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 *AMICUS CURIAE* OF PROFESSOR TANYA MONESTIER IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Professor Tanya Monestier submits this brief as *amicus curiae* in support of Respondent.[1]

Professor Monestier is a Professor of Law at the University at Buffalo School of Law and teaches contracts, sales, conflict of laws, and transnational litigation. Professor Monestier is the author of *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343 (2015), which has been cited by 20 judicial decisions, including the Pennsylvania Supreme Court's opinion below. *See* Pet. App.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or her counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Professor Monestier's academic affiliation is provided for identification purposes only.

41a. As a leading scholar on the interplay between registration statutes and personal jurisdiction, Professor Monestier has an interest in the sound development of the doctrine.

SUMMARY OF ARGUMENT

1. Petitioner contends that a corporation's registration to do business in a State and appointment of an agent to receive service of process can constitute consent to general jurisdiction under the Due Process Clause. But Petitioner's argument assumes that the agreement contained in a corporation's registration to do business is "consent" in the relevant constitutional sense, an assumption that neither Petitioner nor the case law has yet examined.

A corporation's compliance with a State's registration statute does not lead to constitutionally valid consent to general jurisdiction. The consent to personal jurisdiction allegedly extracted by state registration statutes is nothing like the forms of express and implied consent to personal jurisdiction this Court has before recognized. With those express and implied forms of consent—like a forum selection clause and forfeiting a personal jurisdiction defense through a forum's procedural rules—the consent is limited and case specific; is between just the plaintiff and the defendant, without the State's involvement; and is subject to limiting doctrines that temper its application. The consent extracted by state registration statutes—including Pennsylvania's—is nothing like these examples and is not consent at all.

State registration statutes do not extract constitutionally valid consent for the additional reason that consent implies choice. That is, to consent to general jurisdiction through registration, a corporation must

have a meaningful choice to *withhold* consent. But if Petitioner is right, then every State could require consent to general jurisdiction as a condition of doing business within its borders. That leaves corporations with the choice to either consent to general jurisdiction in every State, to do business in no State, or to break the law and do business without registering. None of these options is tenable for a corporation, whose very reason for existence is to do business. And it makes no difference that Pennsylvania law is clearer than some other States in spelling out that the Commonwealth will deem a registered corporation subject to general jurisdiction. A mugger's "your money or your life" is perfectly clear, but the resulting monetary transfer is not consensual.

2. Upholding Petitioner's position would also make *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014) largely superfluous. Saying a corporation has "continuous and systematic" contacts with a forum is tantamount to saying that the corporation is "doing business" in the forum. But *Daimler* rejected continuous and systematic contacts as the test for general jurisdiction in the contacts-based analysis; there is no sound reason for a consent-based analysis to be different. Indeed, Petitioner's view of state registration statutes would render this Court's landmark decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) practically a dead letter for corporations that do business across state lines; the focus will simply shift from contacts to "consent."

Consent through registration statutes is also contrary to the federalism principles at the core of this Court's personal jurisdiction case law. Pennsylvania has no interest in the claims in this case. Petitioner

is a Virginia resident suing a Virginia corporation based on allegations he was injured by exposure to toxic substances while working in Virginia and Ohio. Petitioner's view of registration statutes will allow States to aggrandize themselves at the expense of their sister States.

If Petitioner's view of registration laws is correct, corporations will likely decide to defy, rather than comply with, state registration requirements. Many States impose relatively modest penalties for non-registration that some corporations could deal with or work around. But this "efficient breach" of registration laws would harm corporations and plaintiffs by, respectively, injecting additional complexities into corporate risk management and making it harder to serve process on out-of-state corporations. And in States where corporations continue operations without registering, litigants may find themselves mired in debates about what constitutes "doing business," a question that confounded even the greatest legal minds of the pre-*International Shoe* era.

Finally, Petitioner's position will lead to forum shopping, as this case demonstrates. It would allow *any* plaintiff to bring *any* claim in *any* forum that attempts to extract consent through its registration statute. And non-constitutional doctrines like venue and forum non conveniens are not adequate checks against opportunistic forum shopping. Only a constitutional holding can protect corporations against States abusing their registration statutes.

