No. 21-1168

In the Supreme Court of the United States

ROBERT MALLORY, PETITIONER,

v.

NORFOLK SOUTHERN RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF U.S. TERROR VICTIMS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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AMICUS BRIEF IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI[1]

Amici are U.S. nationals prosecuting claims under the Anti-Terrorism Act of 1992 (ATA) against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA), seeking justice for the loss of loved ones murdered in terror attacks sponsored, financed, and in some cases perpetrated directly by officers and agents of the PLO and PA.[2] In 2019, Congress enacted a statute for the purpose of facilitating personal jurisdiction in such cases, the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. 116-94, div. J, title IX, § 903, 133 Stat. 3082 (codified at 18 U.S.C. § 2334(e)). The PSJVTA is the most recent law passed as part of a multiple-decade legislative effort to address the United States' relationship with the PLO and PA and to find a way to get those entities to end their support for terrorism. The PSJVTA links personal jurisdiction in

[1] No party or counsel for a party made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of the brief. No counsel for a party authored this brief in whole or in part.

[2] Amici are: Alan Bauer, Binyamin Bauer, Daniel Bauer, Revital Bauer, Yehuda Bauer, Yehonathon Bauer, Rebekah Blutstein, Richard Blutstein, Katherine Baker, Larry Carter, Shaun Choffel, Dianne Coulter Miller, Robert Coulter, Ann Coulter, Eliezer Yakir Fuld, Miriam Fuld, Naomi Fuld, Tamar Gila Fuld, Karen Goldberg, Chana Goldberg, Esther Goldberg, Eliezer Goldberg, Yitzhak Goldberg, Shoshana Goldberg, Yaakov Moshe Goldberg, Tzvi Yehoshua Goldberg, Elise Gould, Shayna Gould, Ronald Gould, Nevenka Gritz, Oz Guetta, Varda Guetta, Dov Klieman, Gavriel Klieman, Nachman Klieman, Ruanne Klieman, Yosef Klieman, Leonard Mandelkorn, Nurit Mandelkorn, Shaul Mandelkorn, Jessica Rine, Elana Sokolow, Jamie Sokolow, Lauren Sokolow, Mark Sokolow, Rena Sokolow, Eva Waldman, Henna Waldman, Morris Waldman, and Shmuel Waldman.

ATA cases to conduct that is of obvious and important interest to the United States—PLO and PA payments to terrorists who killed or injured Americans, or engaging in specified activities within the United States. 18 U.S.C. § 2334(e)(1).

The PLO and PA have challenged the PSJVTA's constitutionality. See *Sokolow* v. *PLO*, 140 S. Ct. 2714 (2020) (GVR for further consideration in light of the PSJVTA); *Estate of Klieman* v. *PA*, 140 S. Ct. 2713 (2020) (same); *Fuld* v. *PLO*, __ F. Supp. 3d __, 2022 WL 62088 (S.D.N.Y. 2022), *appeal docketed*, No. 22-76 (2d Cir.).

Amici have an interest in ensuring that their ability to prosecute their ATA claims—which arise under federal law and were brought in federal courts—is not unduly constrained by a Fourteenth Amendment personal jurisdiction analysis of the sovereign power of a particular State. As the Solicitor General has explained, "the United States' constitutional powers and special competence in matters of foreign affairs and international commerce, in contrast to the limited and geographically cabined sovereignty of each of the several States, would permit the exercise of federal judicial power in ways that have no analogue at the state level." U.S. Br. at 32, *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021).

Amici also have an interest in ensuring that any standard for evaluating a consent-to-jurisdiction statute such as the PSJVTA gives due respect to the judgments of Congress and the President in cases involving interests of the National Government—and, in particular, leaves ample room for the political branches in their conduct of foreign policy and assessment of national security issues, an area in which they exercise exclusive control and merit special deference.

