No. 21-1168

IN THE

Supreme Court of the United States

ROBERT MALLORY,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Respondent.

On Writ of Certiorari to the
Pennsylvania Supreme Court

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a nonprofit consumer advocacy organization with members in all 50 states, appears before Congress, administrative agencies, and courts on many issues. Public Citizen has a longstanding interest in issues of court procedure that determine the availability of a judicial forum for injured parties and affect courts' ability to provide redress efficiently and effectively. Public Citizen is concerned that restrictive views of the scope of state courts' personal jurisdiction may unduly limit injured plaintiffs' access to the civil justice system.

SUMMARY OF ARGUMENT

Petitioner's brief explains why this Court can, consistent with precedent, resolve this case by applying the longstanding principle that a party can consent to the exercise of personal jurisdiction. Public Citizen supports that view but submits this brief to suggest an alternative analytical approach that may inform the Court in determining that due process permits the exercise of general personal jurisdiction over a corporation whose appointment of an agent for service of process in a state effectively acknowledges that its local activities are so extensive that it is, in every meaningful sense of the word, present there.

The basic principle animating this Court's personal-jurisdiction decisions has long been that, to satisfy the demands of the Due Process Clause, a state court's exercise of personal jurisdiction must comport

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

with requirements of fundamental fairness—traditional notions of fair play and substantial justice that determine whether it is reasonable to expect the defendant to answer a claim within the state. Physical presence in a state, like domicile, has long been a touchstone for determining when it is fair for a defendant to face trial in the state. Traditionally, if defendants could be found and served within a state, they could expect to have to answer claims before its tribunals, regardless of where those claims arose. *See Burnham v. Super. Ct.*, 495 U.S. 604 (1990).

In cases establishing the "minimum contacts" test, the Court recognized the fairness of expanding personal jurisdiction to allow a defendant whose contacts with a state are less physically concrete than domicile or presence to be haled into court if the defendant has engaged in transactions, out of which the claims arise, that have significant in-state effects. Such jurisdiction, in contrast to "general" jurisdiction based on domicile or presence, has been termed "specific."

Specific jurisdiction has not displaced the traditional principle that a defendant remains subject to all-purpose jurisdiction in a state where it is domiciled. And at least for individual human defendants, specific jurisdiction has also not displaced general jurisdiction based on presence. However, although corporations traditionally were subject to the same principles of personal jurisdiction that govern individuals, and thus were subject to general jurisdiction based on physical presence in states where they could be found, this Court's recent decisions may be read to suggest different treatment for corporations. On this reading, unlike individuals—who remain subject to general jurisdiction both where they are at home and wherever they can be found—corporations are subject to general

jurisdiction only where they are at home (that is, where they are incorporated or have their principal headquarters).

Four Justices of the Court have recently noted the anomaly of imposing greater limits on personal jurisdiction over corporations than over individuals, given that it is no more unfair (and much less practically burdensome) for corporations than for individuals to answer claims in jurisdictions where they are not at home but were found at the time of service. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., joined by Thomas, J., concurring in the judgment); *id.* at 1032 (Alito, J., concurring in the judgment); *Daimler AG v. Bauman*, 571 U.S. 117, 158 (2014) (Sotomayor, J., concurring in the judgment). In fact, the Court has never explicitly held that corporations receive greater protection than individuals against the exercise of personal jurisdiction based on presence. Rather, the Court's decisions restricting the jurisdictions where a corporation can be deemed to be "at home" have reflected the Court's explication of the principle that the exercise of general jurisdiction always satisfies due process in a state where an individual is *domiciled*. The Court has not, in those decisions, directly addressed the application to corporations of the equally venerable concept that individuals are subject to general jurisdiction where they are *present*. And the Court has never expressly overruled its precedent recognizing that, for both corporations and individuals, due process permits a court in a state where the defendant has been found and served to exercise general jurisdiction.

