered these commerce limits largely obsolete. The opinion itself did

not dwell on commerce issues, because Congress had affirmatively authorized state governments to levy the unemployment taxes Washington sought. See 326 U.S. at 315. And the breadth of general jurisdiction permitted under *International Shoe* (that is, before *Daimler*) reduced the importance of registration requirements and of any interstate commerce limits thereon. *Cf. id*. at 318 (noting that "continuous corporate operations" alone might permit suit on "dealings entirely distinct from those activities," and citing *Tauza*).

B. Under current doctrine, Pennsylvania's registration requirement may turn out to be invalid as a matter of dormant commerce. For the requirement to be upheld, not only must Pennsylvania have a "legitimate local purpose," but also any "burden * * * on such commerce" its statute "impose[s]" must not be "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Here Pennsylvania's law does seem to be grounded on a legitimate state interest. That is the same interest underlying its tag jurisdiction over natural persons: a defendant who owes something to the plaintiff, and who is within the jurisdiction and capable of being brought into court, ought to pay what is owed. Had Anthony Walden, the defendant in *Walden* v. *Fiore*, 571 U.S. 277 (2014), gone on vacation to Las Vegas and been served with process there, the Nevada courts would unquestionably have had jurisdiction to hear the suit against him by Gina Fiore, the distant facts of their dispute notwithstanding. In the same spirit, should J. McIntyre Machin-

ery, Ltd., the defendant in *McIntyre*, wish to do business in New Jersey and to build an expensive factory next to the house of the injured Robert Nicastro, New Jersey might reasonably require that the company first agree to answer Nicastro's claim. Such requirements are not an end run around ordinary jurisdictional principles, but a recognition that a corporation which asserts its existence in a new jurisdiction must adhere to that jurisdiction's rules, including rules about service of process and appearance in court.

At the same time, there is also reason for concern about the interstate-commerce burden that general jurisdiction might impose. See generally John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121, 133–54 (2016). Norfolk Southern asserts that a widespread regime of registration-based general jurisdiction would lead to renewed bouts of forum-shopping, with nationwide commercial transactions effectively governed by whichever state promises to apply the most plaintiff-friendly law. BIO 16–17. Nationwide firms might therefore choose to stay out of states with general jurisdiction requirements, *id.*, or might have to establish costly networks of affiliates or subsidiaries; states would externalize the costs of plaintiff-friendly regimes while internalizing their benefits. See Williams, *Preemption: First Principles*, 103 Nw. U. L. Rev. 323, 328 (2009). Whether or not these concerns are valid, they are part and parcel of modern dormant commerce doctrine, and the Court should address them in that light.

C. In addition to simple accuracy, there is another reason for this Court to understand this case as a matter of the state's power to induce consent, and thus as a matter of dormant commerce rather than due process. The political branches can legislate or make treaties on matters of cross-border commerce, but they cannot insist on their own understanding of the Due Process Clause. The effect of a mistaken due process ruling would thus be not only to limit the authority of state courts, but also to limit the authority of Congress and the President.

Section One of the Fourteenth Amendment is constitutional law; it may be "enforce[d]" by Congress, U.S. Const. amend. XIV, § 5, but its content may not be altered, *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). If due process really forbids states from exercising general jurisdiction based on a consent-by-registration statute, then there is nothing that Congress can do about it. Early *Pennoyer*-era cases recognized a difference between the demands of due process (*i.e.*, that a state court *have* jurisdiction) from those of general and international law (which supplied the substantive *standards* for jurisdiction). See, *e.g.*, *Belcher* v. *Chambers*, 53 Cal. 635, 642–43 (1879); see generally Sachs, Pennoyer *Was Right*, *supra*, at 1306–11. But modern cases have tended to speak of personal jurisdiction doctrine as if it flowed directly from the language of the Due Process Clause itself.

By contrast, current case law recognizes the Court's dormant commerce doctrines largely as a set of default rules, which Congress may choose to displace by legislation. Not only may Congress exercise

the commerce power itself, it may also "permit the states to regulate [interstate] commerce in a manner which would otherwise not be permissible." *S. Pac. Co.* v. *Arizona* ex rel. *Sullivan*, 325 U.S. 761, 769 (1945) (collecting cases); accord *Wayfair*, 138 S. Ct. at 2096. Thus Congress might adopt the preferred rule of Norfolk Southern or of Mallory; or it might let states require consent-by-registration in some cases and not others—say, only for cases involving in-state injuries or in-state plaintiffs. As a national legislature, Congress can overcome the collective action problem faced by the states and can decide which balance of burdens and benefits is best.