SUMMARY OF ARGUMENT

1. This case concerns the Fourteenth Amendment's limits on the personal jurisdiction of state courts, not the Fifth Amendment's limits on the personal jurisdiction of federal courts. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion). Congress invoked consent jurisdiction in the PSJVTA, and the PLO and PA are challenging its constitutionality. This Court should be aware of such proceedings when deciding this case and be cautious in making statements that might be misconstrued by lower courts in evaluating the constitutionality of a federal (rather than state) statute.

2. The Court should not extend the "at home" test applied in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), to this case. Rather, if the Court seeks a limiting principle beyond those articulated by Petitioner, it should rely on standards established in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Under *International Shoe*, a consent-to-jurisdiction statute poses no due process concerns if it permits the defendant to make a knowing and voluntary decision and is reasonable in the context of our federal system.

a. Fairness to a defendant requires that consent to the jurisdiction of a court be "knowing and voluntary." *Wellness Int'l Network* v. *Sharif*, 575 U.S. 665, 685 (2015). The Supreme Court of Pennsylvania's conclusion that registration to do business under the relevant state statute was "coerced" was incorrect. Even in cases where a State requires registration as a condition to entry, coercion is absent. Accepting jurisdiction as a condition to doing business might be an undesirable choice for a business enterprise, but requiring an organization to choose

between two less-desirable business arrangements does not amount to unconstitutional coercion.

In cases involving claims of unfairness by individuals, difficult choices do not amount to unconstitutional coercion. And in the context of personal jurisdiction, it is fair to subject an individual to personal jurisdiction if the defendant enjoys "significant benefits provided by the State," even if that defendant would rather avoid suit in the jurisdiction. See *Burnham* v. *Super. Ct. of Cal.*, 495 U.S. 604, 637 (1990) (Brennan., J., concurring). That conclusion follows *a fortiori* in cases like this one, involving a sophisticated, well-counseled business.

b. The *Daimler* "at home" test is a poor fit for evaluating the constitutionality of a consent-to-jurisdiction statute. Consent statutes developed for the precise purpose of reaching corporations that were *not* "at home" in the forum state. Both before and after this Court's path-marking decision in *International Shoe*, the Court upheld consent-to-jurisdiction statutes that imposed "reasonable conditions" and did not "exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission." See *Washington ex rel. Bond & Goodwin & Tucker* v. *Super. Ct. of Wash.*, 289 U.S. 361, 364-365 (1933).

Fidelity to *International Shoe* requires upholding consent statutes that are "'reasonable, in the context of our federal system.'" *Ford Motor Co.*, 141 S. Ct. at 1023 (quoting *International Shoe*, 326 U.S. at 316). To be sure, the interstate federalism principles incorporated in the *International Shoe* analysis limit a State's assertion of personal jurisdiction "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 Squibb* v. *Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017)). At the same time,

interstate federalism is advanced by permitting adjudication when forum States have "significant interests at stake" such as "providing their residents with a convenient forum for redressing injuries inflicted by out-of-state actors" or "enforcing their own safety regulations" *Id.* at 1030 (cleaned up). And interstate federalism does not forbid a defendant to consent to the exercise of personal jurisdiction: "the individual can subject himself to powers from which he may otherwise be protected." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982).

Pennsylvania's highest court concluded that it could identify no legitimate governmental interest advanced by the consent statute at issue here, because this case involves a dispute arising outside the forum State between residents of other States. The Pennsylvania court did not consider whether Respondent had voluntarily subjected itself "to powers from which [it] may otherwise be protected." *Ibid.*

ARGUMENT

"[T]he Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." *Bauxites*, 456 U.S. at 704. "Consent is a traditional basis of jurisdiction that may be upheld even in the absence of minimum contacts between the defendant and the forum state." 16 Daniel R. Coquillette et al., *Moore's Federal Practice—Civil* § 108.53 (3d ed.) (citation omitted); 4 Adam N. Steinman et al., *Wright & Miller's Fed. Prac. & Proc.* § 1067.3 (4th ed.) (similar). "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Bauxites*, 456 U.S. at 703.

