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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF is filing this brief because the jurisdictional issue presented by this case not only affects every corporation that does business in more than one State, but also goes to the heart of due process of law—what this Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), described as "fair play and substantial justice." The Court repeatedly has

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[1] Petitioner and Respondent have lodged blanket consents to the filing of amicus briefs. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

recognized that imposing limits on the ability of a State's courts to assert personal jurisdiction over a defendant is fundamental to the Fourteenth Amendment's guarantee of due process. *See, e.g.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (describing *International Shoe*, 326 U.S. at 310, as "the canonical decision" on personal jurisdiction). Resolution of the question presented here—whether a corporate defendant's registration to do business in a State where it is not "at home" can be deemed consent to, or some other basis for exercise of, that State's general ("all-purpose") jurisdiction—is essential to due process and civil justice.

Respondent Norfolk Southern Railway Co. contends that insofar as *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917), holds that registration can be deemed consent to general jurisdiction, that 105 year-old decision has been abrogated by the Court's modern, post-*International Shoe* personal jurisdiction jurisprudence, including *Daimler AG v. Bauman*, 571 U.S. 117 (2014), *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011), and *Shaffer v. Heitner*, 433 U.S. 186 (1977). Although ALF agrees that *Pennsylvania Fire* has been implicitly overruled, this case affords the Court an ideal opportunity to hold *explicitly* that *Pennsylvania Fire* no longer is good law. ALF is filing this brief to urge the Court to do exactly that.

SUMMARY OF ARGUMENT

Pennsylvania Fire easily satisfies the Court's *stare decisis* criteria for overruling erroneous constitutional

precedents. That century-old, pre-*International Shoe* decision (i) is egregiously wrong; (ii) continues to have significant adverse jurisprudential and real-world consequences; and (iii) any reliance interests in preserving it are minimal.

Although not a model of clarity, *Pennsylvania Fire* apparently holds that a nonresident corporation's appointment of an agent to accept service of process in a State can be deemed consent to the State's general jurisdiction. This ancient holding must be viewed as grievously wrong. It fundamentally conflicts with the Court's modern personal jurisdiction jurisprudence, particularly the narrow limits on general jurisdiction established by *Daimler* and *Goodyear*. In light of these two precedents, no court or litigant can reasonably rely on *Pennsylvania Fire*'s holding. Yet, *Pennsylvania Fire* continues to engender problematic consequences. *See, e.g.*, *Cooper Tire and Rubber Co., Inc. v. McCall*, 863 S.E.2d 81, 83 (Ga. 2021)*, petition for cert. filed*, No. 21-926 (U.S. Dec. 20, 2021) (asserting that allowing "Georgia courts [to] exercise general personal jurisdiction over any out-of-state corporation that is authorized to do or transact business in the state . . . does not violate federal due process under *Pennsylvania Fire* . . . a decision that the Supreme Court has not overruled").

Expressly overruling *Pennsylvania Fire* would dispel any doubt concerning whether courts somehow still are bound by that relic of the pre-*International Shoe* era, when courts followed a territorial (rather than minimum contacts) approach to general jurisdiction and the explosive growth of national and

multinational corporations had not yet occurred. An opinion unequivocally rejecting *Pennsylvania Fire* also would prevent the widespread confusion among courts and litigants, and the rampant forum shopping, certain to ensue if this Court's opinion here somehow were to allow *Pennsylvania Fire*'s holding to stand. And expressly overruling *Pennsylvania Fire* would preserve interstate federalism by ensuring that a State, through the exercise of general jurisdiction, does not exert its coercive power over nonresident corporations in litigation bearing little or no connection to that State.

ARGUMENT

The Court Should Expressly Overrule *Pennsylvania Fire*

A. Expressly overruling *Pennsylvania Fire* would comport with the Court's *stare decisis* principles

Although *stare decisis* "serves . . . many valuable ends," the Court has "long recognized . . . that *stare decisis* is not an inexorable command." *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808, at *24 (U.S. June 24, 2022) (internal quotation marks omitted). This is especially true in constitutional cases, where, in view of the "notoriously hard" task of amending the Constitution to fix "[a]n erroneous constitutional decision," the *stare decisis* doctrine "is at its weakest." *Id.*; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1412, 1413 (2020) (Kavanaugh, J., concurring in part) ("[T]he Court's precedents on precedents distinguish statutory cases

from constitutional cases. . . . In constitutional cases . . . the Court has repeatedly said . . . that the doctrine of *stare decisis* is not as inflexible.") (internal quotation marks omitted). "Therefore, in appropriate circumstances," the Court is "willing to reconsider and, if necessary, overrule constitutional decisions." *Dobbs*, *supra* at *24; *see, e.g.*, *id.* at *25 n.48 (collecting cases where the Court has "overruled important constitutional decisions"); *Ramos*, 140 S. Ct. at 1411-12 (same).

