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 *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM AND PENNSYLVANIA MANUFACTURERS' ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a Pennsylvania statewide, nonpartisan alliance representing businesses, professional and trade associations, health care providers, energy development companies, nonprofit groups, taxpayers, and other Pennsylvania entities. PCCJR is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees on the plant floor, and the millions of additional jobs in supporting industries. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA has forcefully advocated for civil justice reforms that will bring balance and stability to Pennsylvania's legal system.

PCCJR and PMA are filing this *amicus curiae* brief because the outcome sought by Plaintiff-Petitioner

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent have filed blanket consents with the Court.

(hereafter "Mallory") would expose their members, and any foreign corporation, to general personal jurisdiction in Pennsylvania merely for registering to do business, regardless of other contacts. This flimsy jurisdictional basis directly conflicts with, and would nullify, decades of this Court's Due Process approach to general jurisdiction. It is based on obsolete precedent that predates the seminal *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and which this Court has already overruled. Mallory's notion that a state may statutorily deem anything it chooses as grounds for "consent" to general jurisdiction is also fundamentally inconsistent with the doctrinal understanding of "consent" in modern personal jurisdiction jurisprudence.

SUMMARY OF ARGUMENT

This Court has addressed, and carefully delineated, "consent," as a basis for exercising personal jurisdiction over a defendant in its precedent decided under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Consent must be case-specific and voluntary, as the relevant personal jurisdiction consent precedents establish. As such, Mallory's attempt to invent "consent" using a state statute deeming mere registration to do business in the Commonwealth as *ipso facto* a basis for general personal jurisdiction is constitutionally unsustainable.

After *International Shoe*, the Court quickly eliminated the fictional "consent" regime that territorially-based, *Pennoyer*-era jurisprudence had created. Deeming corporations to have impliedly consented to suit as a substitute for actual presence in the forum was no longer necessary. Concurrently, the Court rejected "consent" as a product of state coercion.

Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694 (1982) ("*ICI*"), then established the nature of and form for the current role of consent in the personal jurisdiction context. *ICI* enumerated many express or implied ways in which defendants may submit to jurisdiction. *ICI*, however, omitted the fiction of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)—that mere registration to do business can amount to a constitutionally valid consent to jurisdiction—from the list, confirming that deemed consent was an obsolete relic of overruled *Pennoyer* jurisprudence.

The intentionality of that omission—repeated time and time again by this Court—is apparent from the characteristics of the types of consent *ICI* recognized, an essential analysis that Mallory notably fails to undertake. *ICI*'s roadmap shows that every form of consent this Court enumerated is limited, such that the waiver is specific to the particular case or cases to which the consent applies. In stark contrast, Pennsylvania's blunderbuss approach would compel submission to across-the-board jurisdiction over any suit brought by any plaintiff about anything.

Likewise, Mallory's consent-by-registration theory provides no protection from coercion. It is grounded in legislated duress, requiring out-of-state corporations either to submit to any suit in Pennsylvania or else cease doing business altogether in the Commonwealth. Contrastingly, all of the *ICI* forms of consent have inherent safeguards that limit possible coercion and ensure that consent is truly volitional.

Finally, consent-by-registration, being rooted in state-compelled forfeiture of a constitutional right, infringes on the Commerce Clause and the unconstitutional conditions doctrine.

ICI provides the appropriate doctrinal framework for consent under the prevailing approach to personal jurisdiction of recent decades, as other recent decisions likewise establish. *ICI* should apply to the case at bar to hold that the faulty understanding of consent summarily espoused in *Pennsylvania Fire* is no longer good law.

ARGUMENT

A deep dive into the meaning of consent in this Court's jurisprudence shows that Defendant-Respondent has it right in this case—the type of statutorily coerced submission to jurisdiction as a requirement for registering to do business in Pennsylvania is not a constitutionally valid "consent" under the Due Process Clause. The results are not even close.

I. Early Decisions Applying *International Shoe* Recognize Consent as a Valid Basis for Jurisdiction over a Defendant, but Reject the Consent-Based Fictions of the *Pennoyer*-Era.