The Pennsylvania Supreme Court's judgment should be affirmed.

ARGUMENT

Whether a corporation validly consents to general jurisdiction in a State by performing the statutorily required steps of registering to do business and appointing a local agent for service of process has been a long-dormant area of this Court's personal jurisdiction case law. After the Court's "pathmarking" decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919, 925 (2011) (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 628 (1988)). And for many years, plaintiffs could obtain general jurisdiction over national businesses like Norfolk Southern by demonstrating that the corporation had "continuous and systematic general business contacts" with the forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 416 (1984). Historically, then, plaintiffs could sue national companies wherever they wanted. Registration statutes had little work to do and so rarely came up.

That changed with *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). In *Daimler*, the Court clarified that corporations are subject to general jurisdiction not everywhere they have "continuous and systematic contacts," but only where "their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 919). *Daimler* also clarified that a corporation is generally "at home" only where it is incorporated and where it has its principal place of business. *See id.* at 137.

Plaintiffs like Petitioner have now turned to registration statutes in an attempt to resurrect the pre-*Daimler* status quo. This Court should decline.

I. THE FORCED AGREEMENT EXACTED BY A STATE'S CORPORATE REGISTRATION STATUTE IS NOT CONSTITUTIONALLY VALID CONSENT.

Consent by registration does not comply with the Due Process Clause. "[T]he requirement that a court have personal jurisdiction flows * * * from the Due Process Clause"; it "protects an individual liberty interest" to not be subject to a judgment entered by a sovereign that the defendant does not have adequate connections with. *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). But because it "protects an individual * * * interest," the due process right not to be subject to jurisdiction in a forum "may be intentionally waived" by a party giving its affirmative consent. *Id.* at 702, 704.

Petitioner's argument rests on the view that companies that register to do business in the face of a registration statute consent to the State exercising general jurisdiction over them. *See* Pet'r's Br. 10-11. But neither Petitioner nor his *amici* examine what constitutes "consent" in the relevant constitutional sense. Indeed, not even *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), Petitioner's favored case, explained why the appointment of an agent for service of process constituted consent. That unexamined premise falls apart on closer inpsection. By the usual standards, the "consent" exacted by registration statutes does not count.

1. In *Insurance Corporation of Ireland*, this Court gave an exhaustive list of 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. at 703. That list included contractually agreeing to litigate or arbitrate in a forum and appearing in an action without raising a personal jurisdiction defense in accordance with the forum's procedural rules. *Id.* at 703-705; *see also id.* at 705-707 (upholding finding of personal jurisdiction as sanction for failing to comply with forum's discovery rules and holding that defendant implicitly consented to court's power to enter sanction by choosing to litigate its personal jurisdiction defense in the forum). Consent by registration—despite its supposed historical pedigree—did not make the list. For good reason: In all the ways that count, consent by registration is not like these traditional forms of consent.

First, the explicit and implicit forms of consent recognized in *Insurance Corporation of Ireland* are limited and case-specific. A corporation's consent embodied in a forum selection clause is limited to suits by its contractual counterparty and to disputes arising out of or relating to their contract. *See*, *e.g.*, *Atlantic Marine Constr. Co.* v. *U.S. District Court for W. Dist. Tex.*, 571 U.S. 49, 53 (2013) (contract "stated that all disputes between the parties 'shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division' ") (citation omitted). Likewise, a corporation that forfeits its personal jurisdiction defense in a case does so for that case only. *See*, *e.g.*, *AM Trust* v. *UBS AG*, 681 F. App'x 587, 589 (9th Cir. 2017) (plaintiff had "cited nothing to support its contention that any consent [the defendant] may have given to personal jurisdiction in California in other cases would amount to consent to personal

jurisdiction in this case"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1008 (N.D. Cal. 2014) (rejecting plaintiff's argument that "Defendant must have waived its personal jurisdiction defense in this case by not raising it in previous, separate cases"). Consent by registration is far broader. It permits a defendant to be sued in a forum "on any and all claims against it, wherever in the world the claims may arise" and whomever they may be brought by. *Daimler*, 571 U.S. at 121.