The Court's choice of approach in this case could also affect the reach of international treaties. While countries often negotiate over the mutual recognition of judgments, this Court has never squarely determined whether it violates due process for a state to enforce a foreign judgment that would itself have violated American due process standards when issued. See Restatement (First) of Judgments § 13 cmt.*c* (Am. L. Inst. 1942) (suggesting that it might); *cf.* *Shaffer*, 433 U.S. at 210 n.36 (insisting on the judgment of "a court of competent jurisdiction"); accord *id*. at 201 n.18. Suppose that a foreign nation such as France, not bound by the dormant Commerce Clause, forbade American corporations from doing business there without first consenting to general jurisdiction in cases brought by French citizens. *Cf.* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 14 (1987). A Virginia corporation that had no legal right to operate in

France, and that voluntarily gave its consent to obtain such a privilege, might have French judgments entered against it whose subsequent force in American courts would turn on whether the relevant limits sound in due process or in dormant commerce instead.

In this regard, the United States recently signed (though it has not yet ratified) the Hague Judgments Convention, which promises to respect foreign judgments that, among other grounds, were "given by a court designated in an agreement concluded or documented in writing." Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 5(1)(m) (July 2, 2019), Hague Conference on Private International Law, https://bit.ly/3Ir5P4j; see also Status Table, Hague Conference on Private International Law, https://bit.ly/3RcBNp7 (noting the signature of the United States on March 2, 2022). If a treaty cannot override due process, and if a state court cannot enforce a foreign judgment that due process would ordinarily forbid, then a ruling for Norfolk Southern on due process grounds might conceivably complicate future U.S. obligations.

IV. The Court should vacate the judgment and leave the dormant commerce issues for remand.

There remains uncertainty as to whether the Court's dormant commerce doctrine is correct. Which natural persons may act as a unit when buying Pennsylvania property or entering Pennsylvania contracts is usual-

ly a question for Pennsylvania, not for the Constitution of the United States. Nor is whether six Pennsylvanians may own and operate their backyard wheat farms under a common name (rather than their individual names) obviously a matter of "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3; but see *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The earliest explanation of dormant commerce theories, that the federal power over interstate commerce might be exclusive, see *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), does not necessarily address an out-of-state corporation's right to engage in *intra*state commerce within another state. And even if it did, there would remain a further question of whether the federal commerce power protects such a right "in its dormant state," *Willson* v. *Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829), or whether Congress must first *use* that power by legislating. *Cf. Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 610–12 (1997) (Thomas, J., dissenting) (doubting the "dormant" force of the Commerce Clause altogether).[3]

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[3] Whatever the correct analysis under the Commerce Clause, Congress might also regulate interstate corporate registration under the Full Faith and Credit Clause of Article IV, which allows Congress "by general Laws [to] prescribe the Manner in which [other states'] Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1; see generally Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1203–09 (2009). If it wished, Congress might require states to recognize out-of-state corporate charters, or

But these are all issues for another day. For the present, how to apply the dormant commerce doctrine to the facts of this case, or to what extent that doctrine can itself be justified as an original matter, is not yet before the Court. The question on which certiorari was granted is limited to Fourteenth Amendment due process, Pet *i.*, and at this stage it is not yet clear whether the relevant dormant commerce questions will be adequately briefed.

There are also questions about the issue's preservation. Norfolk Southern advanced an alternative objection under dormant commerce earlier in this litigation, see Brief of Appellee in No. 802 EDA 2018 (Pa Super E Dist), pp. 26–30, which the Pennsylvania Supreme Court chose not to reach in light of its due process holding, see Pet. 29a n.9. But the issue was also clouded by a separate dispute over whether the railroad was engaged in *intra*state commerce in Pennsylvania, relevant both to the scope of the state's registration statute and potentially to the resolution of any dormant commerce questions. Pet. 34a–40a; *cf. Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276, 278–79 (1961) (discussing registration requirements with respect to intrastate commerce).

As "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court

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might do so subject to various conditions, including conditions on jurisdiction. But that would not be possible if consent-by-registration were straightforwardly forbidden as a matter of due process.

should not address any of the dormant commerce questions now. Instead, it should limit itself to correcting the due process errors of the Pennsylvania Supreme Court, vacating the judgment before it, and remanding the case for consideration of any relevant issues under the dormant Commerce Clause, should those issues have been properly preserved.

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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