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 PROFESSOR LEA BRILMAYER IN SUPPORT OF RESPONDENT

ANIKA HAVALDAR
FRESHFIELDS BRUCKHAUS DERINGER US LLP
700 13th Street NW,
10th Floor
Washington, DC 20005
(202) 777-4500

SCOTT A. EISMAN
Counsel of Record
TIMOTHY P. HARKNESS
LINDA H. MARTIN
DAVID Y. LIVSHIZ
ELENA HADJIMICHAEL
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue
31st Floor
New York, NY 10022
(212) 277-4000
Scott.Eisman@freshfields.com

Counsel for Amicus Curiae

September 2, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is a legal scholar and law professor with longstanding academic interests in the areas of conflict of laws, interstate relations, and jurisprudence. She has published dozens of articles on interstate relations, including on the Due Process Clause limits on personal jurisdiction, extraterritoriality, State sovereignty, and interstate cooperation, and is the author of a leading conflict-of-laws casebook and of *Conflict of Laws: Foundation and Future Directions*. She has expertise and a strong interest in questions of personal jurisdiction, and in particular the distinction between general and specific jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments take one of two forms. *First*, Petitioner argues that registering to do business in the forum provides a sufficient basis for jurisdiction under the Due Process Clause. *Second*, Petitioner alternatively argues that registering to do business in the forum is a basis for inferring consent and that this consent, in turn, satisfies the Due Process Clause.

Neither of these arguments is sound. Registration to do business cannot be a sufficient basis for jurisdiction because that would simply reinstate the

[1] All parties consent to the filing of this brief. Pursuant to Rule 37.6, counsel for amicus certify that they authored this brief. No counsel for a party in this case authored this brief in whole or in part. Only amicus and her counsel contributed monetarily to the preparation and submission of this brief.

now-discredited theory that "doing business" in a forum is constitutionally adequate to subject a corporation to general jurisdiction there. Moreover, registering to do business in Pennsylvania does not provide an adequate basis for inferring consent (and thus does not satisfy the Due Process Clause), because Pennsylvania law nowhere states that registration is treated as constituting consent.

Indeed, precisely because Pennsylvania law does not provide for registration to count as consent to jurisdiction, this case is an inappropriate vehicle for considering the issue of whether a State can demand consent to jurisdiction as a quid pro quo for allowing it to do business. The companion case to this one *does* squarely present this fact issue, however. As a result, considering the companion case instead of this case would allow this Court to address the same issue free of this complication, and this writ should be dismissed as improvidently granted in this case.

Finally, if the Court does reach the constitutionality of consent by registration, there are sound reasons to reject such a theory. Significantly, consent by jurisdiction constitutes a threat to state sovereignty that would undermine this Court's personal-jurisdiction jurisprudence. Endorsing a consent-by-registration regime would cause plaintiffs to forum shop for consent-by-registration States with the most plaintiff-friendly laws. Corporations of all sizes would thus find it difficult to predict where they might be sued on any and all claims. Such a framework would return personal jurisdiction jurisprudence to a version of Due Process theory that is at odds with the long-standing principle that personal jurisdiction should treat defendants fairly and produce predictable results.

ARGUMENT

I. Basing general jurisdiction on the simple fact of registration to do business in the forum would be inconsistent with this Court's recent opinions interpreting the Due Process Clause.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), this Court substantially clarified, consolidated, and strengthened due-process protections barring the unreasonable exercise of general jurisdiction over actions having no connection to the forum. It held, in particular, that general jurisdiction should be limited to cases in which the defendant was "at home" in the forum and that a corporation's "doing business" in the forum was not an adequate basis for general jurisdiction. These precedents would be effectively overruled if this Court were to uphold Petitioner's claims in the present case.

A. Under the Due Process Clause corporations are subject to general jurisdiction only where they are "at home" and not where they merely "do business."