Second, the nature of the relationship between the parties in the explicit and implicit forms of consent recognized in *Insurance Corporation of Ireland* differs considerably from consent by registration. When a defendant agrees to a forum selection clause or forfeits a personal jurisdiction defense, the plaintiff is the beneficiary of the defendant's consent. The State is a disinterested party, providing its courts as a neutral forum for the parties' claims. With registration statutes, by contrast, the State procures the supposed consent and the plaintiffs who become the beneficiaries of the consent are essentially random future litigants, wholly unknown to the corporation at the time of registration.

Third, the express and implicit forms of consent recognized in *Insurance Corporation of Ireland* are subject to various limiting doctrines that temper their application. A contractual forum selection clause, for instance, will not be enforced if it is unreasonable and unjust. *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Forum selection clauses are also subject to traditional contract defenses such as unconscionability and economic duress. *Restatement (Second) of Contracts* § 208 (1981) (unconscionability); *id.*

§ 175(1) (economic duress); *see also M/S Bremen*, 407 U.S. at 12-13 (forum-selection clauses should be enforced if they are "unaffected by fraud, undue influence, or overweening bargaining power"); *Lakeside Surfaces, Inc.* v. *Cambria Co.*, 16 F.4th 209, 217 (6th Cir. 2021) ("When evaluating the enforceability of a forum selection clause, this court looks to * * * whether the clause was obtained by fraud, duress, or other unconscionable means * * * .") (citation omitted). Granted, these defenses are not often successful. *See*, *e.g.*, *M/S Bremen*, 407 U.S. at 12 n.14 (concluding that "[t]he record here refutes any notion of overweening bargaining power"). But their availability distinguishes contractal consent from consent by registration, where a corporation cannot argue that the assertion of jurisdiction would be unfair or unreasonable or that the consent was the result of mistake, undue influence, fraud, or the like.

Similarly, implicit consent to jurisdiction always involves some means by which a defendant can implicitly *not* consent to jurisdiction. States must provide some mechanism for a defendant to assert that the forum does not have personal jurisdiction over it. *See Insurance Corp. of Ir.*, 456 U.S. at 706. A defendant that dots its i's and crosses its t's will always be able to participate in a State's judicial processes without consenting to jurisdiction, such as by raising the defense in a pre-answer motion to dismiss or by reserving the defense in an answer. *See* Fed. R. Civ. P. 12(b)(2), (h)(1); *see also, e.g.*, Tex. R. Civ. P. 120a (allowing a party to assert a personal jurisdiction defense through a special appearance entered "prior to motion to transfer venue or any other plea, pleading or motion"); Cal. Code Civ. Proc. § 418.10 (defendant may file motion to quash service of summons "on the

ground of lack of jurisdiction of the court over him or her" but such motion must be made together with or before the defendant files a demurrer or motion to strike). But under Petitioner's position, a defendant has no way to lawfully do business in a state while resisting general jurisdiction.

In short, the forms of consent to jurisdiction that this Court recognized in *Insurance Corporation of Ireland* all involved action or inaction by the defendant specific to the transaction or case and the parties to it. Consent extracted by registration, on the other hand, is completely open-ended and is between the defendant and the State for the benefit of undefined others. That makes consent by registration more like a State's "mere assertion of its own power," not freely given consent. *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29 (1917); *see also Insurance Corp. of Ir.*, 456 U.S. at 705.

Even the Pennsylvania long-arm statute implicitly recognizes that "qualification as a foreign corporation"—that is, registration to do business—is not the same as consent. 42 Pa. Cons. Stat. § 5301(a)(2). The statute provides that "[t]he existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person" and *separately* lists "(i) [i]ncorporation under or qualification as a foreign corporation under the laws of this Commonwealth" and "(ii) [c]onsent, to the extent authorized by the consent." *Id.* That separateness confirms that "qualification" and "consent" are different bases for jurisdiction under Pennsylvania law; "the differing language in the two subsections" cannot have "the same meaning in each." *Russello* v.