"In a continuing process of evolution this Court accepted and then abandoned 'consent' . . . as the standard for measuring the extent of state judicial power over such [foreign] corporations." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). The fulcrum of that "evolution" is *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, this Court rejected decades of personal jurisdiction precedent arising from the territorial-based approach of *Pennoyer v. Neff*, 95 U.S. 714 (1877). 326 U.S. at 316. Effecting a jurisdictional sea change, this Court did away with the "fiction" of a corporation's required "presence" within a state's territory as a prerequisite to personal jurisdiction. *Id.* In its stead, the *International Shoe* Court adopted an analysis evaluating a defendant's contacts with a state measured against traditional notions of fair play and substantial justice to determine whether it would be reasonable to require it to defend itself in a given forum. *Id.*

While *International Shoe* did not involve any determination of the validity of actual consent to forum jurisdiction, its rejection of *Pennoyer*-based jurisdictional "fictions" created the current relationship between "consent" and the contact-based standard that has prevailed over the past three-quarters of a century. After *International Shoe*, jurisdiction is proper "when

the activities of the corporation [in a state] have not only been continuous and systematic, but also give rise to the liabilities sued on." *Id.* at 317. In such a case, exercising personal jurisdiction over the defendant is proper "even though no consent to be sued or authorization to an agent to accept service of process has been given." *Id.*

Importantly, the Court decried the misuse of "consent" in prior precedent—recognizing that cases "supported by resort to the legal fiction that [the corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents" were "more realistically" viewed as situations where "those authorized acts were of such a nature as to justify the fiction." *Id.* at 318. Following *International Shoe*, personal jurisdiction analysis does not rely on fictions of "implied consent" or "presence" in the forum; the "nature and quality" of the defendant's "activity" or contacts in the forum are what matter. *Id.* at 318-19.

While *International Shoe* did not fully define the role of consent in the modern jurisprudence, it laid the foundation. In doing so, that decision provided an early indication of what consent is *not*. *International Shoe* distinguished the idea of "consent to be sued" from the distinct concept of "authorization to an agent to accept service of process," when it disconnected the new contact-driven jurisdiction from older *Pennoyer*-era fictions. *Id.* at 317. Thus, in even the earliest stages, the Court was careful to separate the concept of "consent" from mere compliance with bureaucratic processes

that states require before allowing the conduct of business within their borders—the same type of administrative activity that occurs when a corporation registers to do business in a state, as is at issue in this case.

Consent, as a matter of doctrine, was further elucidated in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *Shaffer* repeated *International Shoe*'s denunciation of the "fictions of implied consent to service on the part of a foreign corporation" that had arisen under *Pennoyer*. *Id.* at 202. When *Pennoyer* controlled, attempts "to identify circumstances under which presence or consent could be attributed to the corporation" not only "absorbed much judicial energy," but was also, at best, a round-about way for "ascertain[ing] what dealings make it just to subject a foreign corporation to local suit." *Id.* at 202-03 (citation and quotation marks omitted).

Shaffer thus reiterated that attempts to fabricate consent based on fictional presence in the forum have no place in prevailing law. Underscoring its rejection of those *Pennoyer*-era jurisdictional excrescences, *Shaffer* expressly "overruled" all earlier "cases decided on the rationales of *Pennoyer*" that were "inconsistent" with *International Shoe* and its progeny. *Id.* at 212 n.39.

Safely within the scope of that blanket overruling of *Pennoyer*-based precedent is *Pennsylvania Fire*, 243 U.S. 93, which had implied consent to jurisdiction based on the administrative act of registering to do business in a state. Indeed, *Shaffer* specifically explained the

Pennoyer origins of the fiction that merely seeking to do business in a state equates to global consent to suit there. 433 U.S. at 201 (explaining that the *Pennoyer* "opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State").

Shaffer's rejection of consent-based fictions is reinforced by that case's facts and holding. In *Shaffer*, a state's statutory scheme enforced the assertion of personal jurisdiction over nonresident defendants by sequestering their property. *Id.* at 189. That statute had "the express purpose" of forcing defendants to "consent" to jurisdiction—namely, by "enter[ing] a personal appearance" to avoid losing one's in-state property, but by which the defendant as a whole was subjected to jurisdiction in the state. *Id.* at 209.

Shaffer found this form of statutorily coerced "consent" invalid under *International Shoe*'s Due Process limitations to personal jurisdiction. Indeed, *Shaffer* explicitly held that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction [via the coercive state statute] should be equally impermissible." *Id.* "Consent" to suit, which is compelled by the state, cannot be a basis for circumventing the protections of *International Shoe*. *See id.* at 210 (rejecting statutes that purport to permit state courts "to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied"). Rather, "all assertions of state-court jurisdiction must

be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212.

