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 Supreme Court Of Pennsylvania

BRIEF OF SCHOLARS ON CORPORATE REGISTRATION AND JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of academics who have separately authored works addressing the constitutional limits on jurisdiction based on corporate registration and, despite employing differing analyses, all reached the same conclusion: such jurisdiction is constitutional if—and only if—the State has a sovereign interest in the dispute. *See* Appendix (listing *amici curiae*). The original understanding, subsequent doctrine, horizontal federalism, and normative principles all support this middle-ground approach not addressed by either party.[1]

SUMMARY OF ARGUMENT

This case poses serious questions regarding the relative powers of States in our federal system. Petitioner and Respondent both stake out maximalist positions. Petitioner argues that States have unfettered power to assert personal jurisdiction over nonresident corporations through registration statutes, while Respondent contends that States have no power to do so

[1] Both Petitioner and Respondent have issued blanket consents to the filing of any *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. South Texas College of Law Houston and Case Western Reserve University School of Law shared the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

if the corporation is not amenable to jurisdiction under the minimum-contacts standard. Neither position is correct.

The proper result should follow the recognized contours of a State's sovereign power as consistently defined by this Court across different centuries and doctrinal contexts. In short, States have sovereign power to employ registration as an alternative jurisdictional basis provided the dispute implicates the State's sovereign interests, such as safeguarding its citizens, redressing in-state injuries, and enforcing its laws.

Corporations are artificial entities that depend on a State's legal recognition. State corporate registration and agent appointment statutes began in the 1800s specifically as a mechanism to obtain consent jurisdiction over nonresident corporations. These statutes had already been upheld by this Court and were in common use before 1868. This Court has since continued to uphold registration statutes supported by a State's sovereign interests under various constitutional doctrines while recognizing limits on employing consent under a registration statute, standing alone, to support jurisdiction in the absence of such interests.

In contrast to the positions advanced by the parties, this means a State *may sometimes—not always or never*—subject out-of-state businesses to personal jurisdiction based on its registration to do business. The State has lawful power to do so when suit is brought by a state citizen or because of an in-state harm or

transaction. Only when the plaintiff is a nonresident seeking a remedy for an out-of-state harm unconnected to the defendant's in-state activity does the State lack the necessary interest to apply its registration statute to assert jurisdiction.

Either stark solution posed by the parties would create doctrinal complications that would require this Court's further intervention. Under Petitioner's view that States can always assert personal jurisdiction predicated on corporate registration, defendants would quickly challenge such jurisdictional schemes as violating the dormant or negative Commerce Clause in cases without a sufficient sovereign interest.[2] In contrast, a holding for Respondent that States lacked sovereign power to obtain jurisdictional consent for harms suffered by their citizens or for in-state injuries or activities would call into question this Court's prior holdings recognizing the legitimacy of these interests in other contexts.[3]

ARGUMENT

Respondents incorrectly argue that consent under a registration statute cannot extend beyond the contours of contacts-based specific jurisdiction. This

[2] *See* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121, 125 (2016).

[3] *See* Charles W. Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 Harv. J. Leg. 377, 417-29 (2020).

ignores that registration statutes have long been viewed by this Court as a form of consent, a wholly independent jurisdictional basis.

Yet Petitioners mistakenly claim that no constitutional limits exist on the consent States may extract from nonresident corporations through a registration statute. This overlooks this Court's early decisions and subsequent doctrine that interpreted the Constitution as imposing such limits. These limits demand a sufficient sovereign interest in the dispute for consent jurisdiction to be validly exercised under a registration statute.

I. Corporate Registration Statutes Operate Independently of Minimum Contacts.

This case differs from this Court's other twenty-first century personal-jurisdiction decisions, which all address the due-process substantive limits on a State's adjudicative authority over a nonresident defendant. The issue here is the permissible scope of an alternative jurisdictional basis that has been recognized for centuries: consent. More specifically, the case addresses statutory jurisdictional conditions imposed on a corporation seeking to obtain the privileges of conducting in-state business and accessing local state courts, a form of consent that has been upheld, within articulated limits, by this Court for almost 170 years.

A. Consent Provides an Alternative Traditional Basis for Jurisdiction.

The right to be free from jurisdiction in a particular State is "an individual right," which, like other individual constitutional rights, can be lost by waiving the right or providing consent. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982). Consent may be based on "actions rather than words." *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 684 (2015). Such consent, when given in accordance with constitutional limitations, authorizes a State's jurisdictional power on its own, irrespective of compliance with other bases for personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Ins. Corp.*, 456 U.S. at 703-04; *Ex parte Schollenberger*, 96 U.S. 369, 377-78 (1878). Consent has served as such an alternative jurisdictional basis in international public law for centuries. *See* John Locke, Two Treatises of Government: The Second Treatise of Civil Government § 119 (1689) (recognizing "tacit Consent" of all possessing or enjoying "any part of the Dominion of any Government").