The distinction between general and specific jurisdiction traces its origins to *International Shoe v. State of Washington,* 326 U.S. 310, 316–20 (1945). In *International Shoe*, this Court explained that general jurisdiction existed when a corporation engaged in activities in the forum that were "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from" those in-forum activities. *Id.* at 318. In the decades that followed, the Court elaborated that "continuous

and systematic business contacts" with the forum justified the exercise of general jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *accord Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 445 (1952). This test for general jurisdiction reinvigorated what had been referred to as "doing business" jurisdiction in cases predating *International Shoe*. *See* 326 U.S. at 314 (collecting cases). Under that test, a corporation was subject to general jurisdiction in a forum if it was doing business there such that it had continuous and systematic contacts with the forum.

The continuous-and-systematic test proved problematic in several ways. For example, although courts identified factors to consider in assessing whether the test was met, they often balanced these factors differently and reached varying conclusions based on similar facts. *Compare, e.g.*, *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (holding that 2,000 sales in five years in an amount of $65,000 to $85,000 per year justified the exercise of general jurisdiction), *with Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372, 376 (5th Cir. 1987) (holding that sales worth "nearly $250,000,000" in five years did not confer general jurisdiction). Results varied, "both state by state and case by case." Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. Chi. Legal F. 171, 198. Given how unsettled the case law was, out-of-state corporations had difficulty predicting whether and where they would be subject to general jurisdiction. *See* Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 746 (1988). And corporations with nationwide operations faced significant exposure and could be sued for

out-of-state conduct in all fifty States. *Cf. Rush v. Savchuk*, 444 U.S. 320, 330 (1980) (observing that "State Farm is 'found,' in the sense of doing business, in all 50 States and the District of Columbia").

The Court accordingly reformulated that test. In *Goodyear*, 564 U.S. 915, the North Carolina Court of Appeals had held that the defendants were subject to general jurisdiction because they placed their products into the "stream of commerce," leading some of those products to end up in North Carolina. *Id.* at 919–20. This Court rejected the North Carolina court's reasoning as muddling the "general and specific jurisdictional inquiries." *Id.* at 919. Although the flow of a manufacturer's products into the forum "may bolster an affiliation germane to *specific* jurisdiction," the Court explained, such ties do "not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.* at 927. Canvassing its jurisdictional case law, this Court explained that defendants are not subject to general jurisdiction merely because they have "continuous and systematic" contacts with a forum. Such a "sprawling view of general jurisdiction," the Court elaborated, would unfairly subject "any substantial manufacturer or seller of goods . . . to suit for relief, wherever its products are distributed." *Id.* at 929.

Instead, to justify the assertion of general jurisdiction, the Court explained, the defendant's contacts must be "*so* continuous and systematic as to render [the defendant] essentially at home in the forum State." *Id.* at 919 (emphasis added; quotation marks omitted). "For an individual," the Court observed, "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 cor-

poration is fairly regarded as at home." *Id.* at 924. *Goodyear* thus inaugurated the "at home" test for general jurisdiction.

Yet questions remained. While *Goodyear* referred to the corporation's principal place of business and State of registration as "paradigm" forums for general jurisdiction, it remained unclear whether corporations could still be "at home" in other forums. *See, e.g.,* Allan Stein, *The Meaning of Essentially at Home in* Goodyear Dunlop, 63 S.C.L. Rev. 527, 545–548 (2012).

A few years later, in *Daimler*, the Court put to rest any doubts that might have remained about the meaning and significance of *Goodyear*. It confirmed that a court may exercise general jurisdiction over a corporation "*only* when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (quotation marks omitted; emphasis added). The Court explained that "the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic." *Id.* at 138–39. Rather, it supported the exercise of general jurisdiction over a corporation in two "paradigm all-purpose forums": "the place of incorporation and principal place of business." *Id.* at 137. These forums, the Court explained, had the "virtue" of being "unique" and "easily ascertainable." *Id.* Limiting the exercise of general jurisdiction to these forums would therefore "promote predictability" on whether and where corporate defendants could be sued for any claims. *Id.* The Court further observed that a corporation's operations in a

different forum would warrant general jurisdiction only "in an exceptional case." *Id.* at 139 n.19.