United States, 464 U.S. 16, 23 (1983). Thus, even Pennsylvania's supposedly clearest-in-the-nation registration statute shows there is something fundamentally different between qualification to do business in a State and "consent" as the concept is traditionally understood in personal jurisdiction jurisprudence.

2. Consent by registration is not constitutionally valid consent because consent implies choice. That is, consent implies a meaningful choice *not* to do the thing requested. But a corporation put to the choice of registering and consenting to general jurisdiction in a State or not registering and not doing business has no choice at all. A business exists to do business; refusing consent is corporate suicide.

The problem of choice cannot be side-stepped by a corporation choosing to do business only in States that do not attempt to extract consent through registration. If one State can impose consent by registration, so can all of them. Consent by registration's constitutionality cannot vary based on how many States exercise the choice that Petitioner claims the Due Process Clause gives them. And that puts a corporation in a truly untenable position: Consent to general jurisdiction *everywhere* in the United States, do business *nowhere* in the United States, or intentionally break the law and do business without registering. Monestier, *supra*, at 1390 ("Since all fifty states have the same laws requiring registration, this 'option' really amounts to a corporation simply not doing business *at all* in the United States."); *see also infra* pp. 15-16.

To be sure, individuals are often asked to choose between consenting to a contractual term they would prefer to avoid and foregoing a product or service they would prefer to have, and contract law generally

treats these unpalatable choices as involving valid consent. But in private transactions, the State can protect against corporate overreach by barring unduly onerous contractual terms or through case-specific judicial doctrines. *See supra* pp. 8-9. With consent by registration, "the consent * * * in question is extracted by a state as a precondition of a benefit over which the state has monopolistic control." D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 Del. J. Corp. L. 1, 37-38 (1990). And because the State has monopolistic control over the power to do business within its borders, the only outside check can come from the Constitution. Proper respect for consent—and the concominant power to say no to the bargain offered—means rejecting the consent-or-else at the core of consent by registration. As one Texas district court has explained, " 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process." *Leonard* v. *USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993).

It is also no answer that, under the Pennsylvania law, corporations are aware that the Commonwealth would deem their registration and appointment of an agent for service of process as consent to general jurisdiction. *Cf.* Pet'r's Br. 43. The mugger who says "your money or your life" while jabbing a revolver into your ribs has given clear notice of the consequences of choosing to hand over your wallet. But that notice does not mean that when the mugger runs off with your money, he does so with your consent. A lack of clear notice can weigh against a finding of consent, as numerous States have held in rejecting consent by registration as a statutory matter. *See*, *e.g.*, *DeLeon*

v. *BNSF Ry. Co.*, 426 P.3d 1, 7 (Mont. 2018) (rejecting consent by registration as a statutory matter because "[n]othing puts a corporation on notice that, by appointing a registered agent to receive service of process in Mantana, it is consenting to general jurisdiction in Montana"); *Chavez* v. *Bridgestone Americas Tire Operations, LLC*, 503 P.3d 332, 348 (N.M. 2021) (holding that neither New Mexico's corporate registration statute nor a prior court decision "provide[d] sufficient notice of a foreign corporation's consent to jurisdiction"). But notice alone cannot create meaningful consent.

II. CONSENT BY REGISTRATION WOULD TURN THE CLOCK BACK TO THE PRE-*DAIMLER* ERA AND LEAD TO NEGATIVE RESULTS FOR COURTS AND LITIGANTS.

1. Consent by registration also makes *Daimler* largely superfluous. *Daimler*, after all, made clear that a corporation was *not* subject to general jurisdiction anywhere it has "continuous and systematic" contacts. *Daimler*, 571 U.S. at 127 (citation omitted).