As the facts of this case illustrate, it is permissible to treat a corporate defendant as present, and as being properly found and served, in a state where its

conduct of business is so substantial that reasonable, nondiscriminatory statutory criteria require it to register and appoint an agent to accept service of process for all purposes, and where it has acknowledged its presence by appointing such an agent. Exercise of jurisdiction over such a defendant is fundamentally fair, both because the defendant has consented to it, as petitioner explains, and because the longstanding legal tradition permitting the exercise of jurisdiction over a defendant present in a state reflects an understanding that it is fair to expect such a defendant to answer claims in that state's courts—whether the defendant is an individual or a corporation.

ARGUMENT

I. General personal jurisdiction based on physical presence is consistent with traditional notions of fairness.

"The existence of personal jurisdiction … depends upon the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum." *Kulko v. Super. Ct.*, 436 U.S. 84, 91 (1978) (citations omitted). "By requiring that [parties] have 'fair warning that a particular activity may subject [them] to jurisdiction of a foreign sovereign,' the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted).

"In evaluating claims that a particular procedure violates the Due Process Clause," this Court has

"asked whether the procedure is traditional." *Rutan v. Republican Party*, 497 U.S. 62, 103 (1990) (Scalia, J., dissenting). As Justice Scalia explained in *Burnham*, "due process 'mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights,' including the 'well-established principles of public law respecting the jurisdiction of an independent State over persons and property.'" 495 U.S. at 609 (plurality opinion, quoting *Pennoyer v. Neff*, 95 U.S. 714, 722, 733 (1878)). Physical presence of a corporation, generally demonstrated by service on a corporate agent within a state, was the "dominant jurisdiction theory in the nineteenth and early twentieth century." Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 621 (1988). Where a corporation had appointed an agent for service of process pursuant to a state statute, this Court "permitted the same sort of dispute-blind jurisdiction that it permitted over individuals who were present in the state or had agents there." *Id.*

Later, prompted "by the growth of a new business entity, the corporation, whose ability to conduct business without physical presence had created new problems not envisioned by rules developed in another era," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994), the Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), identified an additional basis for personal jurisdiction over out-of-state defendants. There, the Court recognized that due process permits exercise of jurisdiction over defendants not domiciled or present in a state, to adjudicate claims arising out of or relating to transactions involving "certain minimum contacts with [the state] such

that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316.

The issue that concerned the Court in *International Shoe* was not whether physical presence was sufficient to justify general jurisdiction but, rather, the inadequacy of "presence" to fully capture the circumstances in which fairness permits the exercise of jurisdiction. The Court recognized that, because "the corporate personality is a fiction," corporate presence "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* at 316; *see also id.* at 316–17 ("[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."). "[A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it," the Court explained that "other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." *Id.* at 318 (citations omitted). The Court observed that, while many decisions upholding jurisdiction were based on the "legal fiction" of "consent," *id.*, "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction," *id.* In other words, where a corporation has "continuous corporate operations within a state" that are sufficiently "substantial," *id.*, it is fair to say that the corporation is "present" in the state and thus subject to the general jurisdictional authority of that state's courts.

International Shoe's innovation was not to limit the exercise of general jurisdiction. Rather, what the decision added to personal-jurisdiction doctrine was recognition that, even absent in-state activity amounting to presence, a corporation that has conducted transactions touching a state, and "enjoy[ed] the benefits and protection of the laws of that state," *id.* at 319, may be required "to respond to a suit brought to enforce" obligations that "arise out of or are connected with the activities within the state," *id.* *International Shoe* thus expanded personal jurisdiction to include specific jurisdiction, without contracting the scope of general jurisdiction.