Consent jurisdiction does not require a connection between the claim and the forum. *Burger King*, 471 U.S. at 472 n.14; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-17 (1972). Yet even though no forum relationship is required, consent differs from other jurisdictional grounds viewed as forms of general jurisdiction—it does not encompass all claims against the defendant, but only those claims within the scope

of the consent.[4] Consent jurisdiction thus elides the traditional contacts-based distinction between general and specific jurisdiction, *i.e.*, whether the suit arises out of or relates to the defendant's in-state activities. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017,1024-25 (2021).

This is appropriate because the constitutional propriety of consent jurisdiction does not depend on the scope of contacts-based general or specific jurisdiction. Consent may establish a nonresident corporation's amenability to suit even without "the minimum contacts necessary for supporting personal jurisdiction." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). The nonresident's amenability, though, is not absolute; it is constrained by the constitutional limits on the State's power to extract consent—in the present case, under a corporate registration and agent appointment statute.

B. Jurisdictional Conditions under Registration Statutes Operate as Consent.

Corporate registration and agent appointment statutes began in the 1800s specifically as a means to obtain jurisdiction over nonresident corporations through the corporation's consent.[5] Despite the intervening changes in corporate and jurisdictional doctrine over some two centuries, it remains that corporations

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[4] *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 756 (1988).

[5] *See* Rhodes & Roberson, *supra* n.3, at 401.

are artificial entities that depend on State legal recognition—a corporation "owes its existence and attributes to state law," as it necessitates sovereign permission as a regulatory pre-condition to conduct operations. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987).

While corporations receive other constitutional protections, including (as relevant in this case) due process and negative commerce protections, corporations "are not citizens within [the] meaning" of the Interstate Privileges and Immunities Clause of Article IV. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869). As a result, a corporation has no constitutional recourse for a State's denial of those benefits and privileges protected by that clause, including the right to maintain an action in the courts of another State or the right to conduct ongoing local, in-state business activities. *E.g.*, *Ry. Express Agency, Inc. v. Virginia*, 282 U.S. 440, 443-44 (1931) (upholding Virginia bar on nonresident corporations conducting the intrastate business activities of public service corporations); *Hemphill v. Orloff*, 277 U.S. 537, 548-51 (1928) (upholding state-court dismissal of breach of contract action filed by foreign corporation conducting in-state activities without registering to do business).

For an out-of-state corporation to obtain privileges and immunities such as accessing the State's judicial system and transacting ongoing, local in-state business (as distinguished from those interstate business activities that are protected by the Commerce Clause), every State statutorily requires foreign or nonresident

corporations to register and obtain a certificate of authority.[6] Upon registration, the State provides government-conferred benefits that it is not constitutionally compelled to provide—and that it can deny to a noncompliant corporation. *E.g.*, *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278-83 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 206-12 (1944); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 275-78 (1927).

In exchange for these benefits, the State may impose obligations related to its sovereign interests through its registration statute. States may thereby "encourage" a corporation's consent to jurisdiction by requiring it as a condition to obtain government-conferred benefits. *Cf. Wellness Int'l*, 575 U.S. at 704 (Roberts, C.J., dissenting) (Congress could "encourage" consent by private litigants to non-Article III courts through conditions on federal benefits). This Court has long viewed such statutory exchanges of obligations to obtain benefits as manifesting a valid consent. If a State's legislature "requires a foreign corporation to consent to be 'found' within its territory . . . as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent." *Schollenberger*, 96 U.S. at 377 (1878). Registration statutes requiring designation of an agent are "constitutional," with "the designation of the agent 'a voluntary act' " that manifests a "real consent." *Neirbo*

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[6] Rhodes & Robertson, *supra* n.3, at 405-08.

Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 175 (1939).

But there are limits. As with other government benefits conditioned on surrendering liberties, the State may not "use strategic manipulation of gratuitous benefits to aggrandize public power [and] . . . to gain leverage over constitutional rights."[7] In the registration context, this means that a State cannot withhold granted benefits unless the imposed obligation is proportionate and related to the conditioned benefit.[8]

II. The Constitution Demands a State Sovereign Interest in the Dispute to Support Jurisdiction under a Registration Statute.

The corporation's consent to jurisdiction, obtained as a condition for registration and permission to do in-state business and access state courts, may only constitutionally extend to the claims where the State has a sovereign interest in the dispute. This requirement flows from original constitutional meaning, subsequent doctrine, and horizontal federalism.

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[7] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1493 (1989).

[8] *See* Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 San Diego L. Rev. 309, 357-59, 363-65 (2021); Rhodes & Robertson, *supra* n.3, at 405-08, 430-36.

A. Original Meaning Supports a State-Interest Requirement.

1. *Antebellum Principles*. At the founding, a State's jurisdictional assertions within its own borders were limited only by state law; the U.S. Constitution did not then restrict state-court authority regarding in-state judgments. But another U.S. sovereign did not owe full faith and credit to a state judgment that exceeded jurisdictional limits imposed by "well-established rules of international law." *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174-76 (1851). These traditional public-law principles included limiting a court's authority to its territory: "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." Joseph Story, Commentaries on the Conflict of Laws § 539, at 450 (1834).