I. This Case Raises No Issue Concerning Constitutional Limits On Federal Judicial Power

This case concerns the Fourteenth Amendment's limits on the exercise of personal jurisdiction by a State, not the Fifth Amendment's limits on the exercise of personal jurisdiction by the United States. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *Nicastro*, 564 U.S. at 884 (plurality opinion).

Interstate federalism principles limit a State's assertion of personal jurisdiction "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 Squibb*, 137 S. Ct. at 1780). "The sovereignty of each State implies a limitation on the sovereignty of all its sister States," and "this federalism interest may be decisive." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (cleaned up). The Commerce Clause similarly limits each State's extraterritorial regulatory powers. *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

Although interstate federalism considerations limit state assertions of personal jurisdiction, they do not constrain the exercise of personal jurisdiction by federal courts exercising the judicial power of the United States under a grant of authority from Congress. That is because "the underlying sovereignty considerations of the United States within the world community are quite different from those of the states within our confederation of states." Wendy Collins Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 457 (2004). Unlike the States, "Congress has the authority to enforce its laws beyond the territorial

boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); see *Gamble* v. *United States*, 139 S. Ct. 1960, 1967 (2019); *Restatement (Third) of the Foreign Relations Law of the United States* § 403 comment a & reporter's note 1 (2018).

The Founding Generation intended the judicial power of the national government to be "co-extensive with its legislative power." *The Federalist* No. 80, at 588 (E.H. Scott ed. 1898) (Hamilton); see 1 Max Farrand, *The Records of the Federal Convention of 1787* 124 (1911) (Madison); 3 Jonathan Elliot, *Debates on the Federal Constitution* 532 (2d ed. 1836) (Madison); 2 Elliot 469 (Wilson); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) (Marshall, C.J.) ("[T]he judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."); *Picquet* v. *Swan*, 19 F. Cas. 609, 611, 613, 615 (C.C.D. Mass. 1828) (Story, J.) (if Congress ordered "that a subject of England, or France, or Russia … be summoned from the other end of the globe," a federal court "would certainly be bound to follow [the command], and proceed upon the law," regardless whether such a proceeding "would be deemed an usurpation of foreign sovereignty"); see also Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1710-1712 (2020).

Statutes aimed at punishing and preventing acts of terrorism against Americans abroad, like the PSJVTA (which amici rely on in their cases against the PLO and PA), raise federal interests of a very different quality than the state interests at issue here. The national government's constitutional powers and special competence in matters of foreign affairs and international commerce, in contrast to the limited and geographically cabined

sovereignty of each of the several States, permit the exercise of federal judicial power in ways that have no analogue at the state level. The Constitution's text allocates matters involving national security, foreign affairs, and foreign commerce exclusively to the national government. Compare U.S. Const. art. I, § 8, cls. 1, 3, 11; art. II, § 2; and art. IV, § 4, with U.S. Const. art. I, § 10, cls. 2-3. "Power over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *Arizona* v. *United States*, 567 U.S. 387, 395 (2012).

Finally, because Congress has invoked consent jurisdiction in the PSJVTA, this Court should be cautious in making broad statements that might be misconstrued by lower courts in evaluating the constitutionality of a federal statute, which concerns circumstances that are distinct from those in this case. Congress's jurisdictional choices should be afforded "special respect" where they entail "delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs," and therefore implicate "important separation-of-powers concerns." *Jesner* v. *Arab Bank PLC*, 138 S. Ct. 1386, 1408 (2018) (plurality opinion); see *id.* at 1412 (Gorsuch, J., concurring) ("[T]he job of creating new causes of action and navigating foreign policy disputes belongs to the political branches.").

This Court has consistently reserved the question whether restrictions on personal jurisdiction imposed under the Fourteenth Amendment would also apply in a case governed by the Fifth Amendment. See, *e.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1783-1784. It should do so here.