"The difficult question, then, is when to overrule an erroneous precedent." *Id.* at 1412. The Court's "cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision." *Dobbs*, *supra* at *26; *see Ramos*, 140 S. Ct. at 1414 (listing some of the "*stare decisis* factors identified by the Court in its past cases," and most recently, in *Dobbs*).

Justice Kavanaugh's separate opinion in *Ramos* consolidates the Court's "varied and somewhat elastic *stare decisis* factors into three broad considerations that . . . together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent." *Id.* at 1414, 1415; *see also Dobbs*, *supra* at *26 (citing Justice Kavanaugh's *stare decisis* analytical framework). These interrelated *stare decisis* considerations "help guide the inquiry and help determine what constitutes a special justification or strong grounds to overrule a prior constitutional decision." *Ramos*, 140 S. Ct. at

1414. They weigh strongly here in favor of expressly overruling *Pennsylvania Fire*.

1. "*First*, is the prior decision not just wrong, but grievously or egregiously wrong?" *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

The answer is yes. *Pennsylvania Fire* is an archaic decision that has been "unmasked as egregiously wrong based on later legal . . . understandings or developments." *Id.* at 1415. It directly and irreconcilably conflicts "with other decisions [and] changed law." *Id.* at 1414. More specifically, *Pennsylvania Fire*'s holding that a corporation can be sued in any State where it merely is licensed to do business (rather than only where it is "at home") for any and all claims arising anywhere, patently conflicts with the narrow limits on general personal jurisdiction established by *Daimler* and *Goodyear*.

The Court explained in *Daimler* that

> [s]ince *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role."

571 U.S. at 128 (quoting *Goodyear*, 564 U.S. at 925).

> [W]e have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less

> dominant place in the contemporary scheme.

Id. at 132-33 (quoting *Shaffer*, 433 U.S. at 204 (holding that a State's general jurisdiction cannot be asserted in a *quasi in rem* action merely based on the presence of property unrelated to the underlying cause of action)).

In light of the Court's repeated and emphatic diminution of general jurisdiction in favor of the due process requirements governing assertion of specific ("case-linked") jurisdiction, *Pennsylvania Fire* is not just wrong, but egregiously wrong. Now that the Court has the opportunity to squarely overrule *Pennsylvania Fire*, allowing *Pennsylvania Fire*'s ostensible consent-by-registration holding to stand would turn the clock back by elevating States' assertions of borderless, all-purpose jurisdiction to a predominant role that would eclipse, and essentially annul, the Court's modern precedents on both general and specific jurisdiction, beginning with *International Shoe*. *See Shaffer* 433 U.S. at 212 ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). As the Pennsylvania Supreme Court held, "to conclude that registering as a foreign corporation invokes all-purpose general jurisdiction eviscerates the Supreme Court's general jurisdiction framework set forth in *Goodyear* and *Daimler* and violates federal due process by failing to comport with *International Shoe*'s 'traditional conception of fair play and substantial justice.'" Pet. App. 46a.

Indeed, the Court has emphasized that *International Shoe* "cast . . . fictions aside," such as the "purely fictional" notion, reflected in *Pennsylvania Fire*, that an out-of-state corporation's "consent and presence" for assertion of personal jurisdiction can be based on appointment of an in-state agent as a condition for doing business. *Burnham v. Super. Ct. of Calif.*, 495 U.S. 604, 617-18 (1990); *see also* Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 San Diego L. Rev. 309, 360, 361 (2021) ("Much of the jurisdictional reasoning of *Pennsylvania Fire* . . . is unavoidably bound up with a now obsolete jurisdictional apparatus . . . based not so much on consent as on the fictive presence that the Court later abandoned in *Shoe*.").

The Court held in *Daimler*—in direct contradiction to *Pennsylvania Fire* and any cases that still adhere to it—that "the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous and systematic course of business . . . is unacceptably grasping." 571 U.S. at 138 (internal quotation marks omitted); *see also BNSF Ry. Co. v. Terrell*, 137 S. Ct. 1549, 1554 (2017) ("Our precedent . . . explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere.").