This territorial limitation imposed a barrier to a corporation's amenability under the original common-law view that "a corporation can have 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). To circumvent this impasse, States enacted the first agent-appointment statutes, requiring corporations desiring to conduct in-state business activities to stipulate to jurisdiction.[9]

This Court upheld such service on a designated agent in *Lafayette Insurance Co. v. French*, 59 U.S. (18 How.) 404 (1856), affirming the dismissal of an

[9] *See* Rhodes & Robertson, *supra* n.3, at 401.

insurance company's full-faith-and-credit challenge to a default judgment issued under an Ohio statute authorizing service on a resident agent for suits founded on insurance contracts with state citizens. "We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law." *Id.* at 407. Because the foreign insurer could transact in-state business only with the State's authorization, "the corporation must be taken to assent to the condition upon which alone such business could there be transacted"—its amenability for those suits predicated on its insurance contracts made within the State. *Id.* at 408-09.

2. *Postbellum Doctrine*. Jurisdictional consent via registration-and-appointment statutes continued to be upheld even as this Court discarded the initial common-law perspective on corporate legal existence and embraced the Fourteenth Amendment's Due Process Clause as an additional limit on state-court adjudicative authority. Due process "normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction." *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring). This allowed States to demand "a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts." *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). States could thus require corporations to "stipulate that in any litigation arising out of

its transactions in the State, it will accept as sufficient the service of process on its agents or persons specifically designated." *St. Clair v. Cox*, 106 U.S. 350, 356 (1882). These early post-Fourteenth Amendment cases specified the scope of the "consent to be 'found' away from home" reached only those suits "growing out of its transactions." *Schollenberger*, 96 U.S. at 378.

Yet this transactional requirement authorized jurisdiction even if the cause of action "arose outside the State," as long as the claim was "shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there." *Louisville & Nashville R.R. Co. v. Chatters*, 279 U.S. 320, 328 (1929). Unless the registration statute or its authoritative construction specified a narrower scope, only claims "wholly unconnected with any act or business of the corporation within the State may not be sued upon there." *Id.* at 325. Even assuming "a transaction would not of itself have been regarded as a doing of business within the State sufficient to establish the [defendant's] presence" for jurisdiction, the corporation's registration evinced a consent to suit for all obligations in any way connected to its in-state business, including through accepting an obligation incurred by a third party within the State. *Id.* at 328-29.

3. *Early Twentieth Century*. As the "corporate presence" jurisdictional fiction developed in the early 1900s, this Court for the first time recognized that service on a designated corporate agent that was "the equivalent of personal service" under a state registration scheme could support jurisdiction over

obligations without any connection to the corporation's in-state business. *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917). While Petitioner emphasizes this case, it is distinguishable. In *Pennsylvania Fire*—and the lower-court decisions it relied upon—the defendant corporations were "doing business" within the State.[10]

At the time, corporate presence through in-state business activities alone subjected the corporation to any and all suits after proper service. *See Ford*, 141 S. Ct. at 1036-37 (Gorsuch, J., concurring). *Pennsylvania Fire* and related decisions were thus "based not so much on consent as on the fictive presence that [this] Court later abandoned."[11] The cases are best "understood as adopting a presumption that, by serving an in-state corporate agent, the plaintiff established both that the corporation was doing business in the state (because registration was only required for in-state business) and the appropriate service requirements had been met for jurisdiction over unrelated causes of action."[12]

This Court's subsequent decisions during the 1920s bolster this understanding. When registration alone without accompanying in-state business was the sole jurisdictional hook for claims unconnected to the

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[10] *See* Charles W. Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 437-39 (2012) (discussing cases).

[11] Rensberger, *supra* n.8, at 361.

[12] Rhodes, *supra* n.10, at 439.

State, the registration statute, unless its language compelled otherwise, was not to "be construed to impose upon the courts of the State the duty, or give them the power, to take cases arising out of transactions so foreign to its interests." *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 408-09 (1929). This Court was wary of construing state registration statutes "to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun . . . when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." *Robert Mitchell Furn. Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921).

While these cases were resolved through a statutory interpretation presumption, this Court added that it did "not wish to be understood that the validity of such service . . . would not be of federal cognizance whatever the decision of a state court." *Chipman, Ltd. v. Thomas B. Jeffery Co.*, 251 U.S. 373, 379 (1920). These cases implied that restrictions existed on consent under a registration statute that furnished the sole jurisdictional basis over claims "foreign to [State] interests"; the primary purpose of corporate registration-and-appointment statutes subjects nonresident corporations to jurisdiction "in controversies growing out of transactions within the State." *Morris*, 279 U.S. at 409.