Applying this standard, the Court held that the Due Process Clause barred California courts from exercising general jurisdiction over Daimler, a German company, to entertain claims brought by Argentinian plaintiffs based on events occurring in Argentina. Daimler's "slim contacts" with California, the Court concluded, "hardly render[ed] it at home there," even assuming that Daimler's subsidiary was "at home" in California, and that this subsidiary's contacts were imputable to Daimler. *Id.* at 136. It thus rejected plaintiffs' argument that general jurisdiction over Daimler existed because Daimler's wholly owned subsidiary, which was incorporated in Delaware and had its principal place of business in New Jersey, distributed Daimler-manufactured vehicles throughout the United States, including California. *See id.* at 121. If the subsidiary's California activities sufficed, the Court reasoned, then general jurisdiction would be available in every State in which the subsidiary had "sizeable" sales. *Id.* at 139. Such "exorbitant" exercises of general jurisdiction, it explained, "would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* (quotation marks omitted). Because neither Daimler nor its subsidiary was incorporated in or had its principal place of business in California, and the case presented no exceptional facts, the Court concluded that Daimler was not "at home" in California and not subject to general jurisdiction there. *See id.* at 139.

In sum, *Goodyear* and *Daimler* confirmed that merely "doing business" in a forum is no longer a ba-

sis for general jurisdiction. Recognizing the significant unpredictability and burdens imposed on corporations subjected to such "exorbitant" exercises of general jurisdiction, *Daimler*, 571 U.S. at 139, those cases limited the exercise of general jurisdiction to States where continuous corporate activities were "substantial" enough to justify suit against the corporation "on causes of action arising from dealings entirely distinct from those activities," *Goodyear*, 564 U.S. at 924. Corporate activities, the Court held, cleared this bar only where the corporation was "at home."

B. Registration laws cannot be used to circumvent the "at home" test and reinstate the discredited "doing business" test for general jurisdiction.

Goodyear and *Daimler* were clearly designed and expected to impose order on what had become an increasingly chaotic body of law, one that was easily manipulated by plaintiffs bent on shopping for the most advantageous forum. Under these two decisions, doing business was no longer sufficient to satisfy the Constitution.

Petitioner argues that *registering* to do business is adequate even if *doing business is* not. No reason is given why adding a registration requirement to a constitutionally inadequate contact—doing business—should effectively remedy the "doing business" standard's due-process defects. If registration was sufficient to cure the inconsistency with the Due Process Clause, States could easily subvert the Due Process Clause merely by adding a registration requirement. Moreover, since corporations that do business in Pennsylvania—to avoid penalties for conducting

unauthorized business, *see* 15 Pa. Cons. Stat. § 411(b)—will almost certainly have registered to do business there, all corporations that do business in Pennsylvania would automatically be subject to general jurisdiction there. This is precisely the result that *Goodyear* and *Daimler* rejected.

The amicus brief submitted by the Center for Auto Safety and the Attorneys Information Exchange Group illustrates this point. That brief argues (at 12) that the rationales that justify exercising general jurisdiction over a foreign corporation in the State of its incorporation are "in fact *more appropriate* when the defendant registers to do business *and* then conducts continuous and substantial business in that venue." But that logic contravenes this Court's clear directive in *Daimler*. There, the Court explained that a "corporation that operates in many places can scarcely be deemed 'at home' in all of them." 571 U.S. at 139 n.20. "Otherwise," the Court observed, "'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Id*. Yet a return to the discredited "doing business" test is precisely what amici—and Petitioner—call for by invoking registration as a basis for general jurisdiction.

II. Jurisdiction cannot be obtained through the legal fiction of inferring "consent" from the fact of registration.

Petitioner also deploys a second attempt at justification. He attempts to justify treating registration as constitutionally sufficient on the theory that registering to do business shows consent, and consent is enough to overcome due-process concerns and support jurisdiction. But Pennsylvania law does not de-

clare registration to constitute consent to general jurisdiction. The corporation that registers is nowhere put on notice that Pennsylvania will infer from the fact of registration that the corporation consents to general jurisdiction. To impose the legal fiction of consent on a corporation that has no way of knowing that it was consenting to general jurisdiction would violate due process.[2]

In presenting their arguments for and against a grant of certiorari, the parties have characterized this case as raising the issue of whether the forum may require consent to general jurisdiction as a condition of doing business. This characterization is misleading. Despite the parties' claims to the contrary, this case does not squarely present the issue of consent to jurisdiction. This case is therefore an inappropriate vehicle for examining the consequences of consent to jurisdiction. Consent is simply not present on the facts of this case.