Instead, as the Court in *Ford* emphasized, "[g]eneral jurisdiction . . . extends to 'any and all claims' brought against a defendant [and] may concern

conduct and events anywhere in the world," but "[o]nly a select 'set of affiliations with a forum' will expose a defendant to such sweeping jurisdiction." 141 S. Ct. at 1024 (quoting *Daimler*, 571 U.S. at 137). More specifically, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919. "With respect to a corporation, the place of incorporation and principal place of business are paradig[m] bases . . . for general jurisdiction." *Daimler*, 571 U.S. at 137; see *also Goodyear*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

Here, "a Virginia resident filed an action in Pennsylvania against a Virginia corporation, alleging injuries in Virginia and Ohio." Pet. App. 2a. Respondent Norfolk Southern is "not at home" in Pennsylvania, *id.* at 48a, and there is "no connection" between Pennsylvania and Petitioner's personal injury claims. *Id.* at 47a-48a. Unpersuaded by Petitioner's "reliance upon Supreme Court cases decided during the *Pennoyer* era, when courts applied a territorial approach to general jurisdiction, as opposed to analyzing the foreign corporation's affiliations with the forum State as mandated by *International Shoe*," *id.* at 48a (citing *Pennsylvania Fire),* the Pennsylvania

Supreme Court held that the Pennsylvania corporate registration scheme at issue here "fails to comport with the guarantees of the Fourteenth Amendment; thus, it clearly, palpably, and plainly violates the Constitution." *Id.* at 48a.

Additional appellate courts also have recognized that *Pennsylvania Fire*'s expansive view of general jurisdiction simply cannot coexist with the modern, narrowly focused formulation of general jurisdiction established by *Daimler* and *Goodyear*. *See*, *e.g.*, *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 136 (4th Cir. 2020) ("[W]e find it difficult to reconcile the *Pennsylvania Fire* approach with the modern view of general jurisdiction expressed in the Supreme Court's recent cases. . . . [F]oreign corporations would likely be subject to general jurisdiction in every state where they operate -- a result directly at odds with the views expressed by the Court in *Daimler*."); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 638 (2d Cir. 2016) ("*Pennsylvania Fire* is now simply too much at odds with the approach to general jurisdiction adopted in *Daimler*"); *Gen. Parts Co. v. Cepec*, 137 A.3d 123, 147 (Del. 2016) ("*Daimler*'s reasoning indicates that such a grasping assertion of state authority is inconsistent with principles of due process, and impliedly, with interstate commerce.").

According to Petitioner, however, *Pennsylvania Fire* "was plainly right," in part because there is nothing "unworkable about statutes like Pennsylvania's." Pet. Br. at 32. To the contrary, in view of the fact that every State has a corporate registration requirement, Petitioner's claim that

Pennsylvania Fire authorizes any and all of the 50 States to exercise general jurisdiction over nonresident corporations is utterly *unworkable*. As Petitioner acknowledges, the "practical consequence" of its nationwide consent-by-registration theory would be that "a corporation will be subject to personal jurisdiction in a State where it might not otherwise be." *Id.* at 33. Indeed, a corporation could be subject to the general jurisdiction of *every* State where it is required to register. This expansive theory of general jurisdiction would produce an incoherent, unworkable mess that makes a mockery of personal jurisdiction. Pretending that a corporation is "at home" in every State for general jurisdiction purposes would directly conflict with this Court's narrow definition of "at home," *see Daimler*, 571 U.S. at 137, and thus, deprive corporations of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

By any modern measure, therefore, *Pennsylvania Fire*, with the benefit of hindsight, is an egregiously wrong decision and should be expressly overruled.