International Shoe and *Shaffer* thus established that consent, as an independent basis for personal jurisdiction, did not rest on the fictions that existed under *Pennoyer*. Nor could consent be the product of coercion by the state—whether such duress takes the form of compelling a submission to jurisdiction for fear of losing one's in-state property, as in *Shaffer*, or by strong-arming foreign corporations to submit to unlimited litigation in the forum by prohibiting them from lawfully conducting business there without such submission. Rather, a corporation's "secur[ing] a license and [] designat[ing] a statutory agent upon whom process may be served" only "provide[s] a helpful but not a conclusive test" for specific jurisdiction. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

II. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée* Delineates the Modern Consent to Jurisdiction.

This Court's most thorough elucidation of consent is in *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982) ("*ICI*"). In this decision, the Court explained that because personal jurisdiction "flows . . . from the Due Process Clause" and "protects an individual liberty interest[,] . . . it may be intentionally waived." *Id.* at 702, 704. Likewise, the case-specific "actions of the defendant may amount to a legal submission to the jurisdiction of the court,

whether voluntary or not." *Id.* at 704-05. These forms of acceptance to suit in the forum comprise "consent" under *International Shoe*.

ICI enumerated the ways in which such consent may be given, specifically listing the "legal arrangements [that] have been taken to represent express or implied consent to the personal jurisdiction of the court." *Id.* at 704. They are:

- "submi[ssion] to the jurisdiction of the court by appearance"
- "parties to a contract may agree in advance to submit to the jurisdiction of a given court"
- "[a] stipulation entered into by the defendant"
- "consent implicit in agreements to arbitrate"
- "state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures"
- "waive[r] if not timely raised in the answer or a responsive pleading"
- "fail[ure] to comply with a pretrial discovery order."

Id. at 704-06 (citations and quotation marks omitted).

Consistent with all of the other instances of consent listed in *ICI*, the "state procedures" constituting

"constructive consent" are case specific. For this example, *ICI* cited (*id.* at 704) *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938), holding that a non-resident plaintiff necessarily consents to counterclaims being filed against it, and *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 (1917), recognizing the constitutionality of deeming either "filing a plea in abatement, or taking the question to a higher court" to be "a submission to [the court's] power." Neither of those cases approached the sort of blanket assertion of general jurisdiction that Mallory claims here.

Notable by its absence in *ICI* is *Pennsylvania Fire*—the linchpin of Mallory's arguments. Despite citing to certain case-specific instances of consent from the *Pennoyer* era,[2] *ICI* made no mention of corporate registration as a recognized form of express or implied consent. *Id.* This omission further indicates that *Shaffer* meant what it said about overruling all *Pennoyer*-derived fictional forms of "consent."

This decision to leave *Pennsylvania Fire* behind cannot be overstated. *ICI* listed "every iteration of consent as it pertains to personal jurisdiction" in its comprehensive discussion of consent in the *International Shoe* era. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1382 (2015). "Why would [*ICI*] omit one particular form of consent," while listing

[2] *Id.* at 704 (*citing Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (non-resident plaintiff consents to counterclaims); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 (1917) ("filing a plea in abatement, or taking the question to a higher court")).

others with significant specificity and with citations to prior decisions of this Court, if it was still a valid basis for personal jurisdiction post-*International Shoe*? *Id.*

Why, indeed? Mallory offers no answer.[3] *ICI*'s failure to include registration as a viable modern form of consent is well-grounded, analytically and doctrinally. The act of merely registering to do business in a state is distinctly different from consent doctrine that *ICI* espoused, for three reasons.

***First*, every type of *ICI*-recognized consent is a case-specific waiver of personal jurisdiction.** In other words, each type of consent that *ICI* enumerated effects a submission to jurisdiction that is narrow in scope such that the constitutional defense is given up only on a one-off basis or in a particular set of cases. Limiting "consent" in this fashion is consistent with the Court's general precedent that constitutional consent, to be valid, must be "knowing." *E.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015) ("[A] litigant's consent—whether express or implied—must still be knowing and voluntary."). No form of *ICI* consent amounts to a boundless relinquishment of a defendant's Due Process rights in any suit, from any plaintiff, on any claim.

As "consent" was understood in *ICI*, for example, a defendant who submits to jurisdiction by entering a voluntary appearance in an action does so with respect

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[3] Nowhere does Mallory offer any meaningful analysis of *ICI*, the Court's most thorough discussion of consent since *International Shoe*.

only to that particular suit.[4] The consent given is specific to that individual case. Likewise, a defendant who agrees to litigate in a particular forum pursuant to a forum-selection clause or arbitration agreement consents to jurisdiction only to the contractually specified class of cases. Waiver by consent extends only to those disputes the contract identifies and extends no further. Unlike Pennsylvania's registration statute, true consent never forfeits Due Process jurisdictional limits for any suit, involving any claim, brought by any possible plaintiff.