The original understanding and early precedent thus comport with a middle-ground approach. This Court recognized in nineteenth and early twentieth century cases that limits exist on employing consent

under a registration statute, standing alone, as a jurisdictional basis for claims wholly unconnected to the State's interests. Yet this connection does not have to satisfy contacts analysis; registration operated as consent for all claims connected in any manner to the forum even if the transaction at issue did not satisfy other then-existing jurisdictional grounds. *Chatters*, 279 U.S. at 328-29. Although these decisions did not detail the constitutional grounding for these principles, the essentials are furnished by the unconstitutional-conditions doctrine, alone or in combination with the Due Process Clause, and the dormant or negative Commerce Clause.

B. A State-Interest Requirement Comports with Due Process and the Unconstitutional-Conditions Doctrine.

The Due Process Clause "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev. v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219 (2019) (quotation omitted). It restrains legislative, executive, and judicial power and prevents such power from being "used for purposes of oppression." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). The Clause applies when a State requires corporations to surrender constitutional rights for the privilege of conducting in-state business activities: "the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is

subject to the limitations of the supreme fundamental law." *Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33 (1922). Registration statutes implicate two potential due process considerations.

1. *Notice*. Due process requires that nonresident defendants "have fair warning" of their amenability to suit, allowing them to structure their conduct "with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472. Such notice provides the corporation the opportunity "to alleviate the risk of burdensome litigation" through insurance, price markups, or forum-business closures. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In early twentieth-century cases, this Court indicated that the consent granted under registration should not extend beyond the limits specified by either the statute's explicit terms or state case-law interpretation. *Morris & Co.*, 279 U.S. at 409; *Robert Mitchell Furn.*, 257 U.S. at 216. While the necessary "fair warning" may not exist under some current state registration statutes, such a constitutional difficulty does not arise here—Pennsylvania law specifies that "qualification as a foreign corporation" establishes "general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a)(2)(i).

2. *Proportionate State Interest*. Notice is not the only determinant, however, as constitutional limits exist on the government's authority to exchange government benefits for a citizen's surrender of a constitutional right. While Pennsylvania's statute provides

notice of its scope, its breadth renders some applications of the statute unconstitutional when the State has no proportionate interest in the suit.

The unconstitutional-conditions doctrine bars the government from coercing citizens to surrender constitutional rights "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship" to the relinquished right. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Due process may operate similarly, as it ensures the government's compliance with "traditional notions of fair play and substantial justice" when exercising its adjudicative power; these notions authorize the State to exchange "reciprocal duties" for conferred benefits under the traditional bases for jurisdiction. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (upholding jurisdiction over domiciliary served outside the State).

These limits, whether flowing from the unconstitutional-conditions doctrine or due process, apply to registration statutes. A State "may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts." *Terral*, 257 U.S. at 532-33. This Court explained that barring foreign corporations conducting in-state business "from exercising their constitutional right to remove suits into Federal courts . . . is beyond the State's power," *Donald v. Phila. & Reading Coal & Iron Co.*, 241 U.S. 329, 332 (1916), as federal judicial authority is "wholly independent of state action, and which therefore the several States may not, by any

exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious." *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 328 (1914).

Registration conditions on interstate private carriers provide another example. Because "a State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations" on interstate private carriers that have "no relation to the public safety or order" or other recognized police powers, *Mich. Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577 (1925), California could not require private carriers to become subject to the duties of public carriers as a condition for doing business in the State. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 599 (1926). The States in such cases lacked any sovereign authority or interest in hindering the rights at issue, barring the States from conditioning their permission to conduct in-state business or to access state courts on relinquishing federal rights.

States have undoubted sovereign interests in hearing a variety of suits against foreign corporations conducting in-state business operations. *See infra* II.D. When pursuing such an interest, a proportionality exists between the obligation imposed and the State's grant of permission to the nonresident corporation to use its courts and conduct in-state business activities. But the State cannot compel the corporation to submit to any and all claims filed against it divorced from any recognized sovereign interest.

This proportionality requirement is a familiar constitutional constraint across various doctrines. The government may condition a land-use permit on a relinquishment of private property when there is a "nexus" and "rough proportionality" between the property demand and the effects of the private land use authorized by the permit, but the government may not leverage its conditions to pursue unrelated government objectives. *Dolan*, 512 U.S. at 386-92. A State's taxation power under the Due Process Clause depends on "whether the state has given anything for which it can ask return." *N.C. Dep't of Rev.*, 139 S. Ct. at 2220 (quotation omitted). State "implied-consent" laws to blood-alcohol testing as a condition for the privilege of driving on its roads may provide civil or evidentiary penalties but not criminal penalties on a refusal because "[t]here must be a limit on the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on the public roads." *Birchfield v. North Dakota*, 579 U.S. 438, 476-77 (2016). The same here—a State may condition its permission to use its courts and conduct in-state business activities on a foreign corporation's obligation to submit to jurisdiction in cases related to recognized sovereign interests, but it may not apply that consent in other cases that do not implicate such an interest.