2. "*Second*, has the prior decision caused significant negative jurisprudential or real-world consequences?" *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

Again, the answer is yes. *Pennsylvania Fire* continues to adversely affect lower courts' jurisdictional decisions, and thus, the very real world of litigation against multistate and multinational corporations. *See, e.g.*, *Cooper Tire*, *supra.* In fact, due in part to its expansive general-jurisdiction holding in *Cooper Tire*, the Georgia Supreme Court—which

contends, 863 S.E.2d at 83, that it is bound by *Pennsylvania Fire* since that decision has not been expressly overruled—now occupies the No. 3 spot on the American Tort Reform Foundation's 2021-2022 "Judicial Hellholes" list.[2]

Even more important, if the Court's opinion here were to effectively resuscitate *Pennsylvania Fire*, the consequences would be dire, and the impact nationwide and international in scope. Such a ruling would essentially nullify *Daimler* and *Goodyear*, or at least create widespread confusion among courts and current and future litigants regarding the status of the Court's jurisprudence on both general and specific personal jurisdiction. A ruling by this Court that *International Shoe* and its progeny did not abrogate *Pennsylvania Fire* also would prompt additional courts to read consent into more States' corporate registration statutes. This would skew the judicial playing field against corporate defendants in every such State, and thereby trigger a forum-shopping frenzy by the already overly aggressive plaintiffs' contingency fee bar.

Petitioner is wrong that allowing *Pennsylvania Fire*'s boundless theory of general jurisdiction to stand would merely implicate "minor business interests." Pet. Br. at 33. The Court's turn-of-the century decision in *Pennsylvania Fire* preceded the Twentieth Century's explosive growth of national and multinational corporations that are registered to conduct business in virtually every State. *See Ford*,

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[2] https://www.judicialhellholes.org/hellhole/2021-2022/georgia-supreme-court/.

141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment) ("*International Shoe*'s emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and international trade."). These "changed facts" are another reason why *Pennsylvania Fire* is egregiously wrong. *See Ramos*, 140 S. Ct. at 1414, 1415 (Kavanaugh, J., concurring in part).

The prospect of suing a corporation for any cause of action in virtually any State would create multiple opportunities for judicial gamesmanship against national and multinational corporations, for example, in product liability litigation. *See, e.g.*, Rensberger, *supra* at 332-46 (discussing concerns about registration-based general jurisdiction such as "invidious forum shopping," "capturing longer statutes of limitations," and "facilitating joinder of defendants"); Tanya J. Monesteir, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1413 (2015) ("[R]egistration-based jurisdiction does not fit well into the landscape of general jurisdiction. It could eliminate the need for minimum contacts altogether; it results in universal and exorbitant jurisdiction; it is conceptually misaligned with doing business as a ground for jurisdiction; and it promotes forum shopping.").

Petitioner's assertion that "Pennsylvania's court system is fair" rings hollow. Pet. Br. at 32. *See 2019 Lawsuit Climate Survey*, *Ranking the States, A Survey of the Fairness and Reasonableness of State Liability Systems* (U.S. Chamber Inst. for Legal Reform 2019)

(ranking Pennsylvania as No. 39 in a survey of how U.S. businesses view the fairness of each State's liability system).[3] Perhaps even worse, corporations may refrain from doing business in certain States, especially those regarded as plaintiff-friendly havens. This would deprive residents of products and services that they need. *See, e.g.*, Brian P. Watt & W. Alex Smith, *"At Home" In Georgia: The Hidden Danger of Registering to do Business in Georgia*, 36 Ga. St. U. L. Rev. 1, 2 (2019) ("The current state of Georgia law is bad practice. It encourages forum shopping, and it cools interstate commerce by potentially deterring foreign corporations from registering to do business in Georgia.").

Insofar as Petitioner is correct that "this Court has not previously overruled *Pennsylvania Fire* and the dozens of other cases upholding corporate registration statutes," *id.* at 31, the Court should expressly and unequivocally extinguish *Pennsylvania Fire* once and for all.

3. "*Third*, would overruling the prior decision unduly upset reliance interests?" *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

The answer is no. Any reliance interests based on *Pennsylvania Fire* are necessarily *de minimis*. In light of *International Shoe* and its progeny, including but not limited to *Goodyear* and *Daimler*, no litigant can "reasonably rel[y]" on *Pennsylvania Fire* or have

[3] https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019-Lawsuit-Climate-Survey-Ranking-the-States.pdf.

"legitimate expectations" that the Court would not overrule a case that already should be viewed as a dead letter. *Id.* The Pennsylvania Supreme Court's opinion underscores this point by observing that

> [t]he High Court has cautioned against relying upon cases decided before *International Shoe* due to concerns that these cases were adjudicated in an era when territorial analysis governed jurisdictional questions. *See Daimler*, 571 U.S. at 138 n.18, 134 S. Ct. 746 (discounting a party's reliance upon pre-*International Shoe* cases "decided in the era dominated by *Pennoyer*'s territorial thinking" because such cases "should not attract heavy reliance today").