II. A State Consent-To-Jurisdiction Statute Is Constitutional If It Gives Fair Warning And Is Reasonable In The Context Of Our Federal System

This Court has left open the question whether the "at home" standard for general jurisdiction applied in *Daimler* should extend to laws that require consent to general jurisdiction as a condition to doing business within a state. See *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558-1559 (2017). The Court should not hold that consent statutes are governed by *Daimler*. Indeed, State consent-to-jurisdiction statutes arose for the specific purpose of reaching corporations that were *not* incorporated or headquartered in the forum State, predating this Court's creation of the "at home" standard by more than 150 years. Extending *Daimler* to the consent context could impinge on flexibility of the national government to use consent as an incentive to advance legitimate interests that are not accounted for in *Daimler's* rigid "at home" test.

Petitioner urges upholding the statute on the basis of the original public understanding of the Due Process Clause, fidelity to this Court's precedent, and the Court's approach to a similar question in *Burnham*. Amici have no quarrel with Petitioner's approach. But if the Court seeks a limiting principal, it should evaluate the statute at issue here under the two-part standards the Court has developed to evaluate state assertions of personal jurisdiction under *International Shoe*: fairness to the defendant and reasonableness in the context of our federal system. See *Ford Motor Co.*, 141 S. Ct. at 1024-1030. The Supreme Court of Pennsylvania held that the statute was unfair because it was coercive and that it was unreasonable in the context of our federal system. The court erred in finding the statute coercive; amici take no position on the question whether the statute is reasonable in the context of our federal system.

A. The Pennsylvania Statute Is Not Coercive

Fairness to a defendant requires that consent to the jurisdiction of a court be "knowing and voluntary," *Wellness Int'l Network*, 575 U.S. at 685, not "unreasonable and unjust," *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). A person's actions are considered "'voluntary' within the meaning of the Due Process Clause" if they are the product of "'a free and unconstrained will.'" *Oregon* v. *Elstad*, 470 U.S. 298, 304 (1985) (quoting *Haynes* v. *Washington*, 373 U.S. 503, 514 (1963)). In contrast, conduct is "involuntary" under the Due Process Clause only if it arises from "coercive activity of the State." See *Colorado* v. *Connelly*, 479 U.S. 157, 165-167 (1986).

The statutory scheme at issue here permits the exercise of general jurisdiction over a corporation that has "qualif[ied] as a foreign corporation" by registering to do business. 42 Pa. Cons. Stat. § 5301(a)(2). The Supreme Court of Pennsylvania held that registration to do business under Pennsylvania's statutory scheme "does not constitute voluntary consent to general jurisdiction" but rather "is coerced." Pet. App. 53a-54a. That conclusion is incorrect, and this Court should reject it.

One might grant for the sake of argument that deciding not to register to do business could be an unattractive choice for a risk-averse business enterprise if the consequence is consent to general jurisdiction. But there are all kinds of state regulations that corporations may prefer to avoid. Requiring an organization "to choose between two less desirable business arrangements" does not amount to unconstitutional coercion. *City of Holyoke Gas & Elec. Dep't* v. *FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992). Rather, coercion of the sort invoked by the Supreme Court of Pennsylvania results from "economic duress" only in "extreme and extraordinary cases," *VKK Corp.* v. *Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001), or cases

involving "threats of serious harm," see 22 U.S.C. § 7102(3)(A); 18 U.S.C. § 1591(e)(2)(A); see also U.S.S.G. § 5K2.12 (mere "financial difficulties and economic pressures upon a trade or business" generally do not rise to the level of coercion).

The level of economic "coercion" here is minimal at best. The relevant statute provides that a foreign corporation "may not do business" in Pennsylvania unless it registers to do so. 15 Pa. Cons. Stat. § 411(a). The statute includes eleven safe harbors, *i.e.*, categories of activities that are *not* "doing business" in the State, including "[d]oing business in interstate or foreign commerce." *Id.* § 403(a)(11). The Pennsylvania General Assembly included the interstate-commerce carve-out to "reflect the provisions of the United States Constitution that … preclude states from imposing restrictions or conditions upon commerce." 15 Pa. Stat. and Cons. Stat. Ann. § 403, committee comment 6 (West 2022). The Supreme Court of Pennsylvania accepted Respondent's position that it engages in *some* "intrastate activities in Pennsylvania in addition to engaging in interstate commerce as a railroad." Pet App. 38a. But it did not explain how the statute imposed a material economic burden on Respondent or even what kinds of business activities triggered the registration requirement.