This comports with this Court's early twentieth-century precedent. *Pennsylvania Fire* upheld all-purpose jurisdiction under a corporate registration statute when the nonresident corporation was "present" and doing business in the State, but this Court

in contemporaneous cases expressed discomfort with, and indicated possible federal constraints on, employing a registration statute as an all-purpose jurisdictional submission without such presence.[13] Under jurisdictional law at the time, the State possessed a sovereign interest in regulating any corporation "present" within its territory, whether the suit had any other connection to the State. But without corporate presence, the State had no recognized interest; thus, the obligation of unconditional submission to the State's adjudicative power would run afoul of the same constitutional principle that barred States from imposing a registration condition that nonresident corporations could not remove cases to federal court. While this Court avoided the constitutional difficulty through limited constructions of the state registration laws under review in *Chipman* and its progeny, the Court's concerns align with a need for proportionality to a sovereign interest.

A contrary inference could be drawn from *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 889 (1988), but that inference misreads the relevant excerpt and, in any event, is based on dicta. *Bendix* held an Ohio statute that tolled limitations while a nonresident corporation was without an in-state agent for process violated the Commerce Clause. *Id.* at 894. The appellee Midwesco argued that the challenged statute was a "forced licensure provision" because, by designating a statutory agent to prevent limitations

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[13] *See supra* Part II.A.

tolling, it "would submit itself to the general jurisdiction of the courts of Ohio for all purposes waiving its personal jurisdiction defenses."[14] The appellant Bendix accepted that all-purpose jurisdiction flowed from registering to do business; its argument was that such an all-purpose jurisdictional submission was not a significant burden on commerce and other methods existed to appoint an agent without registering and "surrendering to the general jurisdiction of the State."[15]

While evaluating the resulting burden on interstate commerce, this Court echoed the parties' positions, stating the appointment would extend jurisdiction "to any suit against Midwesco, whether or not the transaction in question had any connection with Ohio." *Bendix*, 486 U.S. at 892. This excerpt is best read as a description of the operation of the state statute, not as a legal conclusion on whether a registration statute, if construed to support all-purpose jurisdiction regardless of a State's interest in the dispute, is constitutional. Indeed, that issue was not presented in the case; thus, whatever the import of the excerpt, it is quite plainly dicta.

Under this Court's longstanding precedent, registration statutes conferring consent jurisdiction over a nonresident corporation cannot be constitutionally applied unless the State has a sovereign interest in the suit. For these cases, the permissible proportionality between the right being surrendered and the

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[14] Brief for Appellee at 4, *Bendix* (No. 87-367).

[15] Brief for Appellant at 4-5, *Bendix* (No. 87-367).

obligation being imposed does not exist. On the other hand, if a State has a proportionate sovereign interest in the case—even though it may not satisfy the current standards governing contacts-based specific jurisdiction—the Constitution's demands have been satisfied.

C. The Commerce Clause Would Similarly Necessitate a State Interest.

The limitations imposed by the dormant or negative Commerce Clause are not within the question presented in this case. Yet an analysis under the Commerce Clause reinforces the necessity of a sovereign interest to uphold state-court jurisdiction predicated on corporate registration.

The dormant Commerce Clause invalidates a State's laws that burden out-of-state competitors or the flow of interstate commerce without a sufficient local non-protectionist benefit. *See McBurney v. Young*, 569 U.S. 221, 235 (2013). Registration laws with jurisdictional consequences discourage out-of-state companies from doing business within a State, which burdens the flow of interstate economic activity and protects local businesses from outside competition.[16] In early twentieth-century cases, this Court recognized that exorbitant state-law jurisdictional assertions violate the Commerce Clause. *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 315-17 (1923), held that a state statute authorizing service on a railroad soliciting agent was unconstitutional when the defendant

[16] Preis, *supra* n.2, at 125.

conducted no in-state operations and the nonresident plaintiff suffered an out-of-state injury. *See also Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492, 494-95 (1929); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101, 103 (1924).

These cases comport with the modern sovereign interest analysis from *Bendix*. After concluding the Ohio tolling statute significantly burdened out-of-state companies by making them choose whether to submit to jurisdiction for all transactions or forfeit a limitations defense, this Court held the burden on interstate commerce exceeded "any local interests that the State might advance," as the State's "legitimate sphere of regulation" was not furthered by the tolling provision. 486 U.S. at 891-93. The tolling statute did not protect an Ohio resident, this Court reasoned, as the State's long-arm statute would have permitted service on Midwesco throughout the limitations period. Because the limitations period was tolled only for those foreign corporations not registering and submitting to general jurisdiction, the statute "impose[d] a greater burden on out-of-state companies than it does on Ohio companies," without serving any local benefit in protecting the State's citizens. *Id.* at 894.

