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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., AND AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae share a collective concern about the unconstitutional extension of principles of general jurisdiction. Pennsylvania's "consent-by-registration" statute at issue in this case exceeds the boundaries set by this Court and breaks with the history underpinning those boundaries.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has participated as *amicus curiae* in every significant personal jurisdiction case recently decided by this Court. *See, e.g.*, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief through blanket consent letters filed with the Clerk's Office.

fairness, balance, and predictability in civil litigation. ATRA files *amicus curiae* briefs in cases involving important liability issues.

The Coalition for Litigation Justice, Inc. ("CLJ") is a non-profit association formed by insurers in 2000 to address and improve the asbestos litigation environment. The Coalition has filed approximately 200 *amicus curiae* briefs in cases that may have a significant impact on the asbestos litigation environment.

American Trucking Associations, Inc. ("ATA") is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the United States, including this Court.

From the Republic's earliest days, judicial jurisdiction doctrines have mediated core considerations of interstate commerce, federalism, and liberty.[2] Generally, between 1788 and 1868, those doctrines, rooted in both the Full Faith and Credit Clause and state practice, provided that a state court could exercise *in personam* jurisdiction over nonresident defendants only where they voluntarily appeared or were person-

[2] "Judicial jurisdiction" describes a court's assertion of power over a defendant (whether individual or organizational); others employ the term "personal jurisdiction."

ally served with process within the forum's territory. In cases involving organizational defendants like corporations, the Founding-era limitations were more restrictive than those governing individual defendants. While some mid-century practices permitted state courts to exercise *in personam* jurisdiction over nonresident corporations based upon in-state service on an agent, such jurisdiction was typically confined to suits related to the defendant's in-forum activities. It did not encompass suits unrelated to those activities.

Against this historical backdrop, the Pennsylvania statute at issue, conditioning business registration on consent to general jurisdiction, represents a jarring anomaly. *See* Kaminer, *The Cost of Doing Business? Corporate Registration as Valid Consent to General Personal Jurisdiction*, 78 Wash. & Lee L. Rev. 55, 83 (2021) ("Pennsylvania stands alone in its [approach]."). This statute deviates from the practices among the Several States predating the adoption of the Fourteenth Amendment. It upsets the careful balance of interstate commerce, federalism, and liberty underlying those practices. And it offers a roadmap to circumvent this Court's recent unanimous decisions restricting general jurisdiction to states where a defendant is "essentially at home." *Daimler AG v. Bauman*, 571 U.S. 117, 133–39 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Such circumvention would threaten the interstate commercial activity in which *amici*'s members regularly engage and interstate system in which they organize their primary conduct.

Thus, *amici* have a strong interest in this case.

SUMMARY OF ARGUMENT

The Fourteenth Amendment's Due Process Clause prohibits a State from conditioning a nonresident corporation's commercial activities on its assent to general jurisdiction. In addition to the reasons advanced by Respondent, this conclusion flows from an examination of the principles governing state court judicial jurisdiction that developed between the ratification of the Constitution and the adoption of the Fourteenth Amendment.

In a separate opinion in *Ford Motor Co.*, Justice Gorsuch, joined by Justice Thomas, invited parties (and the Court) to reexamine the constitutional constraints on judicial jurisdiction by employing an originalist methodology. 141 S. Ct. at 1036, 1039 & n. 2. They identified the "consent" theory at issue in this case as the sort of pre-*Shoe* practice warranting review. *Id.* at 1037 n. 3. This brief answers that invitation and advances four propositions.

First, as a general matter, a state court could exercise *in personam* jurisdiction over nonresident individuals only where they voluntarily appeared or were personally served with process within the forum. In cases where those options were unavailable, *in rem* and *quasi in rem* jurisdiction (involving property within the forum) offered alternatives. The more relaxed service rules for those suits reflected the forum state's stronger interest to determine the ownership of property located therein.

Second, with organizational entities like corporations, courts developed specific rules governing judicial jurisdiction that originally were more restrictive than those governing individuals but loosened after this Court's decision in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). Around the time of the Constitution's ratification, many courts observed the

"non-migration theory" under which state-chartered corporations enjoyed no legal existence outside their chartering state. Corporations could not do business, sue, or be sued elsewhere. *Earle* recognized that corporations could undertake such activities in territories other than their chartering states, but tied that capacity to principles of "comity." Under those principles, a state might impose conditions on the nonresident corporation's activities in its territory.

Third, important limits governed states' authority to impose those conditions. States could not impose conditions "repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855). Consistent with *Lafayette*'s guard rails, state courts generally limited *in personam* jurisdiction against organizational defendants (like corporations) to claims related to their *in-forum* activities. They did not exercise jurisdiction over claims *unrelated* to those activities. ***In the eighty years between the Constitution's ratification and the Fourteenth Amendment's adoption, Petitioner cannot point to a single decision from any court supporting* in personam *jurisdiction over a nonresident corporation under those circumstances.***

Finally, nothing in the historical record surrounding the Fourteenth Amendment's adoption suggests a departure from these principles. Rather, as this Court found in *Pennoyer v. Neff*, the Due Process Clause hardwired into the Constitution the traditional rules of "public law" referenced in *Lafayette* and reflected in

historical tradition. 95 U.S. 714, 722, 729–30 (1878) (quoting *Lafayette*, 59 U.S. at 407). It supplied two procedural mechanisms to ensure that any conditions imposed by states upon nonresident defendants were consistent with those rules: (1) an independent constitutional basis upon which a litigant could object to a forum state's grant of jurisdiction at the commencement of the suit and (2) an independent federal ground upon which this Court could review state court exercises of personal jurisdiction without awaiting an enforcement proceeding. While effecting these changes, the Due Process Clause did not alter the substantive standards and, as a constitutional constraint on state power, certainly did not license novel theories of state court jurisdiction untethered from historical tradition.