Seven years later, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), confirmed that *International Shoe* did not displace the principle that states may exercise general jurisdiction over corporations where their in-state activities are robust enough to render them physically present. *Perkins* considered whether Ohio courts could exercise general jurisdiction over a foreign mining company. During World War II, the company's mining operations had been suspended, and the company's president and general manager returned to his Ohio home, where the plaintiff attempted to serve process on the company by serving him as its agent. *Id.* at 447–48. *Perkins* concluded that "if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative." *Id.* at 444. The Court noted that "[t]he corporate activities of a foreign corporation

which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful, but not a conclusive, test." *Id.* at 445.

In *Burnham*, a case involving an individual defendant, the Court reaffirmed that *International Shoe* did not displace the traditional view that a defendant's presence in a state, no matter how fleeting and insubstantial an affiliation it reflects, suffices for general personal jurisdiction if the plaintiff succeeds in serving the defendant within the state. In that case, Dennis Burnham had married Francie Burnham in 1976 in West Virginia; a year later the couple moved to New Jersey, where their two children were born. 495 U.S. at 607. In 1987, the couple separated, and Ms. Burnham moved to California with the children. Later that year, Mr. Burnham was in California on business and visited his children. Ms. Burnham served him in California with a California court summons, accompanied by a divorce petition. *Id.* at 608. He challenged the court's jurisdiction over him, arguing that his few short visits to the state were insufficient to justify California's exercise of general jurisdiction over him.

Ruling against him, this Court unanimously agreed that "the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State." *Id.* at 628–29 (Brennan, J., concurring in the judgment). Justice Scalia's opinion for four justices began by emphasizing that "[a]mong the most firmly established principles of personal jurisdiction in American traditions is that the courts of a State have jurisdiction over nonresidents who are physically present in

the State." *Id.* at 610 (plurality). He explained that "[n]othing in *International Shoe* or the cases that have followed it, … offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum … is itself no longer sufficient to establish jurisdiction." *Id.* at 619. "That proposition," he stated, "is unfaithful to both elementary logic and the foundations of our due process jurisprudence." *Id.*

Although the case prompted four opinions, all nine Justices agreed that a defendant voluntarily present in a state is subject to jurisdiction there. Justice White wrote separately to emphasize that "[t]he rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment." *Id.* at 628 (White, J., concurring). Justice Brennan, concurring in the judgment and joined by Justices Marshall, Blackmun and O'Connor, stated that "the fact that American courts have announced the rule for perhaps a century … provides a defendant voluntarily present in a particular State *today* 'clear notice that [he] is subject to suit' in the forum." *Id.* at 636. Justice Stevens, in a one-paragraph opinion concurring in the judgment, noted that the "historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case." *Id.* at 640.

Thus, "the short of the matter is that jurisdiction based on physical presence alone constitutes due

process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619 (plurality). "That standard was developed by *analogy* to 'physical presence,' and it would be perverse to say it could now be turned against that touchstone of jurisdiction." *Id.*

II. Corporations should not be exempted from the longstanding principle that it is fair to sue a defendant where it is found.

A. Recent decisions threaten to create an inconsistent due-process standard for corporations and individuals.

Although the Court's most recent encounter with general jurisdiction over *individual* defendants led to *Burnham*'s unanimous reaffirmation of jurisdiction based on presence, the Court's recent decisions concerning general jurisdiction over *corporate* defendants suggest a more protective rule for corporations: general jurisdiction only where the corporation is incorporated or has its main headquarters. The decisions suggest this standard by emphasizing the analogy between those two locations and an individual's domicile, where general jurisdiction is always proper. But those decisions overlook that an individual is subject to general jurisdiction *both* where she is domiciled *and* wherever she happens to be present and is found and served.

The Court's more recent decisions considering general jurisdiction over corporations began in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), where the Court considered whether a Texas state court could exercise general jurisdiction over a company, Helicol, incorporated and headquartered in

Colombia. *Id.* at 409. Survivors of individuals killed in a helicopter crash in Peru sued Helicol in Texas. Helicol had no physical facilities or employees in Texas. Rather, its contacts consisted of having previously sent its chief executive officer to Houston to negotiate contracts, accepted payment via the Houston branch of a New York bank, purchased helicopters from a Texas company, and sent personnel to Fort Worth for training. *Id.* at 416. The Court concluded that these past contacts did not render the corporation present in Texas and thus that the exercise of jurisdiction over the defendants would violate due process. *Id.* at 418.