Pet. App. 48a.

Indeed, legitimate expectations would be upended only if the Court were to *decline* to hold that *Pennsylvania Fire* no longer is good law. Such a ruling would immediately engender confusion and uncertainty among the countless corporations that rely on the personal jurisdiction principles and criteria which the Court has established or refined in recent years, including in *Daimler* and *Goodyear*. More specifically, with the benefit of *Daimler* and *Goodyear*, corporations know that they are subject to a State's general jurisdiction, and thus subject to suit for all purposes, *only* where they are incorporated and their principal place of business is located. Their reliance on the general jurisdiction limits established by *Daimler* and *Goodyear* guides or affects corporate decision

making, including where to incorporate and locate a company's U.S. headquarters. Obliterating these limits by allowing *Pennsylvania Fire* to stand would make such rational business-decision making futile, and subject corporations to unpredictable litigation costs in far-flung courts where case-linked jurisdiction is absent.

The foregoing "three considerations correspond to the Court's historical practice and encompass the individual factors that the Court has applied over the years as part of the *stare decisis* calculus." *Ramos*, 140 S. Ct. at 1415. Although they "set a high (but not insurmountable) bar for overruling a precedent," *id.*, they are a hurdle that the overruling of *Pennsylvania Fire* easily surmounts.

B. Expressly overruling *Pennsylvania Fire* would help deter forum shopping

Petitioner's consent-by-registration theory, predicated on *Pennsylvania Fire*, would authorize exercise of general jurisdiction over nonresident corporations in every State where they are registered. This jurisdictional nightmare would open courthouse doors to forum-shopping plaintiffs that were bolted shut by *Daimler* and *Goodyear*.

Sometimes described as "litigation tourism," forum shopping "is the practice of filing a lawsuit in a location believed to provide a litigation advantage to the plaintiff regardless of the forum's affiliation with the parties or claims." Philip S. Goldberg, et al., *The U.S. Supreme Court's Paradigm Shift To End Litigation Tourism*, 14 Duke J. of Const. Law & Pub.

Policy 51, 52 (2019); *see* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 484 (2011) ("[O]ther things being equal, the higher a plaintiff's expectation that a particular court will make a favorable court-access decision, the more likely she is to file a lawsuit in that court."). "As a rule, counsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit." Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tulane L. Rev. 553 (1989); *see also* Rensberger, *supra* at 333-35 (discussing "illegitimate" or "invidious" forum shopping). This Court has endeavored to deter forum shopping at least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), where the Court held that federal courts sitting in diversity cases are bound by federal procedural rules even though state substantive law applies. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("discouragement of forum-shopping" is one of the *Erie* rule's aims).

There can be little doubt, however, that every State which, based on *Pennsylvania Fire*, asserts general jurisdiction over every multistate and multinational corporation that registers to conduct business in that State, will become a magnet for forum shoppers. Any corporation haled into a State's courts under these circumstances would be deprived of the very type of due process that this Court has sought to foster and preserve through its modern personal jurisdiction precedents.

Forum-shopping opportunities also can undermine a State's judiciary, especially in States such as Pennsylvania, where state trial and appellate court judges stand for election. *See* Ballotpedia, Pennsylvania judicial elections ("Pennsylvania is one of eight states that use partisan elections to initially select judges and then use retention elections to determine whether judges should remain on the bench.").[4] As one legal scholar has explained "forum selling" is a troubling corollary to forum shopping. "Loose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation." Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. of Legal Analysis 245, 247 (2014). "Without constitutional constraints on assertions of jurisdiction, some courts are likely to be biased in favor of plaintiffs in order to attract litigation and thus benefit themselves or their communities." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016).

Forum selling "leads to inefficient distortions of substantive law, procedure, and trial management practices." *Id.* at 246. For example, some state-court judges may want to attract high-profile cases to enhance their own reputations and careers or to impose their own ideological views. *See generally* Todd J. Zywicki, *Public Choice and Tort Reform* 11 (George Mason Univ. School of Law, Law and Economics, Working Paper No. 00-36, 2000) ("In

[4] https://ballotpedia.org/Pennsylvania_judicial_elections.

major part judges are attracted to the bench because of the power that it gives them to impose their ideological worldview on the public [such as] redistribution of wealth from out-of-state corporations to in-state plaintiffs and redistribution to individuals in poorer communities.").[5] "Since impartial judging is a key Due Process concern, forum selling helps explain why restrictions on state assertions of personal jurisdiction are properly addressed by the Due Process Clause." Klerman & Reilly, *supra* at 243; *see also id.* at 246 (forum selling "can be cured by constricting jurisdictional choice").