One scholar summarizes matters: "A longstanding American jurisdictional tradition authorizes a state to require a nonresident corporation to appoint an in-state agent for service of process and to consent to jurisdiction for claims related to its forum business in return for the privilege of conducting in-state business. … The potential constitutional difficulty is employing a statutory consent scheme to establish amenability for claims wholly unrelated to the defendant's forum activities when the defendant is not conducting business in such a manner as to subject it to general jurisdiction … ***A longstanding historical tradition traceable to the ratification of the Fourteenth Amendment, then, does not support this practice***." Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 442–43 (2012) (emphasis added). Because Pennsylvania's statute is incompatible with that "longstanding historical tradition," it cannot withstand constitutional scrutiny under an originalist interpretation of the Due Process Clause.

ARGUMENT

"To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority." *Burnham v. Super. Ct.*, 495 U.S. 604, 609 (1990) (plurality opinion); *see also id.* at 628 (White, J., concurring in part and concurring in the judgment); *see also Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855) (defining due process by "look[ing] to those settled usages and modes of proceeding" in Anglo-American courts). Those "principles" draw from several sources, especially decisions applying the Constitution's Full Faith and Credit Clause and state practice between 1788 and 1868. *See, e.g.*, *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8 (1907); *Pennoyer*, 95 U.S. at 714.

A. Prior to the Fourteenth Amendment's adoption, state courts could not exercise *in personam* jurisdiction over nonresident individuals absent in-state service or voluntary appearance.

Begin with first principles. "The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books." *Burnham*, 495 U.S. at 609 (plurality); *see also* Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1236 (2009). In English practice, a judicial proceeding without jurisdiction was *coram non judice*, and the resulting judgment was void. *See Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276 (1808). International law principles governing the enforcement of foreign

judgments reflected similar notions: A judgment debtor could oppose enforcement on the ground that the judgment-rendering court lacked jurisdiction. *See id.* at 269–71, 277–79.

The classic English decision of *Buchanan v. Rucker* exemplifies these principles. 9 East 192, 103 Eng. Rep. 546 (K.B. 1808). There, Lord Ellenborough declined to enforce a default judgment rendered by a Tobago court against an English merchant who had never been served or appeared there. In refusing to enforce the Tobago judgment, Lord Ellenborough propounded the famous query: "Supposing, however, that the act had said in terms, that though a person sued in the island [of Tobago] had never been present within the jurisdiction, yet, that it should bind him, upon proof of nailing up the summons at the Court-House door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Id.* at 194. While the answer, of course, was no, Lord Ellenborough's rhetorical query revealed an essential insight about English common law (informed by international law): a binding judgment depends on the jurisdiction of the rendering court, which, in the case of nonresident defendants, requires in-forum service or voluntary appearance.

The foundational ideas reflected in *Rucker* informed the "principles traditionally followed by American courts in marking out the territorial limits of each State's authority." *Burnham*, 495 U.S. at 609 (plurality). *See generally* Story, Commentary on the Conflicts of Laws § 547, at 917 n. 1 (4th ed. 1852) (hereinafter "Story, Conflicts"). While the Fifth Amendment's Due Process Clause did not supply an independent limit on

a state's judicial jurisdiction, *see Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 251 (1833), jurisprudence interpreting the Full Faith and Credit Clause in Article IV of the Constitution, along with state practice, helped to demarcate the jurisdictional boundaries of state courts. Like its antecedent in the Articles of Confederation, Article IV obligated state courts to give "full faith and credit" to the "judicial proceedings" of sister states and discarded the pre-Revolutionary practice under which colonies largely treated each other's judgments like foreign ones—*i.e., prima facie* evidence of an obligation but nothing more. *See Hilton v. Guyot*, 159 U.S. 113, 181 (1895). *See also* Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution* 10 (1945). Highlighting its importance to interstate commerce, Federalist 42 described Article IV as one of the Constitution's provisions "which provide for the harmony and proper intercourse among the States." The Federalist No. 42, at 195 (Madison).

This obligation for one state to give "full faith and credit" to the "judicial proceedings" of another state trained attention on Lord Ellenborough's rhetorical question—what to do if the judgment-debtor challenged the jurisdiction of the judgment-rendering state in an enforcement proceeding. *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting); Story, Conflicts § 609, at 1001. In the decades following the Constitution's ratification, courts developed principles "marking out the territorial limits of each State's authority." *Burnham*, 495 U.S. at 609 (plurality). Over time, these limits on the obligation to give full faith and credit to another state's judgment informed the general principles governing judicial jurisdiction.