The Court next addressed corporate general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). The claims in *Goodyear* arose from a bus accident near Paris allegedly caused by a defective tire manufactured by a foreign subsidiary of Goodyear USA. *Id.* at 918. Survivors of children killed in the accident sued Goodyear USA and several foreign subsidiaries in North Carolina state courts, where Goodyear USA—but not the foreign subsidiaries—was registered to do business and had plants. *Id.* Goodyear USA did not contest jurisdiction. *Id.* at 921. This Court held that the foreign subsidiaries could not be haled into court in North Carolina because, in addition to not being registered to do business there, the subsidiaries "have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers." *Id.* In other words, the subsidiaries were neither domiciled *nor present* in North Carolina.

Goodyear's analysis followed directly from *Perkins*, which the Court called the "textbook case of general

jurisdiction appropriately exercised over a foreign corporation," *id.* at 928, and *Helicopteros*. The Court also observed, though, that "[f]or the individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for the corporation, it is the equivalent place, one in which the corporation is fairly regarded as at home," *id.* at 924—that is, its place of incorporation or principal place of business. That observation is true as far as it goes. But nothing in *Perkins* or *Helicopteros* suggests that the existence of this "paradigm" forum excludes other states where the defendant is found. Put differently, those precedents nowhere indicate that *Burnham*'s reasoning applies only to individuals and not corporations.

Nonetheless, the Court's next decision on corporate general jurisdiction, *Daimler*, could be read to suggest that general jurisdiction over a corporation is *limited* to those paradigm jurisdictions where it is "at home." *Daimler* "concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." 571 U.S. at 120. The corporate defendant that challenged personal jurisdiction in *Daimler* was neither at home nor present in the forum. But the Court's opinion reads as if only the former mattered: Citing *Goodyear*, *Daimler* says the test for general jurisdiction is whether a corporation's "affiliations with the State are 'so continuous and systematic' as to render it essentially at home in the forum State." *Id*. at 139. And, like *Goodyear*, *Daimler* identifies a corporation's state of incorporation and principal place of business as the locations where it is "at home." *Id*. at 137. By focusing on the analogy between these locations and an individual's *domicile*, the opinion appears to sever the

parity for due process purposes between corporations (which can be sued for all purposes "at home") and individuals (who can be sued for all purposes both "at home" and wherever else they are found).

As a result, when the Court next addressed corporate general jurisdiction in *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017), the Court treated it as settled law that a state may not assert general jurisdiction over a corporation "found" within the state unless the corporation's ties with the jurisdiction are so extensive that it is "at home" there. *Id.* at 1558–59. The Court acknowledged that in an "exceptional" case a state where a corporation is neither incorporated nor headquartered *might* meet this test, but it indicated that the corporation's ties to the forum must be equivalent to those that make the corporation "at home." *Id.* Thus, although none of its recent decisions rejecting general jurisdiction had involved presence or explained why jurisdiction based on presence is fundamentally unfair, the Court appeared to view them as ruling out general jurisdiction based on a corporation's substantial presence.

B. Retreating from the recognition of general jurisdiction over corporations based on presence creates an incongruous distinction between due-process rights of natural and artificial persons.

Although the Due Process Clause on its face protects the rights of "any person," the Court's recent cases addressing general jurisdiction threaten a sharp differentiation between due-process rights of natural and artificial persons—a differentiation that favors the latter, without explanation. Under *Burnham*, individuals may be sued on any claim anywhere they

are found, no matter how insubstantial their ties to the state and no matter how onerous it may be to defend litigation unrelated to the state in that location. In contrast, under *Daimler*, general jurisdiction over a corporation is arguably limited to two locations, regardless of how extensive its presence in another state—and how minimal the burden of defending litigation there—may be. *See Daimler*, 571 U.S. at 158 (Sotomayor, J., concurring in the judgment) ("[T]he majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, but a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well).").