Plainly, the types of consent recognized in *ICI* all deal with specific touchpoints—or "contacts" with the forum—limited to the individual case or cases to which consent has been given. Consent, as defined by *ICI*, is limited to waivers of specific jurisdiction. In none of the circumstances *ICI* lists does a defendant vest a forum with all-purpose or general jurisdiction as to all cases and subjects. Yet, as authoritatively construed by Pennsylvania's highest court, the Pennsylvania registration statute purports to do just that. Section 5301(a) provides that registering to do business confers "general personal jurisdiction" over the defendant for any suit whatsoever, by any plaintiff whatsoever

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[4] "[A] party's consent to jurisdiction in one case extends to that case alone and in no way opens that party up to other lawsuits in the same jurisdiction in which consent was given." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018) (citation and quotation marks omitted). *Accord*, *e.g.*, *Ex parte TitleMax of Ga., Inc.*, 340 So. 3d 395, 403-04 (Ala. 2021); *Megadrill Servs. Ltd. v. Brighouse*, 556 S.W.3d 490, 497-98 (Tex. App. 2018) (collecting cases).

(Pennsylvanian or not). *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 566 (Pa. 2021) ("[M]ere completion of the act of registering . . . affords Pennsylvania judicial tribunals general jurisdiction over the foreign corporation"); *see also* 42 Pa. C.S. §5301(a) (purporting to authorize the exercise of "general personal jurisdiction").

By statute, therefore, Pennsylvania attempted to reach an essentially limitless universe of disputes "not arising out of or related to the defendant's contacts with the forum," *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 n.9 (1984), none of which could otherwise constitutionally be brought in that state. The breadth of this statutorily-coerced "consent" is unprecedented and a far cry from any form of "consent" that this Court recognized in *ICI*.

***Second*, consent-by-registration differs from the forms of consent enumerated in *ICI*—all of which offer protection from coercion.** As discussed, *supra*, at 7-9, *Shaffer* invalidated a state scheme that relied upon asset seizure to compel submission to jurisdiction. Indeed, conceptually, coercion is antithetical to consent. "Where there is coercion there cannot be consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973) (*quoting Bumper v. North Carolina*, 391 U.S. 543, 550 (1968)).

ICI recognized consent when personal jurisdiction is the product of a defendant's own volitional act (or failure to act), such as by stipulating to suit in a forum or choosing not to plead personal jurisdiction as a defense. In these situations, coercion is not an issue.

Rather, waiver of jurisdiction is the product of a genuine and legitimate choice—either affirmatively to submit to jurisdiction, or to not raise any objection to it.

Consent is likewise volitional when it arises from a forum selection clause. The contracting parties—as with any other enforceable agreement—voluntarily "manifested [their mutual assent] in their freely negotiated agreement." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). While Mallory suggests that corporations take advantage of relative bargaining positions in proposing forum selection clauses, Petitioner's Br. at 47-48, state-compelled surrender of a constitutional defense is far different from consumers who desire some product or service having to accept the seller's terms. That faulty analogy ignores numerous legal protections that restrict forum selection clauses.[5] The same is not true for the consent-by-registration theory Mallory advances here. Pennsylvania's legislatively mandated deemed consent is subject to no public policy, reasonableness, or other limits—except unconstitutionality as a violation of Due Process.

If the Court permits 42 Pa. C.S. §5301 to have the jurisdictional effect Mallory advocates, no safeguards against coercion would exist. Mallory admits, indeed trumpets, that his theory bypasses all of *International*

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[5] Where the enforcement of a forum selection clause "would be unreasonable and unjust," courts may intervene. *The Bremen*, 407 U.S. at 15. Such clauses can also be "invalid for such reasons as fraud or overreaching." *Id.* Forum selection clauses "are subject to judicial scrutiny for fundamental fairness." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

Shoe's Due Process protections—minimum contacts, reasonableness, actual forum availment, and limiting all-purpose general jurisdiction to where a defendant is essentially "at home." Nearly 80 years of precedent concerned with protecting defendants in accordance with "traditional notions of fair play and substantial justice" would fall by the wayside. *Int'l Shoe*, 326 U.S. at 316 (citation omitted). The inevitable result would be unfettered forum shopping.