Two frequently cited opinions by Justice Joseph Story, sitting as circuit justice, exemplified the influence of these principles. First, *Flower v. Parker*, 9 F. Cas. 323 (C.C.D. Mass. 1823) involved a federal action to enforce a state court judgment against multiple defendants—Flower (a Louisiana resident) and Parker and Stevens (copartners and trustees of Flower involved as a result of "trustee process"). While Parker and Stevens had been served, Flower never was. Echoing Lord Ellenborough, Justice Story observed that: "The judgments of no state courts can bind, conclusively, any persons who are not served with process, or amendable to their jurisdiction. … [This] principle seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction." *Id.* at 324–25.

Second, *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) involved an attachment proceeding in Massachusetts. Swan's agents were summoned to appear and show why the property should not be attached. Reaffirming *Flower*'s principle that "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions," Justice Story elaborated on those limits:

> Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by

> attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that except so far as the property is concerned, it is a judgment *coram non judice*. If the party chooses to appear and take upon himself the defence of the suit, that might vary the case, for he may submit to the local jurisdiction, and waive his personal immunity.

Id. at 612–13. *See also* Story, Conflicts § 549, at 921–22.

Other authorities embraced these principles. Between the ratification of the Constitution and the adoption of the Fourteenth Amendment, several state courts reiterated the view that they would not give full faith and credit to an *in personam* judgment rendered against a nonresident defendant who had not been personally served in the judgment-rendering state or voluntarily appeared in "defence of the suit." *See, e.g.*, *Bissell v. Briggs*, 9 Mass. 462 (1813); *Thurber v. Blackbourne*, 1 N.H. 242 (1818); *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 240 (1828); *Chew & Relf v. Randolph*, 1 Miss. (1 Walker) 1 (1818); *Miller's Ex'rs v. Miller*, 17 S.C.L. (1 Bail.) 242, 244 (Ct. App. 1829); *Shumway v. Stillman*, 6 Wend. 447, 453 (N.Y. Sup. Ct. 1831). *See generally* Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1274 (2017) (collecting cases); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 792 & n. 74 (1955) (same). An 1853 Opinion of the Attorney General likewise

embraced this position. *Case of Lund v. Ogden*, 6 U.S. Op. Atty. Gen. 75, 76–77 (1853) ("All proceedings of this kind … are acts taken in violation of international comity, and a usurpation of general sovereignty, in derogation of the rights of co-equal States and of their residents or subjects.").

Finally, this Court recognized these principles in *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850). *D'Arcy* involved an effort in Louisiana to enforce a New York judgment on an unpaid debt entered against two partners, Gossip and D'Arcy. While Gossip had been served with process (and voluntarily appeared) in the New York action, D'Arcy was not served and did not appear. Even though the underlying debt action had been successfully pursued on a theory of joint and several liability, this Court concluded that the Louisiana court was not obligated to enforce the judgment against D'Arcy because a "judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force." *Id.* at 176.

In sum, it was well established in 1868 that a state court could exercise *in personam* jurisdiction over nonresident individuals only where they were personally served with process within the forum or voluntarily appeared in "defence of the suit." Where those requirements could not be met, a plaintiff could invoke *in rem* or *quasi in rem* jurisdiction grounded upon the forum state's greater interest in property located therein.

B. Prior to the Fourteenth Amendment's adoption, state courts' assertions of *in personam* jurisdiction predicated upon service on a statutorily designated agent of a nonresident organizational defendant were limited to cases arising out of that defendant's transactions in the forum.

The application of the above-described general principles to organizational defendants (like corporations) followed its own evolutionary path. One can divide the time between the Constitution's ratification and the Fourteenth Amendment's adoption into two main eras: one where corporations were not subject to *in personam* jurisdiction outside their chartering states, and one where such jurisdiction would lie for actions arising out of their in-state activities.

The first era covers the period between 1788 and 1839. Corporate organizations were relatively rare during the years immediately following the Constitution's ratification. Many businesses were informal, and corporations often required a state charter along with some public purpose (like a steamship or railroad company). *See, e.g.*, Kalo, *Jurisdiction as an Evolutionary Process: The Development of* Quasi in Rem *and* in Personam *Principles*, 1978 Duke L.J. 1147, 1163–64; Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 Harv. L. Rev. 676, 682, 686–87 (1917).

During this first era, doctrines governing jurisdiction over corporations reflected their roots in state charters. Under the "non-migration theory," corporations existed only within the territory of the chartering state, so their legal capacities—whether to enter into contracts, to sue, or to be sued—halted at the border. *See generally* 6 Thompson, Commentaries on the Law

of Private Corporations § 7989, at 6360–61 (1895) (hereinafter "Thompson"). These limits also affected their amenability to service of process. "At common law, service of process upon a corporation could be made only upon the head or principal officer of the corporation, and *within the jurisdiction of the sovereignty which created it*; and from this rule it followed of necessity that a valid judgment against it *in personam* could not be obtained in the courts of another jurisdiction." Keasbey, *Jurisdiction Over Foreign Corporations*, 12 Harv. L. Rev. 1, 2 (1898) (emphasis added). *See generally* Angell & Ames, Treatise on the Law of Private Corporations Aggregate § 402, at 403 (7th ed. 1861) (hereinafter "Angell & Ames").