Justice Sotomayor's *Daimler* concurrence pointed out that such an approach strayed from the "lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial." *Id.* at 144 (Sotomayor, J., concurring). As she explained "[t]his approach follows from the touchstone principle of due process in this field, the concept of reciprocal fairness," while the "majority's focus on the extent of a corporate defendant's out-of-forum contacts is untethered from this rationale." *Id.* at 151. Moreover, the notion that general jurisdiction is limited to forums where a corporation is "at home" cannot be a complete picture of general jurisdiction because "among other things it would cast

grave doubt on *Perkins*—a case that *Goodyear* pointed to as an exemplar of general jurisdiction … [f]or if *Perkins* had applied" the approach of the majority in *Daimler*, "it would have come out the other way." *Id.* at 152 n.8. "*Goodyear*'s use of the phrase 'at home' is thus better understood to require the same general jurisdiction inquiry that *Perkins* required: An out-of-state business must have the kind of continuous and substantial in-state presence that a parallel local company would have." *Id.*

As Justice Gorsuch pointed out last year in his concurring opinion in *Ford*, a rule limiting corporate general jurisdiction to a limited category of "home" jurisdictions while allowing general jurisdiction over individuals based on presence alone would ensure that "corporations continue to receive special jurisdictional protections in the name of the Constitution" for reasons that are (to say the least) "less [than] clear." 141 S. Ct. at 1038 (Gorsuch, J., concurring in the judgment). "The Constitution," Justice Gorsuch explained, "has always allowed suits against *individuals* on any issue in any State where they set foot. Yet the majority seems to recoil at even entertaining the possibility the Constitution might tolerate similar results for 'nationwide corporations,' whose 'business is everywhere.'" *Id.* at 1039 n.5; *see also id.* at 1032 (Alito, J., concurring in the judgment) ("[T]here are … reasons to wonder whether the case law we have developed … is well suited for the way in which business is now conducted.").

That corporate presence may be less concrete, in some sense, than individual presence does not explain the jurisdictional incongruity. There is no reason to doubt that states can identify criteria to determine when a corporation is genuinely present within their

territories. Although such criteria may subject some corporations to general jurisdiction in numerous states where their presence allows them to be found for service of process, that result is not unfair just because they are more "at home" elsewhere. As *International Shoe, Burnham*, and the Court's general jurisdiction cases before *Daimler* make clear, the proper question is whether the forum state has authority to hale a defendant—whether individual or corporation—into court. That inquiry is based on the entity's relationship with (including presence in) the forum state. Just as California's jurisdiction over the traveling husband in *Burnham* was not defeated because he was "at home" elsewhere, a corporation's relations with other states have no bearing on whether they are present in the forum. As Justice Sotomayor explained in *Daimler*:

> In the era of *International Shoe*, it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. But that is as it should be. What has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy. Just as it was fair to say in the 1940's that an out-of-state company could enjoy the benefits of a forum State enough to make it 'essentially at home' in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is "essentially at home" in each one.

Daimler, 571 U.S. at 155–56 (Sotomayor, J., concurring).

Moreover, in addition to subjecting individuals to general jurisdiction in a much broader range of jurisdictions based on much more fleeting contacts, limiting corporate jurisdiction also harms plaintiffs by shifting the burden of distant litigation onto them without consideration of the defendant's ability to litigate in the forum. *See BNSF*, 137 St. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part) ("It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connections.").