This "local interest" implicating the State's "legitimate sphere of regulation" is not required to equate to the circumstances that authorize specific jurisdiction under a modern minimum-contacts analysis.[17]

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[17] *See* Preis, *supra* n.2, at 141-44; Rhodes & Robertson, *supra* n.3, at 433-34.

Consider *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284, 286-87 (1932). After a Colorado railroad workplace accident, the plaintiff became a bona-fide Missouri resident and then sued his two employer railroads in Missouri. While the Commerce Clause barred his suit against the railroad neither licensed to nor conducting in-state business, this Court found jurisdiction proper over the Missouri-licensed railroad even without any connection—other than the current Missouri residence of the plaintiff and other likely testifying witnesses—between the claim and the forum State. *Id.*

The permissibility of registration-based consent under the Commerce Clause reduces to whether "the plaintiff is a *true* forum shopper," *i.e.*, a plaintiff choosing a "forum that has no relevance to the suit, save its comparative likelihood to favor the plaintiff."[18] This renders the State's interest in the case insufficient to support the corresponding burden on interstate commerce. Yet when the plaintiff is not shopping for plaintiff-friendly law or jurors, but instead sues in a natural State convenient to the parties and witnesses, the Commerce Clause is not offended when a registration statute confers jurisdiction.

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[18] *See* Preis, *supra* n.2, at 133-34.

D. Registration Statutes Reciprocally Exchange Proportional Benefits and Obligations when State Interests Support Jurisdiction.

Registration statutes reflect a negotiated balance between public and private interests. Although the Constitution places limits on the State's authority to condition its permission on the surrender of constitutional rights, such conditions are permissible in cases supported by sovereign interests such as safeguarding state citizens, protecting against in-state harms suffered by both citizens and visitors, and enforcing state laws.

1. *State Citizens*. "Every State owes protection to its own citizens." *Pennoyer*, 95 U.S. at 723. A State therefore has a "'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

This interest extends beyond injuries its citizens suffer within the State. The protection of local citizens "is plainly a legitimate state objective," although "the State has no legitimate interest" in protecting nonresidents from harms arising from out-of-state transactions. *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982). A State has an interest in "safeguarding its populace from falsehoods," even those targeted at nonresidents, *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 777 (1984); and a State may "protect its citizens from [the]

injustice" of seeking redress only in the distant State of the defendant's incorporation. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

Under a minimum-contacts analysis, though, the State's interest in safeguarding its citizens does not always suffice to support specific jurisdiction, as the necessary purposeful availment or relationship to the litigation may not exist. *See Kulko v. Superior Court*, 436 U.S. 84, 100-01 (1978) (recognizing California's "substantial interests in protecting resident children and facilitating child-support actions on behalf of those children," but holding the forum to be unfair without the defendant father's purposeful contacts with the State). But in the registration context, the analysis is different—the only concern is the proportionality of the conditions to the benefits received. And a corporation's agreement to be amenable to suits brought by state citizens in exchange for the State's grant of permission to use its courts and conduct in-state business activities carefully matches the benefits obtained and obligations imposed.

2. *In-State Harms*. States also have an interest in adjudicating claims of in-state harm, whether suffered by residents or visitors. This Court has recognized this interest in a variety of contexts, including physical injuries, *Ford*, 141 S. Ct. at 1030; economic losses, *McGee*, 355 U.S. at 222-23; and reputational damage from defamation. *Keeton*, 465 U.S. at 776. While an in-state harm typically supports specific jurisdiction under a minimum-contacts analysis, a State still has an interest in conditioning its regulatory

approval to do business to a corporation on its agreement to be amenable in all suits brought by those suffering an in-state injury.

3. *State Law*. In addition to promoting the interests of its citizens, a State also has an independent interest in ensuring that corporations abide by state law while transacting in-state business. For example, States have a recognized interest in "enforcing their own safety regulations." *Ford*, 141 S. Ct. at 1030. And States have an "interest in faithful observance" of their regulatory schemes by nonresidents conducting activities subject to their legislative jurisdiction. *Travelers*, 339 U.S. at 648. While in most cases this interest authorizes the exercise of specific jurisdiction under the minimum-contacts test, this does not discount a State's authority to request a corporation to register and provide its agreement to be amenable in cases related to such significant sovereign interests.

Corporations have a choice to refuse to register. States may only require registration under the dormant Commerce Clause when a corporation is engaging in an ongoing and regular course of intrastate or local business activity comparable in nature to a local business enterprise.[19] Corporations engaged solely in interstate business activities or who engage only in isolated in-state transactions or mere solicitation need not register, as isolated or independent intrastate activities, even if otherwise sufficient to establish adjudicative jurisdiction, are insufficient to require

[19] *See* Rhodes & Robertson, *supra* n.3, at 427.

registration. *E.g.*, *Neth. Shipmortgage Corp. v. Madias*, 717 F.2d. 731, 726 (2d Cir. 1983); *Long Mfg. Co. v. Wright-Way Farm Serv., Inc.*, 214 N.W.2d 816, 818-20 (Mich. 1974).