State courts uniformly applied the non-migration theory to *in personam* jurisdiction. Some applied it strictly and also disallowed attachment of nonresident corporate property located in the forum. *See, e.g.*, *Kane v. Morris Canal and Banking Co.*, opinion set forth in a footnote at 14 Conn. 301, 303 n. (a) (N.Y. Sup. Ct. 1840); *Peckham v. Inhabitants of N. Par. in Haverhill*, 33 Mass. (16 Pick.) 274, 286 (1834); *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5 (N.Y. Sup. Ct. 1819). Others, while holding that the non-migration theory precluded *in personam* jurisdiction over nonresident corporations, permitted attachment of their in-forum property, just like in cases involving individuals. *See, e.g.*, *Bushel v. Com. Ins. Co.*, 15 Serg. & Rawle 173 (Pa. 1827). *See generally* II Henderson, *The Position of Foreign Corporations in American Constitutional Law* 77 (1918) (hereinafter "Henderson"); Angell & Ames § 406, at 407–08.

State statutes reflected a similar pattern. Between 1788 and 1825, no state statute authorized jurisdiction

over nonresident companies. Between 1825 and 1839, six states enacted statutes addressing the issue.[3] Three were industry-specific (insurance in Maryland and Georgia; railroads in Virginia); three others (New Hampshire, Florida, and Kentucky) did not contain industry-specific limitations.[4] These statutes had a limited sweep. For example, Maryland's and Georgia's statutes expressly limited judicial jurisdiction to cases involving in-state activities. *See Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 298–99 (C.C.D. Conn. 1800) (analyzing Maryland law). New Hampshire's Supreme Court construed its generally worded statute to apply to a claim by a New Hampshire resident arising in New Hampshire. *See Libbey v. Hodgdon*, 9 N.H. 394, 396 (1838) ("[E]ven-handed justice requires that we … not send our citizens to a foreign jurisdiction in quest of *redress for injuries committed here*.") (emphasis added). ***During this first era, not a single state statute supported* in personam *jurisdiction against a nonresident corporation for claims unrelated to its in-state activities.***[5]

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[3] Pennsylvania and Connecticut enacted statutes regulating suits against corporate bodies during this era, but courts did not apply those statutes to nonresident corporations. *See Eline v. Western Maryland Ry. Co.*, 97 A. 1076, 1077 (Pa. 1916); *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301, 305 (1841).

[4] 1834 Md. Laws, ch. 89; 1829 Ga. Laws 17; 1827 Va. Acts 77; 1825 N.H. Laws 64; 1829 Fla. Laws 144; 1835 Ky. Acts 268.

[5] In other cases, scholars have been unable to locate decisions interpreting statutes enacted during this first era. *See* Henderson at 80. While Petitioner argues that the general phrasing of these statutes suggests a broad sweep, Br. 19, that argument ignores this Court's regular reminder that statutes must be read in light of the common-law tradition in which they are adopted. *E.g.*, *Burnham*, 495 U.S. at 609 (plurality). In this case, the

In 1839, this Court in *Bank of Augusta v. Earle* ushered in the second era. 38 U.S. at 519. The primary case in *Earle* concerned an action on a bill of exchange brought by the Georgia-based bank against an Alabama citizen. Citing the non-migration theory, the Alabama citizen defended on the ground that the Georgia bank lacked the power to purchase (through an agent) the bill in Alabama. While acknowledging that strict application of the non-migration theory might preclude the purchase, *id.* at 588, this Court noted that colonial-era practice was more nuanced. It specifically cited Maryland's statute, described above, providing that insurance corporations not chartered by the state, which shall transact or have transacted business in the state, may be sued in courts "upon contracts made in the state." *Id.* at 592. Accordingly, a nonresident corporation could engage in activity outside the territory of the state of its creation, but that activity depended upon the other state's permission. *Id.*

During this second era, while states enjoyed greater latitude to regulate nonresident corporations, their authority to impose conditions was not boundless. A state could not impose conditions "repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." *Lafayette*, 59 U.S. at 407. In the case of judicial jurisdiction, the challenge became how to map principles like in-state service and voluntary appearance, developed in the context of individual defend-

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tradition of the non-migration theory more strongly supports a narrower construction.

ants, onto organizational ones. *See St. Clair v. Cox*, 106 U.S. 350, 354 (1882).

While the general principles might be similar at a sufficiently high level of generality, their precise application necessarily would have to account for salient differences between individuals and corporations. Corporations, unlike individuals, were juridical creations (giving the chartering state a continuing interest in the corporation's commercial conduct). *See* Keasbey, 12 Harv. L. Rev. at 3–4. Moreover, corporations, unlike individuals, could not be "found" in a single place but relied on authorized persons such as officers or agents to carry out their activities (requiring careful consideration of the scope of any agent's authority). *See* Morawetz, A Treatise on the Law of Private Corporations § 522, at 495 (1882) (hereinafter "Morawetz").