C. A restrictive rule of general jurisdiction over corporations favors large corporations over smaller ones.

A jurisdictional rule that declines to recognize "presence" as a basis for general jurisdiction over corporations "grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions." *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring/dissenting). "Under [*Daimler*'s] reasoning, it is virtually inconceivable that [large] corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States." *Id.*

While multinational corporations benefit from this jurisdictional advantage, small ones do not. Small companies operate close to home. Although they may

ship and advertise globally, their "presence" is often limited to the locations *Daimler* identified as paradigmatic "homes." Consequently, they will not benefit from a jurisdictional loophole that would allow huge companies such as Norfolk Southern to avoid general jurisdiction in states where the vast majority of their activities take place. Small companies, like individuals, are more likely harmed by special jurisdictional rules for corporations, under which they frequently will have to bear the burden of litigating disputes with larger companies away from home, even where corporate defendants have extensive contacts with the preferred forum. *See also Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring) ("[T]oday, this Court usually considers corporations 'at home' and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many 'headquarters.'").

D. Narrow corporate jurisdictional rules harm the states.

"[J]urisdiction is in the first instance a question of authority." *J. Mcintyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality). The traditional standard allowing states to exercise jurisdiction over corporations whose presence is signified by registration to do business vindicates state authority over corporations that claim protection of state law. By contrast, the theory that corporate general jurisdiction is limited to the one or two states where a corporation is incorporated and headquartered "never explains why the State should lose [general jurisdiction] when, as is increasingly common, a corporation 'divides its command and coordinating functions among officers who work at several different locations.'" *Daimler*, 571

U.S. at 157 (Sotomayor, J., concurring) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010), cleaned up).

Narrow jurisdictional rules also artificially shift the playing field, misallocating cases to, and potentially burdening, states where corporations incorporate at the expense of states where they carry on most of their activities:

> Heavy reliance on at-home jurisdiction, however, leads to a jurisdictional "allocation" that is uneven and unfair. Some states are home to many more corporations than others, even though their corporations engage in business all over the country. Because the administrative burden of at-home jurisdiction is significant, states may not *want* to hear all cases brought against resident corporate defendants. It is not surprising, from this perspective, that Delaware's expansion of forum non conveniens came *after* the circumscription of personal jurisdiction in cases like *Daimler* … pushed more litigation against corporate defendants into Delaware's courts. Put bluntly, it is a signal from the Delaware courts that they do not want all the cases that the Supreme Court assumes belong with them.

Maggie Gardner, *et al.*, *The False Promise of General Jurisdiction*, 73 Ala. L. Rev. 455, 467–68 (2022).

III. Norfolk Southern's presence in Pennsylvania permits general jurisdiction there.

Recognition that due process permits a state to assert general jurisdiction over corporations present in the state requires reversal of the judgment below. Pennsylvania law provides reasonable criteria to identify corporations deemed present in the state. Norfolk Southern's registration effectively acknowledges that

it meets those criteria, and that acknowledgment, together with its substantial presence in the state, lays to rest any claim that asserting general jurisdiction over it violates traditional standards of fairness.

Pennsylvania law requires foreign corporations that "do business" in Pennsylvania to register with the state. 15 Pa. C.S.A. § 411(a). "Doing business," however, encompasses a much narrower set of activities than a casual reading of the term might suggest. The statute lays out a long list of "activities not constituting doing business," including maintaining accounts with financial institutions, selling through independent contractors, "conducting an isolated transaction that is not in the course of similar transactions," "owning, without more, property," and "doing business in interstate or foreign commerce." 15 Pa. C.S.A. § 403. As the legislative record explains, "[t]ypical conduct requiring registration includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes." 15 Pa. C.S.A. § 403 comm. cmt. (2014). For purposes of Pennsylvania law, the "concept of 'doing business' involves regular, repeated, and continuing business contacts of a local nature." *Id.*

Pennsylvania law makes explicit numerous avenues through which state courts may obtain general jurisdiction over both individuals and corporations. Individuals are subject to the jurisdiction of Pennsylvania courts in all matters, regardless of a claim's relationship to the forum, if they are domiciled in the Commonwealth, consent to jurisdiction, or are physically present in the Commonwealth when served. 42 Pa. C.S.A. § 5301. Corporations are subject to general

jurisdiction under analogous circumstances: if they are incorporated under Pennsylvania law, consent to jurisdiction, or are "carrying on [] a continuous and systematic part of [their] general business within the Commonwealth." *Id.* § 5301(a)(2).