A. The present case does not establish jurisdiction by consent under this Court's precedents.

Consent, as this Court has recognized, is not a monolithic concept. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée* lists the "variety of legal arrangements" that "have been taken to represent express or implied consent to the personal jurisdiction of the court," 456 U.S. 694, 703–04 (1982):

---

[2] And even if the statutory scheme were clear that registration constituted consent to general jurisdiction, that "consent" would be coercive and thus not true, voluntary consent. *See* Resp. Br. 8, 19.

- agreement in advance to submit to the jurisdiction of a given court, *id.* (citing *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964));
- agreements to arbitrate, *id.* (citing *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964));
- waiver of personal-jurisdiction requirements through failure to timely raise the issue in an answer or responsive pleading, *id.* (citing Fed. R. Civ. P. 12(h));
- submission to a court's jurisdiction, *id.* (citing *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29–30 (1917)); and
- voluntary use of certain state procedures, such as filing a cross-action in the State's courts, *id.* (citing *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938)).

Because they reflect the defendant's voluntary consent to jurisdiction, these "arrangements" provide an independent basis for jurisdiction, separate from the minimum-contacts test. But it is not constitutionally permissible to infer consent to jurisdiction just to avoid an inconvenient due-process requirement.

If consent is not monolithic, neither is it infinitely malleable. Indeed, registering to do business is notably absent from the Court's ostensibly exhaustive list.

Indeed, the forms of consent identified in *Bauxites* differ markedly in character from the "consent" via registration to do business that Petitioner asserts as the basis for jurisdiction. *See infra* § II.B (discuss-

ing forum-selection clauses). Most of these examples of using consent to establish jurisdiction involve express consent. There is no express consent in the present case. Moreover, traditional forms of consent are limited in scope to particular disputes (and are thus a form of specific jurisdiction), while consent-by-registration is all-purpose. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1383–87 (2015). For example, a forum-selection clause in a contract would be understood as only justifying the forum's exercise of adjudicative authority over disputes between the parties to the contract that arise out of the contract, itself.[3]

B. There was no express consent in the present case because Pennsylvania's registration scheme does not specify that registering to do business shall count as consent to general jurisdiction.

As structured, the Pennsylvania registration statute does not obviously elicit any consent whatsoever.

First, Pennsylvania's registration statute nowhere requires corporations to manifest express consent to personal jurisdiction. Express consent must be "clearly and unmistakably stated." *Black's Law*

---

[3] *Bauxites* itself recognized that an inference of personal jurisdiction could not be made unless the documents that the penalized party was refusing to produce concerned proof of personal jurisdiction. The imposition of the sanction of jurisdiction was carefully limited to only those cases where the defendant's behavior supported an implication that the documents led to the conclusion that the forum was entitled to assert jurisdiction.

Dictionary (11th ed. 2019). Pennsylvania's registration statute, however, does not require corporations to clearly and unmistakably register their consent to jurisdiction. That statute does not mention jurisdiction at all. *See* 15 Pa. Cons. Stat. § 411. For example, the corporation's agent is not required to sign a document stating, "I understand that by registering under this statute, I hereby agree that this corporation will be subject to general jurisdiction in Pennsylvania's courts." *See* Monestier, *supra*, at 1393–94. Nor does the form that out-of-state businesses must file to register to do business in Pennsylvania mention personal jurisdiction or suggest that, by filing the form, the corporation will be subject to suit in the Commonwealth. *See* Pa. Dep't of State, Bureau of Corps. & Charitable Orgs., Foreign Registration Statement, http://tiny.cc/ej3yuz (last visited Sept. 1, 2022). If registration to do business constitutes express consent, as Petitioner argues, many corporations would be unknowingly expressly consenting to jurisdiction. This is an oxymoron.