Saying that a corporate defendant has "continuous and systematic" contacts with a forum is little different than saying that a corporate defendant "does business" in the forum. *See* Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler *v.* Bauman *and the End of Doing Business Jurisdiction*, 66 Hastings L.J. 233, 240-241 (2014) ("[D]oing business essentially became synonymous with, or a proxy for, the *Helicopteros* standard of continuous and systematic general business contacts."). If doing business in the forum—plus taking the statutorily required step of registering and appointing an agent for service of process—allows general jurisdiction once more, "*Daimler*'s ruling

would be robbed of meaning by a back-door thief." *Brown* v. *Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016). True, *Daimler*'s general jurisdiction holding was premised on a corporation's *contacts* with the forum. Here, the general jurisdiction argument is based on the defendant's supposed *consent* to jurisdiction. *Daimler*, therefore, does not specifically speak to the constitutionality of registration statutes. But interpreting registration statutes as Petitioner suggests would functionally gut *Daimler* by opening up the possibility of suit anywhere and everywhere a corporate defendant registers to do business.

It's not just *Daimler* that would be rendered obsolete. Specific jurisdiction, the "centerpiece" of modern jurisdictional law post-*International Shoe*, would be largely wiped off the map, at least as it concerns large corporations doing business in multiple States. *Goodyear*, 564 U.S. at 925 (citation omitted). If each State could constitutionally enact a registration statue that conferred general jurisdiction over a registered corporation, it would obviate the need for resort to specific jurisdiction and eliminate much of the practical importance of *International Shoe* and its progeny.

2. The end-run around *Daimler* that Petitioner proposes is contrary to the federalism principles antimating this Court's personal jurisdiction doctrine. "[T]he Framers * * * intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). But "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.*

Put to practice, the federalism aspect of personal jurisdiction requires consideration of "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780 (2017). Pennsylvania here has *no* interest in Petitioner's case. Petitioner is a Virginia resident who alleges he was exposed to asbestos while working in Virginia and Ohio. He is suing a Virginia corporation in Pennsylvania. Why Pennsylvania? Petitioner's counsel candidly admitted it was because Petitioner's "trial lawyers are based" there. Alison Frankel, *This Sleeper Supreme Court Case Could Be A Nightmare For Corporations*, Reuters (July 15, 2022), https://tinyurl.com/3c3y7j9u.

A State has no conceivable interest in adjudicating a dispute that does not arise from or relate to acts done there or involve a defendant corporation that is essentially at home there. With registration statutes, "[t]he state * * * attempts to extract the corporation's consent to all-purpose adjudicative authority, but without relinquishing anything additional in return." Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 443 (2012). That lopsided " 'exchange' has lost its connection to the state's appropriate regulatory power." *Id.* No principle, much less federalism, is served by allowing Petitioner to sue in a forum with absolutely no connection to his case.

3. In the face of being subject to general jurisdiction everywhere it does business and registers, many corporations may decide to defy, rather than comply with, state registration statutes. In many States, the consequences of non-registration are frustrating, but

manageable. In a consent-by-registration regime, "a corporation who defie[s] registration statutes could face lesser jurisdictional consequences than a corporation who complie[s] and register[s]." Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 Wake Forest L. Rev. 999, 1006 (2012). Many States forbid the company from initiating suit in its courts. *See*, *e.g.*, Alaska Stat. § 10.06.713; Ind. Code § 23-0.5-5-2(b); Va. Code Ann. § 13.1-1057(A)-(B); Wis. Stat. § 180.1502(1)-(3); Wyo. Stat. Ann. § 17-16-1502(a)-(c). Many States also impose fines, ranging from $1,000 to $10,000. *See*, *e.g.*, Alaska Stat. § 10.06.710; Ind. Code § 23-0.5-5-2(f); Wis. Stat. § 180.1502(5); Wyo. Stat. Ann. § 17-16-1502(d). These consequences, while inconvenient, may be palatable for larger corporations that can afford a few thousand dollars in fines and can use contracts to channel potential affirmative suits to a State that does not impose consent by registration.

No one benefits from this "efficient breach" of corporate-registration laws. Corporations, which now need to add a new layer of legal risk management to their operations, obviously do not benefit. But plaintiffs do not benefit either. Corporate registration statutes, by requiring the corporation to appoint a local agent for service of process, assure plaintiffs of a local person or entity authorized to receive notice of their suit against the out-of-state corporation. *See*, *e.g.*, *Chavez*, 503 P.3d at 347 (explaining that, even without consent by registration, registration statutes "provid[e] a convenient means of identifying a corporate agent with authority to accept service"); *Genuine Parts Co.* v. *Cepec*, 137 A.3d 123, 142 (Del. 2016) (corporate registration statutes "requir[e] a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases.")