Norfolk Southern is present—under any reasonable definition—in Pennsylvania. In 2020, Norfolk Southern's 3,749 employees in Pennsylvania made up the second largest state cohort among its workforce—second only to Georgia and more than in Virginia, where the company is incorporated and headquartered.[2] In addition to the thousands of active employees, nearly 2,700 railroad retirement recipients also reside in Pennsylvania.[3] Norfolk Southern spent approximately $900 million on taxes and other purchases in Pennsylvania in 2020, about seven times what it paid in its "home" state of Virginia. *See ESG Report* at DS-4. In addition, Norfolk Southern has 2,419 miles of railroad in the state—more mileage than the company operates in any other state. *Id.* at DS-3–4; *see also* Pa. Dep't of Transp., *Pennsylvania State Rail Plan 2020* (Mar. 2021), at 2-21–24, 2-60, 2-62 (describing Norfolk Southern's extensive facilities throughout Pennsylvania).[4]

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[2] Norfolk Southern, *2021 Environmental, Social, and Governance Report*, at DS-3–4, http://www.nscorp.com/content/dam/nscorp/get-to-know-ns/about-ns/environment/sustainability/2021-Norfolk-Southern-Environmental-Social-Governance-Report.pdf (*ESG Report*).

[3] Norfolk Southern, *Norfolk Southern in Pennsylvania* (2018), http://nscorp.com/content/dam/nscorp/get-to-know-ns/about-ns/state-fact-sheets/pa-state-fact-sheet.pdf.

[4] https://www.penndot.pa.gov/Doing-Business/RailFreightAndPorts/Planning/Documents/2020%20Pennsylvania%20State

(*Footnote continued*)

In short, Norfolk Southern is "found" in Pennsylvania in a much more meaningful sense than an individual who is temporarily present there. Under traditional standards of fair play and substantial justice, Pennsylvania has undoubted authority to exercise jurisdiction over any case relating to any driver or passenger served while passing through the state. Those same principles permit Pennsylvania to exercise general jurisdiction based on service of process in Pennsylvania on Norfolk Southern's resident agent.

The assertion of general jurisdiction is also consistent with practical demands of procedural fairness. Norfolk Southern is well established in Pennsylvania and undoubtedly prepared to engage in a substantial amount of litigation in the Commonwealth. It has thousands of workers among whom employment disputes undoubtedly arise and operates the machinery responsible for much of the most famous tort litigation in our nation's history: trains. Any "'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business" would be minuscule. *Int'l Shoe*, 326 U.S. at 317.

Assertion of general jurisdiction by Pennsylvania is also fully consistent with a reasonable allocation of authority among the states. Under this Court's precedents, Virginia has unquestionable authority to exercise all-purpose jurisdiction over cases involving Norfolk Southern by virtue of its incorporation there. Prohibiting a similar exercise of jurisdiction by Pennsylvania, where Norfolk Southern has more physical and human infrastructure than in its "home" in Virginia,

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%20Rail%20Plan/2020%20Pennsylvania%20State%20Rail%20Plan.pdf.

would be anomalous. Permitting the exercise of jurisdiction would promote equal treatment of sovereign states and would not infringe legitimate interests of any state.

In sum, whether this case is viewed through the lens of consent, as petitioner does, or from the standpoint of the principle that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system," *Burnham*, 495 U.S. at 619 (plurality), Pennsylvania courts may constitutionally exercise general personal jurisdiction over Norfolk Southern.

CONCLUSION

This Court should reverse the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

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