Pennsylvania's registration scheme is silent on the matter of consent; it does not state that registration shall be deemed to indicate consent to jurisdiction, nor does it require a corporation's consent to jurisdiction as a condition of registration.[4]

---

[4] Pennsylvania's Supreme Court reached the opposite conclusion—that consent is required by the statutes—in the opinion below. *See* Pet. App. 53a–54a. Amicus respectfully disagrees with that part of the court's reasoning (though she agrees with the ultimate result: that the Pennsylvania registration scheme is unconstitutional). This Court may review that holding de novo, since it implicates a federal issue that turns on state law: whether registration to do business pursuant to Pennsylvania's

As is "always" the case, statutory interpretation "start[s] . . . with the text of the statute." *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021); *accord Bowser v. Blom*, 807 A.2d 830, 835 (Pa. 2002). In the case of supposed "consent" to registration requirements, the text of the statute is particularly important because the defendant is entitled to notice that engaging in certain activities will be treated as consent to general jurisdiction. The relevant question, then, is whether the plain text of Pennsylvania's registration scheme requires that a nonresident corporation consent to general jurisdiction in Pennsylvania courts when it registers to do business. It does not.

Although Petitioner claimed in asking this Court to grant certiorari (Pet. 3–4) that the "plain text" of Pennsylvania's registration scheme "clearly require[s]" a corporation to consent to personal jurisdiction when it registered to do business in Pennsylvania, Pennsylvania's registration statute nowhere mentions consent. That statute requires nonresident corporations to register with the State before they can conduct business there. 15 Pa. Cons. Stat.

---

statutes constitutes consent to jurisdiction as a federal constitutional matter. *Cf. General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) ("The question whether a contract was made is a federal question for purposes of Contract Clause analysis, . . . and 'whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment.'"). *See generally* Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919 (2003).

§ 411(a).[5] And it penalizes unregistered corporations by forbidding them to "maintain an action or proceeding in [Pennsylvania]." *Id.* § 411(b). But it says nothing about registration entailing consent to personal jurisdiction; indeed, it says nothing about either consent or personal jurisdiction anywhere in the statutory language.

Petitioner tries to brook that gulf by invoking (Pet. 4) Pennsylvania's long-arm statute—another statute that likewise fails to say anything to the effect that registration should count as consent.[6] What the long-arm statute says instead is that "qualification as a foreign corporation" "shall constitute a sufficient basis of jurisdiction to enable the tribunals of [Pennsylvania] to exercise general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a)(2)(i)–(ii). Because it is inconsistent with the holdings in *Goodyear* and *Daimler*, this provision is invalid under the Due Process Clause. In any case, even if it was constitutional, this provision would still say nothing about consent.

---

[5] "[A] foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department under this chapter." 15 Pa. Cons. Stat. § 411(a).

[6] Although the long-arm statute provides that consent is a basis for jurisdiction it nowhere provides what should count as consent, let alone that registration to do business will count as consent.

C. Petitioner cannot claim that registration to do business in the forum supports an inference of implied general jurisdiction.

This Court has recognized that in appropriate cases, consent may be implied from actions that are not themselves intended as communications of agreement. In *Bauxites*, for example, the Court observed that a party may waive objections to personal jurisdiction through failure to raise them. 456 U.S. at 704–05. This authority to impose a waiver is limited, however. In *International Shoe*, the majority approved the results reached in cases that "resort[ed] to the legal fiction that [the defendant] has given its consent to service and suit, consent being implied from its presence in the state," only because "more realistically . . . those authorized acts were of such a nature as to justify the fiction." 326 U.S. at 318.

The legal fiction of implied consent to jurisdiction is appropriate only when the plaintiff has shown independently that exercising jurisdiction would be fair and consistent with due process. Thus, consent can be implied only when the actor's conduct "logically support[s] the inference of consent to jurisdiction[,] and . . . . 'the implication must be predictable to be fair.'" Monestier, *supra*, at 1394 (quoting *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011)); *see also* Restatement (Second) Contracts § 19(2) (1981) ("The conduct of a party is not effective as a manifestation of his assent unless he . . . knows or has reason to know that the other party may infer from his conduct that he assents."). In other words, there must be a reasonable trigger that suggests a willingness to consent.