A finding of unconstitutional coercion here would likely call into question other regulatory regimes, like that of the Federal Reserve Board of Governors, which will not allow a foreign bank to open an office in the United States without the foreign bank's consent to the jurisdiction of the United States courts in *any* investigation involving U.S. banking laws, whether or not focused on activities in or directed at the United States. See *In re Sealed Case*, 932 F.3d 915, 923 (D.C. Cir. 2019); Bd. of Governors of the Fed. Rsrv. Sys., Form FR K-2.

Cases involving claims of unfairness by individuals are also instructive. In *North Carolina* v. *Alford*, 400 U.S. 25 (1970), a criminal defendant argued that his guilty plea to a murder charge was not "voluntary." *Id.* at 29. He pleaded guilty while maintaining his innocence because the overwhelming evidence against him presented a serious risk that the State would put him to death if he insisted on proceeding to trial. *Id.* at 27-28. This Court rejected the claim that these circumstances prevented the defendant from making a voluntary decision, holding that even the risk of a death sentence did not make the defendant's plea a product of "fear and coercion." *Id.* at 29, 37.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), this Court rejected a Due Process Clause challenge to the plea bargaining tactics of a prosecutor who told the defendant that if he did not accept a five-year prison sentence for forgery, the defendant would be additionally indicted under a three-strikes statute with a mandatory life sentence upon conviction. The Court held that "the imposition of these difficult choices" was "permissible." *Id.* at 364.

And in *Burnham*, 495 U.S. 604, Justice Brennan concluded that exercising "tag" jurisdiction over an individual physicially present in a state for three days did not offend "traditional notions of fair play and substantial justice" because the three-day visit gave the defendant "significant benefits provided by the State." 495 U.S. at 637-638 (Brennan., J., concurring). "His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and water-ways; he likely enjoys the fruits of the State's economy as well." *Ibid.* A sophisticated, well-counseled entity that is present in a State enjoys such benefits as well.

These authorities undermine the Supreme Court of Pennsylvania's conclusion that the Pennsylvania business-registration statute is coercive and unfair.

The Supreme Court of Pennsylvania also likened the statute to "contractual forms of consent to jurisdiction [that] are subject to reformation if they are the product of economic duress or contracts of adhesion." Pet. App. 55a. That analogy further undermines the court's conclusion, because this Court has repeatedly upheld contracts that require consent to jurisdiction. Thus, in *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964), this Court upheld a consent-to-jurisdiction clause in a farm-equipment lease signed by family farmers. See *id.* at 313-314; *id.* at 318-319 (Black, J., dissenting). The contract, prepared by the leasing company's lawyers, appointed a person connected with the company as the defendants' agent to accept service of process. *Id.* at 318-319 (Black, J., dissenting). The Court rejected the dissent's argument that the clause was "too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home." *Id.* at 332 (Black, J., dissenting). The dissent asserted, to no avail, that "[i]t strains credulity to suggest that these Michigan farmers ever read this contractual provision … [or] would have known or even suspected that [it] amounted to an agreement … to let the company sue them in New York should any controversy arise." *Id.* at 332-333 (Black, J., dissenting). And the dissent lamented that the Court had "permit[ted] valuable constitutional rights to be destroyed by … such sharp contractual practices." *Id.* at 333 (Black, J., dissenting).

Similarly, in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), this Court upheld a forum-selection clause in a contract that a cruise-line customer was "deemed to have had knowledge of." *Id.* at 590. The Court

upheld the clause under standards of "fundamental fairness." *Id.* at 595. It was undisputed that "only the most meticulous passenger [was] likely to [have] become aware of the forum-selection provision" at all, and most likely "after they ha[d] actually purchased their tickets." *Id.* at 597 (Stevens, J., dissenting). Yet the Court rejected the dissent's assertion that this provision should be "deemed as wanting in the element of voluntary assent." *Id.* at 598 (Stevens, J., dissenting); see *id.* at 593-594.