***Third*, state mandated consent-by-registration coerces defendants to surrender their constitutional rights for the benefit of forum-shopping plaintiffs.** "In determining whether personal jurisdiction is present . . . the 'primary concern' is 'the burden on the defendant.'" *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780, (2017) (*quoting World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), other citations omitted). It also matters whether "the plaintiffs were engaged in forum-shopping—suing in [a state] thought [to be] plaintiff-friendly, even though their cases had no tie to the State." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1031 (2021). These Due Process interests further align Pennsylvania's deemed "consent" with the unconstitutionally extracted consent in *Shaffer*, *see supra* 7-9, as opposed to the valid forms of consent listed in *ICI*.

In each of *ICI*'s enumerated types of consent, the relationship between the plaintiff and defendant provides the basis for consent. Forum selection clauses or arbitration agreements are agreements to resolve

specified disputes litigated in a particular forum. That contractual relationship is what also gives rise to litigation. Similarly, for personal jurisdiction based on a defendant's volitional conduct, *e.g.*, exposure to a counterclaim or failure to raise a jurisdictional defense properly, the waiver is a product of the defendant's actions with respect to a particular lawsuit against the defendant. Every instance that was constitutionally adequate "consent" in *ICI* involved a nexus between the defendant and the plaintiff(s) in the case to which consent pertains.

An essentially unlimited waiver commanded by legislative decree is far different. Here, a state has categorically taken away a defense guaranteed to defendants by the U.S. Constitution and Due Process, not for its own benefit, but for the benefit of unknown third persons—plaintiffs, generally, who are strangers to the relationship giving rise to the state's seizure. That is *Shaffer* all over again, only with a defendant's constitutional right substituted for its sequestered property.

Beyond just favoring one side of the "v.", Pennsylvania has targeted a select group of defendants—corporations—to bear the constitutional loss. However, "[t]he Fourteenth Amendment due process constraint . . . applies to all state-court assertions of general jurisdiction" and "does not vary with the type of claim asserted or business enterprise sued." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558-59 (2017).

Pennsylvania's coercive and discriminatory regime raises multiple constitutional problems. For one,

it unreasonably burdens interstate commerce. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), this Court evaluated the constitutional legitimacy of a similar state statutory scheme. The state tolled its statute of limitations for claims against parties not "present" in the state. *Id.* at 889. As here, state law deemed mere presence to be "consent." "To be present . . . , a foreign corporation [had to] appoint an agent for service of process, which operate[d] as consent to the general jurisdiction of the [state's] courts." *Id.*[6]

The result, as in this case, presented foreign corporations with a Hobson's choice. The state penalized corporations that did not submit to service of process with an endless limitations period. To avoid that result, corporations had to take steps that the state deemed "consent" to general jurisdiction, thereby forfeiting any personal jurisdiction defense. The state forced every out-of-state corporation "to choose between 'exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the state].'" *Id.* at 891 (*quoting Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 820 F.2d 186, 188 (6th Cir. 1987)).

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[6] *Bendix* did not present a personal jurisdiction issue, however the Court did recognize the "significant burden" of forcing a foreign corporation "to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction." *Id.* at 892.

That statutory scheme, like Pennsylvania's here, was unconstitutional. The illusory "choice" behind the state's statutory consent violated the Commerce Clause. The state scheme—effectively compelling a waiver of the personal jurisdiction defense to gain the benefit of any statute of limitations—imposed an "unreasonable" burden on interstate commerce. *Id.* That "significant" burden, which "exceed[ed] any local interest that the State might advance," could not be justified, given the gravity of forcing a defendant to "subject[]" itself "to the general jurisdiction of the [state's] courts" simply to gain "the protection of the limitations period." *Id.* at 891, 892-93.

Indeed, the extracted consent to jurisdiction "would extend to any suit against [the foreign corporation], whether or not the transaction in question had any connection" to the state, reaching "matters to which [the state's] tenuous relation would not otherwise extend." *Id.* Pennsylvania's coercive jurisdiction-by-registration is no different. As in *Bendix*, Pennsylvania would "force[] a foreign corporation to choose between exposure to the general jurisdiction . . . or forfeiture of" an important "defense." *Id.* at 893. Pennsylvania's statute compelling corporations to choose between submitting to general jurisdiction, as in *Bendix*, and doing no lawful in-state business whatsoever is even more coercive than the statutory scheme *Bendix* struck down. This statute goes beyond stripping out-of-state corporations of a single, affirmative defense (in *Bendix*, the statute of limitations), and instead prohibits

corporations from fulfilling their fundamental purpose of engaging in business.