But there is no such reasonable trigger here. No corporation behaving reasonably in the post-*Daimler* world would understand itself to be consenting to general jurisdiction by registering to do business in a State. Corporations no longer expect that registering to do business may give rise to general jurisdiction; they expect to be subject to general jurisdiction only where they are "at home." *See supra* § I.A. As a result, corporations would not think to check whether the long-arm statute says that they can be subject to jurisdiction based on registration. One could not expect every single entity that does business in Pennsylvania, many of which are small, to read every statute that Pennsylvania has enacted. It is therefore unfair to infer consent from the act of registration based on a different statute.

Even if Pennsylvania's registration statute had clearly and expressly set out the jurisdictional effects of registering to do business, due process would not be satisfied. "Consent" of that kind may be knowing, but it is not voluntary and it does not represent a choice between options. Registration to do business does not resemble traditional forms of consent that this Court has recognized in the jurisdictional context. This difference is thrown into sharp relief when one compares Pennsylvania's registration scheme to forum-selection clauses—which are truly consensual.

First, the parties negotiating a contract have choices. The parties can make proposals about the choice of a forum and are free to agree on a forum, decide not to include a forum-selection clause, or choose not to contract at all. *See Atlantic Mar. Constr. Co., v. United States Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 63 (2013) ("[A] valid forum-selection clause . . . 'represents the parties' agree-

ment as to the most proper forum.'"). Under Pennsylvania's statutory regime (according to Petitioner's proposed interpretation), the corporation lacks a meaningful choice. Its options are to (1) cease (legal) business activity in Pennsylvania, or (2) submit to general jurisdiction there. The fact that the corporation is given these two choices—neither of which is considered acceptable—does not make this registration scheme consensual. Pet. App. 54a ("[f]aced with this Hobson's choice, a foreign corporation's consent to general jurisdiction in Pennsylvania can hardly be characterized as voluntary" (alteration in original)). Pennsylvania would be using state power to impose its preferred solution on the nonresident corporation wishing to do business in the State.

Second, parties who agree to a forum-selection clause give limited consent to jurisdiction. They agree to be sued in a court only in disputes with their counterparty *and* pertaining to the subject of the contract. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88 (1991) ("the passenger and the Carrier" agreed on a forum in which "all disputes and matters whatsoever arising under, in connection with or incident to th[eir] Contract" would be litigated). The parties do not consent to general jurisdiction in the forum's courts over any and all claims.

Finally, parties can escape forum-selection clauses when they are unreasonable or the product of duress. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972) (forum-selection clauses are subject to the contract doctrines of "fraud, undue influence, or overweening bargaining power"); *Carnival Cruise Lines*, 499 U.S. at 591–92. There is no escape hatch available to a corporation who becomes subject

to general jurisdiction, short of revoking its registration. And even then, the corporation would still be subject to general jurisdiction for any claim originating in the time period when it *was* registered in Pennsylvania. *See* 42 Pa. Cons. Stat. §§ 5301(a)(3)(i), (b) ("[d]iscontinuance" of "qualification as a foreign entity under [Pennsylvania's] laws" "shall not affect jurisdiction with respect to [conduct] occurring during the period such status existed").

As this comparison highlights, the "consent" that underpins general jurisdiction over nonresident corporations in Pennsylvania is keyed to mandatory registration and so is by nature coercive. But true consent—which provides a jurisdictional basis consistent with due process—is, by definition, voluntary. Petitioner's argument fails to bridge or even acknowledge this gap.

D. Because this case does not implicate the defendant's consent, it is an inappropriate vehicle for examination of the issue of jurisdiction by consent.

In short, though the parties assumed that the Pennsylvania scheme required consent, closer inspection reveals that it does not. To conclude otherwise would be to depart from the plain text of Pennsylvania's statutes. The Court should instead hew to the statutes' plain language, which never mentions consent. As a result, the question presented—"whether the Due Process Clause prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state," Pet. Br. i—is not raised by the Pennsylvania licensing scheme. The Court should therefore dismiss the writ of certiorari as improvidently granted, leaving in place the result

below. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 5.I.15 (10th ed. 2013).