In sum, a claim of unconstitutional "coercion" is unsustainable for a business required to consent to personal jurisdiction as a condition of doing intra-state business in the State. If the individuals in *Alford*, *Hayes*, *Burnham*, *Szukhent*, and *Shute* were not coerced, neither is a sophisticated business like Respondent wishing to engage in business beyond its core business of engaging in interstate commerce.

B. The Court Should Not Apply *Daimler* To Consent-to-Jurisdiction Statutes

The Court should not extend *Daimler*'s "at home" test to state consent-to-jurisdiction statutes. Rather, if the Court seeks a limiting principal beyond those Petitioner has articulated, it should apply federalism-based standards developed under *International Shoe* and expressed in its recent Fourteenth Amendment cases. Applying these standards—and not the "at home" test—would abide by the public understanding of state power at the time of ratification of the Due Process Clause of the Fourteenth Amendment, comport with doctrine leading to and developed under *International Shoe*, and leave appropriate room for legislative judgments advancing legitimate governmental interests. Amici take no position on the *outcome* of a federalism analysis in this case.

1. Begin with history. Consent-to-jurisdiction doctrine developed in the Nineteenth Century in response to the rule that a corporation had "no legal existence out of the boundaries of the sovereignty by which it is created." *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 588 (1839). This meant that a corporation could *only* be sued in its State of incorporation. See *Ohio & Miss. R.R. Co.* v. *Wheeler*, 66 U.S. (1 Black) 286, 298 (1862). The "exemption of a corporation from suit in a state other than that of its creation[] was the cause of much inconvenience and often manifest injustice." *St. Clair* v. *Cox*, 106 U.S. (16 Otto) 350, 355 (1882).

a. In order to mitigate this injustice, courts of that era held that a State could permit a foreign corporation to do business within its borders "accompanied by such conditions as [the State] may think fit to impose; and these conditions must be deemed valid … provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1856).

In *Baltimore & Ohio Railroad Co.* v. *Harris*, 79 U.S. (12 Wall.) 65 (1869), this Court upheld the assertion of personal jurisdiction by courts of the District of Columbia over a Maryland corporation that injured a D.C. resident in Virginia. It explained that Congress had no obligation to permit the Maryland corporation to operate in the District of Columbia, and so Congress was within its rights to determine that such a corporation "may exercise its authority in a foreign territory [*i.e.*, in the District of Columbia] 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. If it do business there, it will be presumed to have assented and will be bound accordingly." *Id.* at 81. The Court added: "The question is always one of legislative intent, and not of legislative power or legal possibility." *Id.* at 83.

b. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Nothing in this text concerns consent to personal jurisdiction, and this Court did not perceive ratification of the Fourteenth Amendment to effect a change in existing law discussed above. To the contrary, over the ensuing two decades, the Court continued to follow the rule set out in *French* and *Harris*. See, *e.g.*, *New Eng. Mut. Life Ins. Co.* v. *Woodworth*, 111 U.S. 138, 146 (1884); *St. Clair*, 106 U.S. (16 Otto) at 356; *Balt. & Ohio R.R. Co.* v. *Koontz*, 104 U.S. (14 Otto) 5, 10 (1881); *Ex parte Schollenberger*, 96 U.S. (6 Otto) 369, 375-376 (1878); *Chi. & Nw. Ry. Co.* v. *Whitton*, 80 U.S. (13 Wall.) 270, 284-285 (1872).

In *Commercial Mutual Accident Co.* v. *Davis*, 213 U.S. 245 (1909), this Court upheld a statutory consent-to-jurisdiction statute against a due process challenge: "The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law." *Id.* at 255 (citing *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 602, 609-610 (1899)). Similarly, in *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917), the Court held that a consent-to-jurisdiction statute permitting general jurisdiction upon the appointment of a state official to receive process (as state law required) "did not deprive the defendant of due process of law." And in

Hess v. *Pawloski*, 274 U.S. 352 (1927), the Court held that because "the state may make and enforce regulations reasonabl[y] calculated to promote care on the part of all, residents and nonresidents alike, who use its highways," it may "declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served" without violating the due process clause of the Fourteenth Amendment. *Id.* at 356-357.