Consequently, many states enacted statutes requiring nonresident corporations to designate agents for service of process (with some specifying default agents if the corporation failed to do so or withdrew from the forum). *See generally* II Cook, A Treatise on Stock and Stockholders, Bonds, Mortgages, and General Corporation Law 1174–78 (3d ed. 1864) (collecting authorities) (hereinafter "Cook"). Petitioner argues that those statutes represent a broad-based endorsement of general jurisdiction. Br. 16.

That argument is wrong. As Petitioner concedes, Br. 52, some state statutes (like Indiana's in *Lafayette*) explicitly confined *in personam* jurisdiction over nonresident corporations to cases arising out of the corporation's in-forum activities. At least nine statutes enacted during this era similarly limited their

application to the defendant's in-forum activities.[6] Those statutes do not support Petitioner's view.

While roughly twenty other statutes enacted during this era were more generally phrased,[7] Petitioner misreads them. Petitioner's argument relies heavily on statutes designating the identity of agents authorized to receive service of process on nonresident corporations. This argument confuses the *mode* of service with the authorization of jurisdiction. Contemporaneous decisions illustrate the distinction. For example, an 1865 New Jersey law provided that, in suits against a foreign corporation, process may be served on "any officer, director, agent, [or] clerk," among others. 1865 N.J. Laws 497. Yet the following year, New Jersey's high court refused to interpret this language to authorize jurisdiction over foreign corporations for claims unrelated to their in-forum activities:

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[6] Ga. Code. Ann. §§ 2-4-3329–3335 (1867); Ind. Code. §§ 25-1–6 (1852); Iowa Code § 101.1705 (1851); Kan. Stat. Ann. § 81-15 (1868); Me. Rev. Stat. Ann. tit. 9, ch. 81, § 22 (1857); Mo. Rev. Stat. §§ 87.1, 87.3 (1845); N.Y. Code of Proc. § 427 (1849); Ohio Rev. Code Ann. § 730.3 (1847); Wis. Code of Proc. § 39(1) (1857).

[7] Ala. Code § 6-1180 (1867); 1851 Cal. Stat. 51; Conn. Gen. Stat. §§ 11–17 (1849); Del. Code Ann. tit. 10, §§ 1246–47 (1852); 112 Ill. Comp. Stat. § 68 (1855); Ky. Code of Prac. in Civ. & Crim. Cases ch. 2, § 80 (1854); Md. Code Ann. § 26-7 (1860); Mass. Gen. Laws, ch. 252, § 46 (1856); Mich. Comp. Laws §§ 116.3, 116.7 (1846); Minn. Stat. § 66.1 (1867); Miss. Code Ann. § 35-11-57 (1857); Neb. Rev. Stat. §§ 2-74–75 (1866); N.H. Rev. Stat. Ann. §§ 159:4–6 (1867); 1865 N.J. Laws 497; Or. Rev. Stat. §§ 24.7–8 (1864); 1841 Pa. Laws 29; 1844 R.I. Pub. Laws 118–19; Tenn. Code Ann. §§ 1-5-2831–6-2832 (1858); Vt. Stat. Ann. tit. 27, ch. 87, §§ 5–9 (1862); 1855–56 Va. Acts 26; 1863 W. Va. Acts 192.

> [Plaintiffs] insist[] that, by [this statute], all foreign corporations are made suable in the courts of this state, whenever any director, clerk, or other agent of such corporation can be found within our territorial limits. ***Such is not the construction which is put by this court on this statute.*** … We find thus a mode is prescribed of effecting service of process on foreign corporations; ***but the question still remains, in what cases can they be so served? Can they be so served when, upon general principles, the courts of this state have no jurisdiction? The statute does not say so.*** There is not a word in it indicative of an intention to amplify the capacity of the court with regard to that class of cases in which these creatures of foreign law are parties—defendants. The statute does not give any new right of suit; nor does it purport to take away any of the privileges of foreign corporations. It simply appoints a method of bringing corporations invested with a foreign character into the courts of this state, when such courts have jurisdiction over them. We think that the act in question has no scope beyond this. ….[I]t is difficult to believe that it was the design to place within the jurisdiction of our courts, all the corporations of the world, merely from the fact that a director, clerk, or other subordinate officer happened to come upon the territory of the state.

Camden Rolling Mill Co. v. Swede Iron Co., 32 N.J. L. 15, 17–18 (1866) (emphasis added) (citations omitted).

State courts tended to interpret these statutes narrowly. Some limited their application to a non-

resident defendant's in-forum activities. *See generally* Thompson § 8807, at 6381; Rhodes, 64 Fla. L. Rev. at 637. Others, under the "casual presence" doctrine, disallowed jurisdiction over nonresident corporations where their agents were served in the forum state while present for reasons unrelated to their corporate activities. *See, e.g.*, *Latimer v. Union Pac. Ry.*, 43 Mo. 105 (1868). *See generally Morawetz* § 522, at 496. As one jurist explained, jurisdiction based upon casual presence "would be so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it." *Moulin v. Trenton Mut. Fire & Life Ins. Co.*, 24 N.J.L. 222, 234 (1853).