C. Expressly overruling *Pennsylvania Fire* would help preserve interstate federalism

Allowing a State like Pennsylvania to welcome forum-shopping plaintiffs (and their opportunistic attorneys) by subjecting all registered corporations to its general jurisdiction also would undermine interstate federalism.

"Interstate federalism refers to the relationship between the states within our federal system, their status as coequal sovereigns, and the limits on state power that derive from that status." A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 616, 624, 637 (2006). The fifty States are "coequal sovereigns," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), and "'[t]he sovereignty of each State

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[5] https://atlanticlegal.org/wp-content/uploads/2022/01/SSRN-id244658.pdf.

. . . implie[s] a limitation on the sovereignty of all its sister States.'" *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 293) (alterations in original). "The concept of minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 291-92; *see Goodyear*, 564 U.S. at 918 (assertion of personal jurisdiction "exposes defendants to the State's coercive power").

But this is precisely the situation here. The Pennsylvania Supreme Court observed that "[t]he factual predicate underlying the instant appeal illustrates the textbook example of infringement upon the sovereignty of sister states, as Pennsylvania has no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here." Pet. App. 47a-48a.

Indeed, "[a]s [the Court] explained in *World-Wide Volkswagen*, '[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.'" *Bristol-Myers Squibb*, 137 S. Ct. at 1780-81 (quoting *World-Wide Volkswagen*, 444 U.S. at 294). In short, interstate

federalism "bars one state from over-reaching and hearing claims that should be heard elsewhere." Goldberg et al., *supra* at 62; *see also* Spencer, *supra* at 624 ("state sovereign authority plays a vital role in limiting the scope of a state's adjudicatory jurisdiction").

Declining to overrule *Pennsylvania Fire* explicitly, or at least to explain that it has been abrogated by cases such as *Daimler, Goodyear*, and *Shaffer*, would afford Pennsylvania—and other States interested in hosting a virtually endless stream of multifarious suits against major corporations—a renewed basis for asserting, albeit incorrectly, that *Pennsylvania Fire* remains good law. The prospect of *Pennsylvania Fire*-adherent States competing against each other for individual, mass-action, or class-action plaintiffs in high-profile, anti-corporate, state-court litigation by enacting expansive liability statutes, adopting one-sided procedural rules, and issuing pro-plaintiff trial-court and appellate rulings, would imperil interstate federalism, as well as negatively impact due process and fair, responsible adjudication. *See generally* 28 U.S.C. § 1711 note (Class Action Fairness Act §§ 2(a)(2), (3) & (4), Pub. L. No. 109–2, 119 Stat. 5 (2005)) (describing state-court class-action abuses, including state courts "acting in ways that demonstrate bias against out-of-State defendants"*).* Furthermore, pro-plaintiff judicial bias is fundamentally unfair not only to major corporations, but also to smaller companies that lack the resources to defend themselves even in meritless suits.

Adjudication or settlement of litigation where a State has asserted registration-based general jurisdiction over a multistate or multinational corporation no matter how disconnected the plaintiff's cause of action is from the forum State, can have nationwide repercussions. Through assertion of registration-based general jurisdiction, an economically important, consumer-rich, or plaintiff-leaning State would be able to anoint itself as a de facto national (or even international) regulator, essentially forcing corporations doing business in the State to conform their conduct to the State's statutory or common law, no matter how ideologically or otherwise out-of-step it may be with most other States' laws. *See generally Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.") (alteration in original; internal quotation marks omitted); *see also Zywicki*, *supra.*

Allowing a forum State to flex its coercive power in such a manner would violate interstate federalism's constitutional imperative as well as the Fourteenth Amendment's Due Process Clause. Rather than respecting its constitutional role as a co-equal sovereign, a jurisdictionally gluttonous State such as Pennsylvania attempts to be "more equal" than other States when asserting personal jurisdiction over corporate defendants in litigation that not only could have been, but properly should have been, brought in

a manner that is consistent with this Court's modern personal jurisdiction principles.

CONCLUSION

The Pennsylvania Supreme Court's judgment should be affirmed.

Respectfully submitted,

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