Two cases of the pre-*International Shoe* era contained language that "the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states." *Simon* v. *Southern Ry. Co.*, 236 U.S. 115, 130 (1915); *Old Wayne Mut. Life Ass'n of Indianapolis* v. *McDonnough*, 204 U.S. 8, 22 (1907). However, later cases read *Simon* and *Old Wayne* to reflect a presumptive rule of statutory construction, not a mandatory restriction imposed by the Fourteenth Amendment. Thus, in *Missouri Pacific Railroad Co.* v. *Clarendon Boat Oar Co.*, 257 U.S. 533 (1922), the Court explained that *Old Wayne* and *Simon* stood for the proposition that "in dealing with statutes providing for service upon foreign corporations doing business in the state upon agents whose designation as such is especially required, this court has indicated a *leaning* toward a construction, *where possible*, that would exclude from their operation causes of action not arising in the business done by them in the state." *Id.* at 535 (emphasis added). In *Robert Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, 257 U.S. 213 (1921), the Court confirmed that the extent to which "compulsory assent" was a condition of entry remained a matter of state law, and that a State could require a corporation's "compulsory assent" to jurisdiction, either "by the appointment of an agent" or merely by "going into business in the State without appointing one." *Id.* at 216. And in *Perkins*

v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court said that *Old Wayne* and *Simon* turned on the fact that "no actual notice of the proceedings was received in those cases by a responsible representative of the foreign corporation," the necessary result of which "was a finding of inadequate service in each case and a conclusion that the foreign corporation was not bound." *Id.* at 443-444.

Thus, in 1933, the Court rejected a due-process challenge to a state consent-to-jurisdiction statute, summarizing the rule regarding such statutes as follows:

> The state need not have admitted the corporation to do business within its borders.…
>
> It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the state constitutes an assent on its part to all the reasonable conditions imposed.… And for this reason a state may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission.

Washington, 289 U.S. at 364-365.

2. In *International Shoe*, the Court cast aside mechanical and quantitative evaluations of the defendant's "presence" in the State, in favor of "reasonable[ness], in the context of our federal system," dependent "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 317, 319.

The Court in *International Shoe* did not overturn any decision approving jurisdiction on the basis of statutory consent requirements. To the contrary, the Court cited such cases with approval and explained that in appropriate circumstances, corporate actions "may be deemed

sufficient to render the corporation liable to suit," because they "were of such a nature as to justify" "resort to the legal fiction that it has given its consent." *Id.* at 318 (citing *French*, *St. Clair*, *Davis*, and *Washington* v. *Super. Ct.*). And only one month after *International Shoe*, the Court applied a consent-to-jurisdiction statute, explaining: "By designating an agent to receive service of process and consenting to be sued in the courts of the state, the corporation had consented to suit in the district court." *Miss. Publ'g Corp.* v. *Murphree*, 326 U.S. 438, 442 (1946). Long after that, the Court stated that an entity required "to appoint a resident agent for service of process" would "subject itself to the general jurisdiction" of the State's courts. *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 892 (1988).

The Court's modern personal-jurisdiction cases require, as a basis for specific jurisdiction, that a defendant's contacts with the forum State be sufficient such that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice." *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *International Shoe*, 326 U.S. at 316-317).

In other contexts, this Court has also enforced a reasonableness requirement, including on regulations concerning the conduct of business within the state. Thus, in applying the unconstitutional conditions doctrine, this Court has held that an "'essential nexus' [must] exist[] between the 'legitimate state interest' and the [] condition extracted by the [government]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 386 (1994) (quoting *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)). Similarly, in applying a reasonableness test to implied-consent statutes involving blood-alcohol content testing under the Fourth Amendment, this Court said that the test "does not differ"

from the Due Process test, because "reasonableness is always the touchstone." *Birchfield* v. *North Dakota*, 579 U.S. 438, 477 (2016).