Against this weight of authority, Petitioner only cites two state-court decisions from the second era. Br. 19, 21 (quoting *Fithian, Jones & Co. v. New York & Erie R.R. Co.*, 1 Grant 457, 31 Pa. 114, 115–16 (1857); *Cumberland Coal Co. v. Sherman*, 8 Abb. Pr. 243, 245 (N.Y. Sup. Ct. 1858)). Neither supports Petitioner's argument.

Fithian involved an action brought by Pennsylvania plaintiffs to recover an in-state judgment obtained against in-state defendant, Inmann. The plaintiffs sought recovery against a foreign railroad company operating in Pennsylvania that had previously been held as Inmann's debtor under a New York judgment. The Supreme Court of Pennsylvania held that the foreign company may be made garnishee in Pennsylvania because the action involved persons and property within Pennsylvania and "[i]f neither the property nor the person of Innman was within the jurisdiction of this state, the courts of New York would not be bound to give to our judgment an extra-territorial operation." *Fithian*, 31 Pa. at 115.

In *Cumberland Coal*, the New York Supreme Court held that a foreign corporation was *not* amenable to service of process predicated upon section 427 of New York's Code—stating that residents may bring an action against a foreign corporation "for any cause of action"—because the foreign corporation did not have property in New York and *the cause of action did not arise there*. 8 Abb. Pr. at 245. In the court's view, section 134 of the Code provided that service could be made against a foreign corporation "only when it has property within this State, or the cause of action arose therein." *Id.* The court held that proof of service "in the manner prescribed by the Code … is necessary, without voluntary appearance, to give the court jurisdiction" and that "[u]nless the cause of action as to the [foreign corporation] arose in this State, it cannot be made a party to the action by section 427 of the Code; and having no property in this State, it cannot be made a party by a service under section 134." *Id.* at 245, 252. Thus, *Fithian* and *Cumberland Coal* do not support Petitioner's view.

In sum, this case does not present a situation where a lack of decisional authority demonstrates that "the issue was so well settled that it went unlitigated." Br. 18 (quoting *Burnham*, 495 U.S. at 613 (plurality)). It presents the converse situation. Between 1839 and 1868, *in personam* jurisdiction over nonresident corporations was hotly litigated, and the jurisprudence does not support Petitioner's view. ***During the entire second era, indeed during the eighty years between the Constitution's ratification and the Due Process Clause's adoption, Petitioner has not identified a <u>single</u> case supporting jurisdiction over a nonresident corporation for claims unrelated to its in-forum activities.***

C. The Fourteenth Amendment's ratification did not alter the historical limits on state court *in personam* jurisdiction over nonresident defendants.

The history surrounding the ratification of the Fourteenth Amendment is sparse. Ratification debates contain little reference to the Due Process Clause and virtually none to judicial jurisdiction. *See* Berger, *The Transformation of the Fourteenth Amendment* 201 (1977); Mott, *Due Process of Law* 164 (1926); Sachs, 95 Va. L. Rev. at 1273. This lacuna has caused most scholars to conclude that the Due Process Clause did not alter the "the content of the rules for acquiring personal jurisdiction." Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. Chi. L. Rev. 1589, 1596 (2018). Rather, as *Pennoyer* found, it hardwired into the Constitution the general principles governing the exercise of that jurisdiction and the guard rails set by *Lafayette* on the conditions that states could impose. 95 U.S. at 722, 729–30. *See generally* Kurland, *The Supreme Court, the Due Process Clause, and the* In Personam *Jurisdiction of State Courts: From* Pennoyer *to* Denckla: *A Review*, 25 U. Chi. L. Rev. 569, 578 (1958).

Leaving the substantive standards unchanged, the Due Process Clause carried two consequences. First, it offered an express avenue by which litigants could obtain relief from exorbitant assertions of jurisdiction at commencement of the suit. Pre-ratification, the Full Faith and Credit Clause did much of the work, and litigants often needed to await an enforcement action before testing whether the state's jurisdiction exceeded the permissible limits. Once the "public law" was embedded in the Due Process Clause, a litigant could immediately test whether jurisdiction was constitutionally permissible. *See* Sachs, 95 Tex. L.

Rev. at 1253. Second, it enabled this Court to police those exercises of judicial jurisdiction on review without awaiting an enforcement action. This Court's cases predating the ratification of the Fourteenth Amendment involved an effort to give full faith and credit to an already-rendered judgment. As *Pennoyer* and its progeny (including this case) illustrate, anchoring the traditional principles grounded in general law into the Due Process Clause permitted this Court a degree of federal oversight at an earlier stage. *See* Kurland, 25 U. Chi. L. Rev. at 585; Sachs, 95 Tex. L. Rev. at 1288.

D. Materials following the Fourteenth Amendment's ratification have limited explanatory value at best and, in all events, do not support a different rule.

Unable to identify a single decision between 1788 and 1868 supporting his theory, Petitioner's purported "originalist" argument rests on a jumble of authority mostly *post-dating* the adoption of the Fourteenth Amendment. That authority cannot illuminate its meaning.

Originalism rests on the premise that constitutional terms like the Due Process Clause constitute legal text. *See* Scalia, *A Matter of Interpretation: Federal Courts and the Law* 46 (1997). "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905); *accord Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838). Because the Constitution's meaning is "fixed at its ratification," the "goal of originalism [is] to ascertain the ordinary and public meaning of the Constitution's text at th[at]

time." Gorsuch, *A Republic, If You Can Keep It* 110, 123 (2019). Thus, there is a strong argument that post-ratification practice simply does not bear upon the originalist interpretation of a constitutional provision. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring).