Many corporations thus have alternative avenues, even without registering to do business, to obtain economic benefits from a State. And even those in-state business activities requiring registration could be performed by a related corporate entity that registers to do business, with the granted jurisdictional consent extending only to the registering entity. While these options may not be available to all types of corporate activities, including businesses operating a transportation network like Respondent,[20] registration also carries an important advantage: it permits the corporation to access the State's courts as a plaintiff, allowing the corporation to file suit to enforce contracts and other agreements with state residents. In this way, registration functions as a two-way street—it offers the corporation the right to sue as a plaintiff in exchange for the obligation to agree to be sued there.

Such an exchange furthers the same policies underlying other *ex ante* forum-selection agreements. The corporation's consent to jurisdiction spares litigants and the judiciary from the burdens, expense, and strain of jurisdictional discovery and pre-trial dismissal motions.[21] The corporation, in turn, can structure

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[20] *See* Rensberger, *supra* n.8, at 365-66.

[21] *See* Rhodes & Roberston, *supra* n.3, at 428.

its conduct in reliance on predictable jurisdictional outcomes.

III. An All-or-Nothing Approach Would Undermine Interstate Federalism.

The parties to this case have staked out maximalist positions. Petitioner asserts that a State may require corporations to consent to jurisdiction for *any* lawsuit as a condition of registration to do in-state business. Respondent asserts that a State can *never* require foreign corporations to consent to jurisdiction as a condition of doing business in the State.

Both these positions undermine the interests of interstate federalism, and both are inconsistent with this Court's prior recognition of state authority and the constitutional limits that cabin that authority. And importantly, either approach would cause significant disruption in the management of national commerce and dispute resolution.

Commerce naturally crosses state lines. This Court's minimum-contacts analysis generally ensures that disputes arising from that commerce flow to forums with sovereign interests. *Ford*, 141 S. Ct. at 1025. But there are circumstances where a forum State may possess a strong interest in the suit—and may even be the forum best suited to resolve it—although contacts jurisdiction does not exist. When States foresee such situations, their ability to obtain *ex ante* jurisdictional consent facilitates interstate coordination.

States have pursued this course, employing jurisdictional consent—whether through corporate registration or another analogous state-law mechanism—when their sovereign interests are implicated but contacts jurisdiction is uncertain or unavailable. This Court should not extinguish this existing jurisdictional alternative.

1. *Corporate Oversight*. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), held that a Delaware corporate directorship alone did not support specific contacts jurisdiction in Delaware for a nonresident director's corporate activities. In reaching this holding, this Court highlighted that Delaware did not, like other States, statutorily require directors to consent to jurisdiction for suits related to their corporate duties. *Id.* This suggested that such consent statutes could support jurisdiction even when contacts analysis did not.

Days after *Shaffer*, Delaware enacted legislation providing that nonresidents serving as officers of Delaware corporations consented to suit in Delaware for litigation involving the corporation "in which such officer is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity, whether or not the person continues to serve as such officer at the time suit is commenced." Del. Code tit. 10, § 3114. In upholding § 3114 after *Shaffer*, the Delaware Supreme Court explained that, "so long as the consent requirement serves a legitimate State purpose," it sufficed to establish jurisdiction because the directors had explicit statutory notice "that they could be haled into the Delaware Courts to

answer for the alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities." *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980); *see also Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157-58 (3d Cir. 2010).[22]

States have also employed jurisdictional consent when alterations in a corporation's form may impact the State's jurisdictional reach. For example, New York statutorily requires that, when a domestic corporation merges with an out-of-state entity, the new entity consent to in-state service of process and resulting jurisdiction "for the enforcement of any liability or obligation of any domestic corporation or of any foreign corporation, previously amenable to suit in this state." N.Y. Bus. Corp. Law § 907(e)(1)(2)(E). This statute has been employed to obtain jurisdiction over a corporate successor that would not otherwise exist. *See Armour Handcrafts, Inc. v. Miami Decorating & Design Ctr., Inc.*, 99 A.D.2d 521, 521-22, 471 N.Y.S.2d 607, 608-09 (1984).

These statutes presuppose the validity of jurisdictional consent as an imposed condition when the State

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[22] In upholding § 3114's prong for necessary-or-proper officer parties in *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 279 (Del. 2016), the court detailed that the statute includes "a safeguard against overreaching, because a nonresident officer and director can only be served in a case in which the corporation itself is a party, and in which the officer or director is a necessary or proper party to the suit," thereby ensuring the implied-consent mechanism "only applies when a director or officer faces claims that arise out his exercise of corporate powers."

has sovereign interests in the dispute. A holding by this Court accepting either of the parties' positions could upend this existing balanced approach.