Just as *Bendix* held that "[r]equiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions . . . is a significant burden," *id.*, so should this Court so hold. "Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce." *Id.* Pennsylvania "may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain." *Id.*[7] Having conditioned the right to do business in Pennsylvania on a corporation's relinquishment of the Due Process limits to personal jurisdiction, Pennsylvania's registration statute violates the Constitution. The Commonwealth's "exaction" of

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[7] *Bendix* broadly defined the corporate "privileges" to which constitutional protection extends. "Although statute of limitations defenses are not a fundamental right, . . . it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere." *Id.* Even more basic is the right to engage in commerce at all, which Pennsylvania conditions on the relinquishment of the Due Process defense of personal jurisdiction. *See Ford Motor Co.*, 141 S. Ct. at 1037 (Gorsuch, J., concurring) (explaining *International Textbook Co. v. Pigg*, 217 U.S. 91, 107-12 (1910), as holding "that an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called dormant Commerce Clause.").

this constitutional right is every bit as "unreasonable" as withholding the benefit of the statute of limitations. *Id.*

In addition to improperly burdening interstate commerce, 42 Pa. C.S. §5301 also imposes an unconstitutional condition. "[T]he unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Thus, " 'the government may not deny a benefit to a person because he exercises a constitutional right.' " *Id.* (*quoting Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)); *see also* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988) ("[E]ven if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional right.").

Allowing foreign corporations to do business in a state on condition that they forfeit all Due Process defenses to personal jurisdiction likewise violates the unconstitutional conditions doctrine. *See Home Ins. Co. v. Morse*, 87 U.S. 445, 453-54 (1874) (invalidating as "repugnant to the Constitution of the United States and the laws in pursuance thereof," state statute conditioning a foreign corporation's right to do business in a state on agreeing not to remove cases to federal court); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-33 (1922) (reaffirming that "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[s]"; "the sovereign power of a State in excluding foreign corporations . . . is subject to the limitations of the supreme fundamental law").

Like Pennsylvania's corporate registration statute, the state statutes in *Morse* and *Terral* selectively and discriminatorily targeted "foreign corporations" and unconstitutionally conditioned their ability to conduct "business within that State" on the relinquishment of jurisdictional rights. States may not force litigants to "bind [themselves] in advance . . . to forfeit [their] rights at all times and on all occasions, whenever the case may be presented." *Morse*, 87 U.S. at 451; *see also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) ("As a general rule, neither statute nor judicial decree may bind strangers to the State.") (plurality opinion).

Given the Constitution's multiple protections against coerced waivers of constitutional rights, *ICI* unsurprisingly recognized as valid only "consents" which are limited in case-specific ways, and not the boundless consent-by-registration theory of *Pennsylvania Fire*. *See Koontz*, 570 U.S. at 606 ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). State schemes that confer benefits, including "gratuitous governmental benefit[s]" such as a "business license," on condition that the recipient forfeit constitutional rights simply

cannot pass constitutional muster. *Id.* at 608 (collecting cases, including *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926)), which invalidated business licensing requirement that forced private carriers to become common carriers in order to do business in the state). Equally invalid is Pennsylvania's registration scheme, which "give[s] no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to [a corporation's] livelihood or submit to a requirement which may constitute an intolerable burden." *Frost*, 271 U.S. at 583.

This Court should reaffirm its holdings in *ICI*, limiting the forms of consent that survive *International Shoe* to those involving specific jurisdiction, and leaving the *Pennoyer*-era "fiction" of consent-by-registration to the annals of history. The sweeping theory of consent that Mallory advocates simply does not fit with the post-*International Shoe* doctrinal contours found in *ICI*—that consent must be case-specific, driven by the parties' relationship with each other, subject to reasonable protections against coercion, and excluding categorical deemed consents imposed through state action.

III. Post-*ICI* Jurisprudence Reaffirms that Its Definition of Consent Controls This Case.

ICI represents the Court's most thorough elucidation of consent as a basis for jurisdiction following *International Shoe*, and should apply here. Post-*ICI* cases

confirm its continuing vitality. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), reiterated that personal jurisdiction is a "waivable right" and cited *ICI* as the relevant standard for the types of "'legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Id.* at 472 n.14 (*quoting ICI*, 456 U.S. at 703). Neither *Burger King* nor any other decision since *ICI* has suggested that *ICI*'s enumeration of those constitutional consent arrangements was incomplete or mistakenly omitted *Pennsylvania Fire*.