If corporations do not register, plaintiffs will need to arrange for service of their suits in potentially far away forums, adding additional expense and complexity to what should be a straightforward beginning to any lawsuit. "[If] simplifying service through the availability of appointed agents is the state's goal, assertions of general jurisdiction based on the appointment will undermine that goal—by discouraging foreign corporations from complying with qualification provisions in order to avoid the jurisdictional exposure." Lewis, *supra*, at 29. That goal would be better served "by requiring appointment of an agent to receive process in actions where the state otherwise has constitutionally acceptable jurisdiction over the defendant." *Id.*

In some States, however, defiance might not be an option. In these jurisdictions, either the attorney general or another interested party can sue to restrain the unregistered business's operations in the State, truly putting the corporation to the decision to consent or withdraw from the State. *See*, *e.g.*, Ala. Code § 10A-1-7.22(b) (attorney general can sue); Idaho Code § 30-21-512 (same); N.J. Stat. Ann. § 14A:13-12 (same); *see also* Ariz. Rev. Stat. Ann. § 10-1502(F) ("attorney general or any other person" can sue). A corporation may therefore decide to litigate whether its actions actually constitute "doing business," such that registration is required.

That question will frustrate litigants and courts alike. During the *Pennoyer* era, the doing business case law was "cluttered with refined and often senseless distinctions that sought to measure the quantity of the defendant's activities within the state but paid little or no attention to the burden imposed on the

corporation of asserting jurisdiction over it or the overall desirability of litigating in the particular forum." 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice & Procedure* § 1066 (4th ed. Apr. 2022 update). The precedent was so discordant that even Learned Hand declared that "[i]t is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930). The morass will mean that corporations will be denied the "[p]redictability" that "is valuable [when] making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). And courts will no longer be able to treat personal jurisdiction as a matter to "be resolved expeditiously at the outset of litigation." *Daimler*, 571 U.S. at 139 n.20.

4. Finally, consent by registration will usher in a new era of forum shopping. It is no secret that there are some jurisdictions—Pennsylvania among them—that are "thought plaintiff-friendly" even for cases with "no tie to the State." *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1031 (2021). Case in point: Petitioner chose to sue in Pennsylvania, a state with absolutely no connection to his legal claims, and to hire trial counsel located nearly 400 miles from where he lives.

With consent by registration, *any* State can potentially be a forum for *any* suit against a national business, allowing plaintiffs' counsel their pick of where to sue. And for defendants haled into a forum with no connection to the underlying dispute, non-constitutional mechanisms like "[v]enue statutes, transfer of venue, and the doctrine of forum non conveniens may

not adequately protect a foreign corporation from inconvenient litigation." Pierre Riou, Note, *General Jurisdiction Over Foreign Corporations: All That Glitters Is Not* Gold Issue Mining, 14 Rev. Litig. 741, 745 (1995) (footnotes omitted). Only a constitutional holding can protect corporations against States abusing their corporate registration statutes.

In *Daimler*, Justice Ginsberg for the Court posed a hypothetical about a Polish plaintiff getting into a car accident in Poland and suing Daimler, a German company, in California. 571 U.S. at 121-122. She stated that "[e]xercises of personal jurisdiction so exorbitant * * * are barred by due process constraints on the assertion of adjudicatory authority." *Id.* Under Petitioner's logic, that hypothetical Polish plaintiff *could* sue Daimler in California over a car accident that took place in Poland so long as Daimler had registered to do business in California. The assertion of personal jurisdiction is no less "exorbitant" in the latter case than in the former; the Court should reject Petitioner's claims to the contrary.

CONCLUSION

For the foregoing reasons, the Pennsylvania Supreme Court's judgment should be affirmed.

Respectfully submitted,

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