In short, whatever remains of a State's "authority to exclude foreign corporations from doing business within its boundaries," that authority must be exercised in a manner that "bears a rational relation to a legitimate state purpose." *W. & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 667-668 (1981); *see Watson* v. *Emps. Liab. Assur. Corp.*, 348 U.S. 66, 82 (1954) (Frankfurter, J., concurring) ("[T]here is no denial of due process because the Louisiana condition of admission meets the test of reasonableness, a standard to be applied in diverse contexts in the light of all relevant factors, including here the recognized power to exclude a foreign corporation.").

3. Extending *Daimler's* "at home" test to this case would jeopardize reasonable legislative judgments that consent statutes serve legitimate governmental interests in appropriate circumstances, including in the PSJVTA, which deems "any activity" in the United States by the PLO or PA (with specified and narrow exceptions) to be consent to the jurisdiction of the United States courts in civil cases under the Anti-Terrorism Act of 1992. 18 U.S.C. § 2334(e)(1)(B). To take another important example, the Federal Reserve Board of Governors does not allow foreign banks to open U.S. offices without consenting to the jurisdiction of the United States courts in investigations involving U.S. banking laws, without regard to whether the investigation involves activities in the United States. See *In re Sealed Case*, 932 F.3d at 923; Bd. of Governors of the Fed. Res. Sys., Form FR K-2.

States, too, have enacted consent statutes linked to state interests. Delaware law, for instance, provides that acting as a director or officer of a Delaware corporation "shall be a signification of the consent" of that person to

acceptance of service of process and thus personal jurisdiction in specified cases. Del. Code, tit. 10, § 3114(b). Delaware's Supreme Court held this statute constitutional because "Delaware has a legitimate interest in providing a forum for efficient redress of claims against a Delaware corporation and the fiduciary whose actions are at the heart of those claims." *Hazout* v. *Tsang Mun Ting*, 134 A.3d 274, 289 (Del. 2016).

A rule that consent is improper unless the minimum contacts test is met or the defendant is "at home" under *Daimler* would jeopardize such determinations.

4. Finally, to the extent a limiting principle beyond those suggested by Petitioner is required, that limiting principle is interstate federalism. The Due Process Clause of the Fourteenth Amendment, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (quoting *World Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980)). At minimum, the clause protects every person from the arbitrary exercise of governmental power "without any reasonable justification in the service of a legitimate governmental objective." *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845-846 (1998). On these facts, the Supreme Court of Pennsylvania called this case a "textbook example of infringement upon the sovereignty of sister states" and concluded that Pennsylvania has "no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here." Pet. App. 47a-48a; see *id.* at 86a-88a (alleging that both parties are citizens of Virginia and plaintiffs' claims arose from his exposure to asbestos in Ohio and Virginia). The Pennsylvania Attorney General did not defend the law's constitutionality, despite being notified that the constitutionality of the

statute had been drawn into question. See Docket Sheet at 6, Case No. 802 EDA 2018 (Pa. Sup. Ct. Sept. 14, 2018). On the other hand, at least in some circumstances a defendant may consent to the exercise of personal jurisdiction notwithstanding interstate federalism considerations. See *Bauxites*, 456 U.S. at 703 n.10; *Nicastro*, 564 U.S. at 900 (Ginsburg, J., dissenting). For example, "the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection," and that waiver presents no constitutional defect. *Bauxites*, 456 U.S. at 705.

CONCLUSION

In resolving this case, this Court should not inadvertently cabin the power of the national government to address matters within its competency, such as foreign policy and national security. In addition, the Supreme Court of Pennsylvania's conclusion that the statute is unconstitutionally coercive cannot be sustained. Finally, this Court should not extend *Daimler's* "at home" test to consent-to-jurisdiction statutes.

Respectfully submitted.

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