In *Burnham v. Superior Court*, 495 U.S. 604 (1990), Justice Scalia's plurality opinion explained that jurisdiction-by-registration was historically, contextually, and doctrinally rooted in *Pennoyer*-era law. The *Pennoyer* requirement of personal service in the forum "weaken[ed]" as states began to enact corporate registration statutes. *Id.* at 617. Such laws were "initially upheld . . . under the Due Process Clause on grounds that they complied with *Pennoyer*'s rigid requirement of either 'consent,' or 'presence.'" *Id.* at 617. "As many observed, however, the [concepts of] consent and presence"—built from *Pennoyer*—"were purely fictional." *Id.* at 617-18. "Our opinion in *International Shoe* cast those fictions aside and make explicit" that "[d]ue process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*." *Id.* at 617-18; *see also BNSF*, 137 S. Ct. at 1558 (rejecting reliance on cases that "were decided before this Court's transformative decision on personal jurisdiction in *International Shoe*");

Daimler AG v. Bauman, 571 U.S. 117, 118 n.18 (2014) (same). Accordingly, any attempt to define consent based on the discarded, fiction-laden decisions of the *Pennoyer* era—including *Pennsylvania Fire*—is misplaced and contrary to prevailing personal jurisdiction law.

This prevailing law, as it pertains to Due Process limits applicable to corporations, includes the Court's recent decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Mallory's arguments would render these decisions, along with over a decade of this Court's recent jurisdictional precedents, essentially meaningless; bypassed by expansive deemed consent theories.[8]

Daimler briefly addressed consent, reaffirming that the *Pennoyer*-era focus on a corporation's "presence" in the state—a concept rooted in a theory of implied consent to the forum's jurisdiction—"should not attract heavy reliance today." 571 U.S. at 138 n.18. Nor should "unadorned citations to . . . cases . . . decided in the era dominated by *Pennoyer's* territorial thinking," rendering Mallory's reliance on *Pennsylvania Fire*, a ghost of *Pennoyer*, inapt. *Id.*

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[8] *Amici* fully supports Defendant-Respondent's analysis of the Due Process jurisdiction standards in *Goodyear* and *Daimler* that foreclose the registration-by-consent theory, and how jurisdiction-by-registration would unravel that body of law. To avoid unnecessary duplication, *amici* discusses them only briefly.

Instead, under *Daimler* and *Goodyear*, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction"—*i.e.* (1) "domicile," which for a corporation, is "the place of incorporation and principal place of business," and (2) the "exceptional case" where the corporation's operations are "so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 137, 139 n.19. These contours define the outer limits of general jurisdiction, significantly restricting available venues where, as here, a forum-shopping plaintiff is asserting claims that do not arise out of or relate to a corporation's in-forum contacts. The *Daimler-Goodyear* requirements are such that "each ordinarily indicates only one place" as a permissible forum, and such places are "easily ascertainable." *Id.* at 137.

Those key characteristics of all-purpose jurisdiction would vanish if jurisdiction-by-registration were added as an alternative means of hailing defendants into court. Every state in the union—or at least every state "thought [to be] plaintiff-friendly," *Ford Motor*, 141 S. Ct. at 1031—could create general jurisdiction over any and all nationwide corporations by simply enacting a statute like Pennsylvania's, or even if their courts interpreted present registration laws to have the same effect. That result is precisely what *Daimler* condemned as "unacceptably grasping" and "exorbitant" in violation of Due Process. 571 U.S. at 138-39 ("[T]he same global reach would presumably be available in every other State in which [a company's] sales are sizable.").

For large corporate defendants, Mallory's theory would expand all-purpose general jurisdiction from *Daimler*'s "paradigm" examples to dozens of states, if not all of them—precisely the result this Court rejected in *Daimler*. Indeed, Mallory's argument is even more "grasping" and "exorbitant" than that rejected in *Daimler*, since it turns on a mere piece of paper, instead of "a substantial, continuous, and systematic course of business." *Id.* at 138.

Where statutes are silent on the jurisdictional effect of registration (currently every other state besides Pennsylvania), the question would be left to judicial interpretation, which hardly creates an "easily ascertainable" landscape.[9] The potential for a judicial muddle is especially high, as neither state nor federal courts are bound by each other's federal constitutional rulings.[10] *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 726 (2010) ("We do not defer to the judgment of state judges in determining whether, for example, a state-court decision has deprived a defendant of due process"). *Daimler*'s endorsement of limited and easily ascertainable jurisdictional

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[9] *See Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 91-92 (Ga. 2021) (allowing general jurisdiction by consent based on an "inverse implication" from a poorly drafted statute that otherwise provided no basis for specific jurisdiction over foreign corporations), *cert. pending*, No. 21-926 (filed Dec. 20, 2021).

[10] In Pennsylvania, for instance, federal courts have to determine whether to follow *Mallory*, as opposed to a pre-*Daimler* Third Circuit decision that, in one paragraph, allowed consent by registration. *See Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991).

standards cannot be squared with a consent-by-registration theory.