Amicus does not contest that this issue is an important one. This Court should thus consider the issue in another case where it is squarely presented. The Court could do so by granting certiorari in *Cooper Tire & Rubber Co. v. McCall*, No. 21-926, which addresses Georgia's registration law. The Georgia Supreme Court found that the State's registration scheme impelled corporations to consent to general jurisdiction, but—unlike the Pennsylvania court below—concluded that the statute was nevertheless constitutional. Unlike in this case, the decision left standing below *does* permit registering corporations to be sued in the State for any and all claims, on the basis of "consent" to jurisdiction. *Cooper Tire* would therefore squarely present the issue raised by Petitioner here.

III. Registration laws would threaten choice of law and state sovereignty.

Even setting aside its constitutional inadequacies, registration-based jurisdiction would present a host of prudential concerns.

To begin with, statutes conditioning registration to do business on consent to general jurisdiction would enable unfettered forum shopping. Pennsylvania and other registration-law States will become attractive forums for litigants who find it impossible or even inconvenient to sue in a corporation's State of incorporation or primary place of business (or one in which the corporation is subject to specific jurisdiction). Those litigants could sue a California corporation headquartered in Oregon for conduct that oc-

curred in Washington in an unrelated registration-law State.

Such a suit would undermine the "predictability" that corporations find "valuable" in "making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). As this Court has long recognized, businesses rely on settled jurisdictional rules "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *accord Daimler*, 571 U.S. at 139. And based on settled jurisdictional rules, a California corporation would expect that a lawsuit based on its West Coast conduct would be brought in California, Washington, or Oregon, and so would be governed by the procedural rules of one of those States. That expectation would be reasonable, since forums almost always apply their own procedural rules, such as statutes of limitations, burdens of proof, rules about contributory negligence, statutes of frauds, and choice-of-law methods.

But that expectation would be upended if plaintiffs can freely forum shop. In other words, relaxing jurisdictional rules, as Petitioner urges here, makes it more difficult for corporations, at the time of their primary conduct, to predict the applicable law. This unpredictability is magnified when the choice-of-law determination is itself governed by the law of the forum shopper's preferred forum. For instance, the hypothetical California corporation operating on the West Coast, but registered to do business in Pennsylvania as a mere precaution, could find itself mired

in a Pennsylvania lawsuit governed by the Pennsylvania statute of limitations.[7] The corporation would thus be forced to answer for conduct that it should have reasonably expected was long behind it. This scenario undermines "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

The result would be that plaintiffs would have a menu of States to choose from when deciding where to sue and would typically choose to sue in States with the most plaintiff-friendly laws. When all was said and done, we would have a nationwide standard of corporate conduct set by individual States' courts, often based on cases unconnected to the forum and involving defendants who do minimal (or even no) business there.

In other words, the forum shopping that a consent-by-registration regime allows would threaten the sovereignty of sister States. The federalist system was designed so that purely local legal disputes would typically remain under the control of the States in which they originate or that have some stake in the controversy—such as States in which the defendant is "at home." Yet under Petitioner's approach, these local controversies could easily find themselves being litigated in Pennsylvania or some other registration-law State that lacks any interest in the dispute. Meanwhile, non-registration-law

---

[7] *See* Monestier, *supra*, at 1411. *See generally* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 Akron L. Rev. 19 (1989).

States hoping to keep those disputes in their own courts will be incentivized to push their laws in an increasingly plaintiff-friendly direction. But inevitably unclear or undecided issues of one State's law will routinely be decided in the courts of a different State with no connection at all to the claim. That is not the system on which corporations—and States—have come to rely.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

SCOTT A. EISMAN
Counsel of Record
TIMOTHY P. HARKNESS
LINDA H. MARTIN
DAVID Y. LIVSHIZ
ELENA HADJIMICHAEL
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue,
31st Floor
New York, NY 10022
(212) 277-4000

ANIKA HAVALDAR
FRESHFIELDS BRUCKHAUS DERINGER US LLP
700 13th Street NW,
10th Floor
Washington, DC 20005
(202) 777-4500

Counsel for Amicus Curiae

September 2, 2022