2. *Products and Torts Cases.* Products-liability and other torts cases sometimes fall in a gap where the plaintiff cannot sue at home, or all the parties cannot be sued in one forum, under either general or specific contacts jurisdiction. One example is *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021), *petition for cert. filed*, No. 21-926 (Dec. 20, 2021). In that case, a Florida resident, who was a passenger in a vehicle driven by a Georgia resident, suffered severe injuries in Florida when the vehicle's rear tire allegedly failed; the Florida plaintiff then sued the Georgia driver, the Georgia car dealership that sold the used vehicle, and the nonresident tire manufacturer in Georgia. *Id.* at 83. The Georgia Supreme Court upheld jurisdiction over the nonresident tire manufacturer under the State's consent-by-registration scheme. *Id.* at 91-92.

It is uncertain whether Georgia could constitutionally exercise specific contacts-based jurisdiction over the nonresident tire manufacturer. *See Ford*, 141 S. Ct. at 1030; *cf. id.* at 1035 (Gorsuch, J., concurring). In any event, because of a quirk in Georgia's long-arm statute, only consent jurisdiction was available in *Cooper Tire*. 863 S.E.2d at 91-92. But this exercise of consent jurisdiction was appropriate and aptly supported by Georgia's sovereign interests. Cooper Tire was conducting in-state business activities necessitating its registration. One of its tires was on a vehicle sold to a Georgia resident within the State that then

was involved in an accident in Florida, implicating Georgia's sovereign interests in protecting its citizens from the in-state sale of defective and unsafe products.

Cooper Tire illustrates a common occurrence in products-liability and other tort cases—while it may be impossible to sue all the defendants in a single State under contacts jurisdiction, consent jurisdiction supported by sovereign interests may fill that gap. Consent jurisdiction thereby may buttress other interstate federalism policies. The joinder of all defendants in a products-liability suit fulfills "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." *World-Wide Volkswagen*, 444 U.S. at 292. Moreover, it effectuates "the shared interest of the several States in furthering fundamental substantive social policies." *Id.*

Most States have adopted so-called "innocent seller" exceptions to joint-and-several liability in products-liability cases. These statutes insulate retailers from liability for defective products but commonly authorize retailer liability if the manufacturer is not amenable to the State's jurisdiction.[23] The effectiveness of these laws therefore requires States to have authority to join potentially responsible parties to the suit. Restricting the States' power to exercise personal jurisdiction in products-liability cases undermines state tort law and risks granting effective "immunity

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[23] *E.g.*, Colo. Rev. Stat. § 13-21-402(2); Del. Code tit. 18, § 7001(c)(2); Minn. Stat. § 544.41 subdiv. 2(2).

from suit for manufacturers" that is at odds with state substantive law.[24]

These examples illustrate that a State's ability to require jurisdictional consent—when applied to cases implicating a legitimate state interest—protects the negotiated give-and-take of state regulatory interests within a functioning federalist system. As this Court has explained, the Commerce Clause itself "was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093-94 (2018). Recognizing the States' limited power to require jurisdictional consent as a condition of doing business promotes the interests of interstate federalism that this Court has long sought to protect. *See Ford*, 141 S. Ct. at 1030; *Burger King*, 471 U.S. at 473-74; *World-Wide Volkswagen*, 444 U.S. at 292.

The States need some power to negotiate jurisdictional consent to ensure that they can enforce their laws and protect their regulatory interests while opening their markets to nonresident business entities. But that power cannot be unlimited; jurisdictional overreach encroaches on the interests of sister States, threatening other States' powers to protect their own interests. A middle-ground approach would allow a State to engage in jurisdictional negotiation but limit the State's permissible reach to the realm of the State's

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[24] Alexandra D. Lahav, *The New Privity in Personal Jurisdiction*, 73 Ala. L. Rev. 539, 582 (2022).

sovereign interest. This approach is consistent with this Court's longstanding jurisdictional doctrine and avoids the pitfalls of either of the more extreme positions staked out by the two parties.

Scholars (including some of the *amici* here) have proposed registration schemes employing such a middle-ground approach to authorize a State's sovereign interests to fill in existing gaps in contacts jurisdiction.[25] Consent jurisdictional schemes provide an opportunity for the legislature to signal the State's priorities to the judicial branch.[26] Such schemes could represent "a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history." *Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring).

CONCLUSION

This Court should require that a State must have a sovereign interest to support consent jurisdiction under a registration statute and remand for consideration

[25] *E.g.*, Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. Ann. Surv. Am. L. 23, 99 (2018); Rhodes, *supra* n.10, at 444-47; Rhodes & Robertson, *supra* n.3, at 411-15.

[26] Aaron D. Simowitz, *Jurisdiction as Dialogue*, 52 N.Y.U. J. Int'l Law & Politics 485, 525-26 (2020).

of whether the Pennsylvania statute can be constitutionally applied in this case.

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JULY 12, 2022

APPENDIX

Amici Curiae Scholars of Corporate Registration and Jurisdiction

This Appendix provides *amici*'s titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply the endorsement of the view expressed herein by *amici*'s institutions.

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