The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), further supports *ICI*'s reasoning as the modern understanding of consent, while also exposing the fallacies of Mallory's contrary argument. *Nicastro* acknowledged "a number of ways" for a defendant to consent or "submit to a State's authority." *Id.* at 880. Like *ICI*, *Burger King*, and all of the Court's other recent consent-related precedent, *Nicastro* mentioned no theory of mass consent through registration—or via any other possible deemed circumstance.[11]

In listing how submission to jurisdiction may occur, *Nicastro* did acknowledge so-called "tag" jurisdiction. *Id.* ("[p]resence within a State at the time suit commences through service of process") (*citing Burnham*, 495 U.S. 604). Personal "tag" service, as discussed, was upheld as a "traditional" basis for obtaining personal jurisdiction over individuals by a plurality of this Court in *Burnham*—upon which Mallory heavily relies. Petitioner's Br. at 34-41. However, the personal service in *Burnham* was anything but consensual, 495

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[11] *Cf.* 18 U.S.C. §2334(e)(1)(A) ("a defendant shall be deemed to have consented to personal jurisdiction" by making any payment to a beneficiary of a terrorist who injured any American, regardless of the defendant's or the beneficiary's domicile, or where the terrorist act occurred). If Mallory prevails, various forms of purported "deemed" consent will undoubtedly proliferate, such as California deeming "consent" by virtue of the manufacture of an injurious firearm or Texas similarly deeming "consent" from abortion assistance.

U.S. at 608, and *Nicastro*—like every other recent decision discussing consent—did not endorse, or even cite, *Pennsylvania Fire*. *See* 564 U.S. at 880.

Time and time again, since *International Shoe* this Court has declined opportunities to endorse *Pennsylvania Fire* as a form of consent. Never has this Court taken any step that would have rescued that decision—so fundamentally inconsistent with prevailing personal jurisdiction standards—from *Shaffer*'s blanket overruling of *Pennoyer*-era fictional jurisdiction cases. 433 U.S. at 212 n.39. This case presents no reason for this Court to change the course it has charted consistently for nearly eight decades.

Finally, in the Court's most recent personal jurisdiction case, Justice Gorsuch recounted the history of personal jurisdiction jurisprudence—including the role consent has played. *Ford Motor Co.*, 141 S. Ct. at 1034-39 (Gorsuch, J., concurring). That chronicle began with *Pennoyer*, where "a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction." *Id.* at 1036. While "old physical presence rules for individuals seem easily adaptable to" modern practices—*i.e.*, tag jurisdiction over the person, *see Burnham*, *supra*—*Pennoyer*-era fictions governing corporate presence were called into question by "the rise of corporations and interstate trade." *Id.*

States responded. Some enacted legislation "to secure the out-of-state company's presence or consent to suit." *Id.* at 1037. Such statutes included "requiring an

out-of-state corporation to incorporate under their laws . . . or at least designate an agent for service of process," the latter of which this Court upheld in *Pennsylvania Fire*. *Id.* at 1036-37.

International Shoe and its progeny, however, "sought to start over," "'cast[ing] . . . aside' the old concepts of territorial jurisdiction" of *Pennoyer*—and thus, decisions like *Pennsylvania Fire*, which unlike *Burnham*, were not adaptable to modern doctrine, but rather in direct conflict. *Id.* at 1037. Thus, this sea change "*also* cast doubt on the idea, once pursued by many state courts, that a company 'consents' to suit when it is forced to incorporate or designate an agent for receipt of process in a jurisdiction other than its home State." *Id.* (citation omitted).

After *International Shoe*, there simply is no place for *Pennsylvania Fire*, a decision rightly retired alongside *Pennoyer*. Despite multiple opportunities, this Court has declined to resurrect that obsolete decision. That is, of course, no surprise. Nearly eighty years ago the Court set aside "nearly everything that had come before" in favor of "a new test focused on 'traditional notions of fair play and substantial justice.'" *Id.* at 1037-38 (*quoting International Shoe*, 326 U.S., at 316). Those "traditional notions" require the minimum contacts and essentially at-home tests this Court has carefully developed. To discard these well-accepted frameworks in favor of resurrecting the century-old *Pennsylvania Fire* decision would send personal jurisdiction jurisprudence back a century. This Court should follow the path it has blazed since *International*

Shoe and reject the present attempt at an end run around the "at home" requirement for general jurisdiction. Accordingly, it should affirm the decision below.

CONCLUSION

This Court should affirm the judgment below.

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