In support of a radically different approach, Petitioner cites only two decisions, neither of which supports Petitioner's view. Br. 11 (quoting *Bruen*, 142 S. Ct. at 2111, 2131, 2137; *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008)). In both, the post-ratification history simply confirmed the Court's finding (based on *pre-ratification history*) that the Second Amendment codified a "pre-existing right." *Bruen*, 142 S. Ct. at 2127, 2130; *Heller*, 554 U.S. at 592, 599. Petitioner has no such evidence. Rather, the historical evidence reveals the principles discussed above, which constrained excessive assertions of state authority. In this context, it makes no sense to rely upon novel state statutes enacted decades after the Fourteenth Amendment's ratification to shed light on the "original" meaning of the phrase "Due Process." *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in the judgment) ("Past practice does not, by itself, create power.") (internal quotation marks omitted); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370 (1995) (Thomas, J., concurring in the judgment) (explaining that "historical evidence from the framing outweighs recent tradition").

In all events, these post-1868 sources cannot sustain the weight Petitioner seeks to give them. Other state practices belie Petitioner's claim that states uniformly endorsed "general jurisdiction by consent" following

adoption of the Due Process Clause. For example, some courts continued to observe the casual presence doctrine, described *supra* at 20. *See, e.g.*, *Aldrich v. Anchor Coal & Dev. Co.*, 32 P. 756 (Or. 1893); *Philips v. Burlington Library Co.*, 21 A. 640 (Pa. 1891); *Dells Improvement Co. v. District Court*, 2 N.W. 698 (Minn. 1879); *Newell v. Great W. Ry. Co., of Canada*, 19 Mich. 336, 346 (1869). *See generally* Ballantine, Ballantine on Corporations § 291, at 863 (1927). Continued observance of this doctrine helped to ensure that the forum courts did not become "arbiters of differences in which our citizens have no interest … and [would] turn a well meant provision into an instrument of mischief." *Newell*, 19 Mich. at 346.

Other courts continued to confine *in personam* jurisdiction over nonresident corporations to cases related to their in-state activities. *See, e.g.*, *Sawyer v. N. Am. Life Ins. Co.*, 46 Vt. 697 (1874); *Bawknight v. Liverpool & London & Globe Ins. Co.*, 55 Ga. 194, 196–96 (1875); *Dells Improvement*, 2 N.W. at 699; *Central R.R. & Banking Co. v. Carr*, 76 Ala. 388 (1884). *See generally* Cook § 758, at 1173 & n. 1 (collecting cases); Morawetz § 523, at 497 (same). Reflecting a sensitivity to interstate commerce, the Alabama Supreme Court explained that "to hold otherwise, would be to allow foreign corporations which transact business in Alabama, to be drawn into our courts, for the adjudication of every contract they may make, and of every tort and wrong they may be charged with committing, even in the State which gave them being." *Carr*, 76 Ala. at 393. Both doctrines exemplify a circumspect approach to *in personam* jurisdiction against nonresident corporations.

That circumspect approach tracked this Court's jurisprudence. Several decisions specified that constitutionally effective service on agents of nonresident defendants was limited to cases involving in-state activities. *See Old Wayne*, 204 U.S. at 21 (holding that a company's designation of a statutory agent would not "be sufficient to bring it into court in respect of *all* business transacted by it, no matter where, with, or for the benefit of [the] citizens of [the forum state]"); *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1915) (following *Old Wayne*'s principle that "statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states"). Others upheld the exercise of *in personam* jurisdiction in cases where the claim concerned the defendant's in-forum activities. *See Ex Parte Schollenberger*, 96 U.S. 369 (1877) (upholding jurisdiction in Pennsylvania on claims arising out of insurance on property in Pennsylvania); *Baltimore & Ohio R.R. Co. v. Harris*, 79 U.S. (12 Wall.) 65 (1870) (upholding jurisdiction in the District of Columbia on a claim arising out of an out-of-state train accident where the trip originated in D.C. and ticket was purchased there). *See also Cox*, 106 U.S. at 356 (observing that, as a condition of doing business, a state may require a nonresident corporation to stipulate that it will accept sufficiency of service on agents "in any litigation arising out of its transactions in the state").

Petitioner's "consent-by-registration" framework untethers these carefully crafted limits from their historical moorings. To understand why, return to first principles. Recall that, if in-forum service of the individual defendant (or the defendant's agent) did not occur, the alternative means of establishing *in personam* jurisdiction was a "voluntary appearance" in "defence of the suit," *supra* at 11. Much like "agency," the concept

of "appearance" was a quite technical one. *See also Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting). Derived from English practice, "appearance" was a dispute-specific act taking many forms and sometimes tied to a particular writ. *See* 2 Elliott & Elliott, A Treatise on General Practice § 472, at 603 (1894) (hereinafter "Elliott & Elliott"); *Romaine v. Union Ins. Co.*, 28 F. 625, 631–34 (C.C.W.D. Tenn. 1886) (describing historical English practice). For example, a "special appearance" preserved the defendant's ability to contest jurisdiction; a "distressed" appearance (tied to the writ of *distringas*) sought to dissolve an attachment; an appearance "*de bene esse*" (recognized in Pennsylvania) represented a conditional appearance. *See* Krohn, *The Appearance* De Bene Esse: *Is it an Antique Under the Present Rules of Civil Procedure in Pennsylvania*, 59 Dickinson L. Rev. 156 (1955); Sunderland, *Preserving a Special Appearance*, 9 Mich. L. Rev. 396 (1911).

These forms contrasted with a "general appearance," often referred to as a "voluntary appearance" or an appearance *gratis*. *See, e.g.*, 2 Street, Federal Equity Practice § 648, at 402 (1909) (hereinafter "Street"); Foster, A Treatise on Pleading & Practice in Equity in the Courts of the United States § 100, at 161 (1890). A defendant's "voluntary appearance" in a case waived any objection to judicial jurisdiction and relieved the plaintiff of the need to compel the defendant's appearance (a practice derived from the writ of *capias*). *See Jones v. Andrews*, 77 U.S. (10 Wall.) 327, 332–33 (1870); *see generally* Kerr, A Treatise on the Law of Pleading and Practice § 253, at 333 (1919); Street § 654, at 405–06; Elliott & Elliott § 475, at 609; Vance, *Jurisdiction; Its Exercise in Commencing an Action at Law* 52 (1890).

Petitioner's view abandons this technical practice of "voluntary appearance" and replaces it with one lacking limits. A "voluntary appearance" in litigation differs materially from Petitioner's "consent-by-registration" framework. *See* Stimson, *Jurisdiction Over Foreign Corporations*, 18 St. Louis L. Rev. 195, 202 (1933). A "voluntary appearance" was tied to a particular dispute between particular parties; by contrast, a single act of registration, under Petitioner's view, would expose a nonresident corporation to jurisdiction over all claims by all parties from all corners of the world irrespective of the forum's relationship to the suit. A "voluntary appearance" typically occurred after the suit had commenced; by contrast, a single act of registration would, under Petitioner's view, apply instantaneously and indefinitely. Whatever the permissible outer boundaries of "voluntary appearance," the Due Process Clause does not support the boundless sweep that Petitioner seeks to give it.

In sum, Petitioner's reliance on authorities enacted or announced decades after the ratification of the Fourteenth Amendment is not faithful to an originalist interpretation of the Due Process Clause. Even if those sources somehow bore on the matter, they do not sustain Petitioner's sweeping proposition about general jurisdiction.

E. *Pennsylvania Fire*'s anomalous decision does not impede an originalist interpretation of the constitutional limits of state court jurisdiction over nonresident defendants.

Against this relative harmony between the originalist interpretation and this Court's jurisprudence, *Pennsylvania Fire* represents the anomaly. *See Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). The reasoning in Justice Holmes' cryptic opinion is thin at best. The entire constitutional analysis consists of a single paragraph positing that the nonresident corporation "takes the risk" that a state court will broadly interpret its statutory agent provision to encompass claims unrelated to the company's in-forum activities. *Id.* at 96. In support of this novel "assumption of risk" theory, Justice Holmes relies on no decision of this Court and none of the history antedating the Fourteenth Amendment's adoption. Constitutional jurisprudence, especially when it departs so radically from its historical antecedents, should not rest on such a thin reed.

Recognizing the slender support for *Pennsylvania Fire*, courts and scholars have proposed several solutions, ranging from explicitly overruling *Pennsylvania Fire* to recognizing that it rested on premises (like "doing business" jurisdiction or a state's power to exclude corporations engaged in interstate commerce) that this Court's subsequent decisions have trimmed or rejected. *See* Rhodes, 64 Fla. L. Rev. at 439; Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1344, 1346 (2015); Riou, *General Jurisdiction Over Foreign Corporations: All that Glitters is Not* Gold

Issue Mining, 14 Rev. Litig. 741 (1995); Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 Rev. Litig. 1 (1990). Respondent too has proposed a variety of acceptable approaches. Resp. Br. 30–38.

Amici take no position among these alternatives. Under any of them, this Court can recognize that Pennsylvania's "consent-by-registration" scheme exceeds the constitutional boundaries governing *in personam* jurisdiction as informed by an originalist analysis. It does not rest on in-state service; it does not tie jurisdiction to claims arising out of the defendant's in-state conduct; it exceeds any reasonable understanding of the technical practice of "voluntary appearance" in "defence of the suit." Pennsylvania's statute, therefore, flouts "the principles traditionally followed by American courts in marking out the territorial limits of each State's authority," *Burnham*, 495 U.S. at 609 (plurality), and is "inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others," *Lafayette*, 59 U.S. at 407. Evidencing that "inconsisten[cy]" and "encroachment," not a single state—not even Pennsylvania—has joined Petitioner to defend this aberrational approach.

CONCLUSION

Pennsylvania's high court correctly concluded that Pennsylvania's "consent-by-registration" statute cannot withstand federal constitutional scrutiny. For the foregoing reasons, its judgment should be affirmed.

Respectfully submitted,

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