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 ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR's members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts, and administrative agencies. AAR participates as amicus curiae to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.[1]

It is no surprise that the issue of general personal jurisdiction returns to this Court—for the second time in five years—in a case brought against a railroad under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. FELA establishes an exclusive federal regime for resolving railroad employees' claims for workplace injuries against their railroad employer—and displaces the state workers' compensation systems that cover similar claims in virtually all other U.S. industries. As a result, AAR members face hundreds of FELA lawsuits each year.

AAR's members are uniquely vulnerable to forum shopping abuses, especially in FELA cases. Large railroads operate in many states. And although FELA suits arise under federal law, they cannot be removed

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[1] Both parties have filed a general consent to amicus briefs. No person or entity other than AAR has made a monetary contribution toward this brief, and no counsel for any party authored this brief in whole or in part.

to federal court. *See* 28 U.S.C. § 1445(a). FELA plaintiffs therefore have their pick of *any* state or federal court that can establish personal jurisdiction over the defendant railroad.

AAR's member railroads thus have a strong interest in this case. Pennsylvania requires foreign corporations to register to do business in the state and mandates that registration subjects them to general personal jurisdiction in Pennsylvania's courts. If this Court upholds Pennsylvania's law, other states will be free to require foreign corporations to submit to general personal jurisdiction as the price of doing business in those states. AAR's members operate in and are subject to the foreign corporation registration requirements of many states. Those railroads (and all other foreign corporations) would be susceptible to being sued for any claim, by any plaintiff in Pennsylvania—and in all states that follow Pennsylvania's lead—regardless of whether there is any connection between the underlying claim and their activities in the state.

INTRODUCTION AND SUMMARY OF ARGUMENT

Five years ago, in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), this Court blocked one attempt by the FELA plaintiffs' bar to extend general jurisdiction against railroads to states where they are not "at home." There, the Court held that *Daimler AG v. Bauman*, 571 U.S. 117 (2014), meant what it said—general jurisdiction is almost never appropriate outside of a corporation's state of incorporation or principal place of business, including in FELA cases.

But the FELA plaintiffs' bar quickly switched gears, arguing that states may subject foreign corporations

to general personal jurisdiction by forcing them to register to do business there, and imposing general jurisdiction based on registration.

Petitioner Robert Mallory defends Pennsylvania's registration-based jurisdiction statute by arguing that such statutes merely obtain voluntary consent to jurisdiction. He suggests that if respondent Norfolk Southern does not wish to face any suit by any plaintiff in the Commonwealth's courts—regardless of whether the suit has anything to do with Pennsylvania—it can simply choose not to do business there.

Setting aside whether that is a real choice for any business, it is a practical and legal impossibility for railroads. Railroads cannot simply pick up their tracks and move them to another state or just abandon their tracks. Any choice the railroads made to do business in a particular state was made long ago—often long before the state required registration and in some cases even before the state existed. Halting operations now would have a devastating effect not just on the railroads—which would lose the billions they have invested in unmovable tracks and fixed facilities—but on commerce in those states, which depends on moving freight by rail. And because the nation's integrated rail system is essential for transporting freight among the states, ceasing operations in one state would cripple interstate commerce.

In any event, railroads are not allowed to halt operations without obtaining permission from the Surface Transportation Board. And the Board is virtually certain not to approve a major freight railroad's withdrawal from an entire state, given the devastating effect that would have on the economy and the general public, not only in that state, but nationwide.

As a practical matter, therefore, upholding Pennsylvania's registration-based jurisdiction regime would subject railroads to the same grasping form of general jurisdiction that this Court rejected in *Daimler* and *BNSF*. And that too would have a disproportionate effect on railroads. FELA subjects railroads to unique risks from forum shopping. States like Pennsylvania and Montana have long been magnets for FELA cases that have no connection whatsoever to those forums, as the facts of this case and *BNSF* illustrate. Upholding Pennsylvania's regime would allow any other state to adopt the same regime, potentially subjecting railroads to general jurisdiction in any state in which they operate—and rendering *Daimler* and *BNSF* dead letters.

ARGUMENT

IMPOSING GENERAL JURISDICTION BY REGISTRATION IS UNCONSTITUTIONAL

I. Because Railroads Cannot Choose To Shut Down In States Where They Now Operate, Registration-Jurisdiction Has Nothing To Do With "Consent."

The premise of petitioner's argument is that so-called "consent-by-registration statutes produce *voluntary* consent to jurisdiction." Pet. Br. 28 (emphasis added). Yet petitioner makes little effort to defend that premise. And for good reason: as the Pennsylvania Supreme Court explained, forcing foreign corporations to relinquish their constitutional right to resist being haled into courts that do not have personal jurisdiction or cease doing business in a state is a "Hobson's choice." Pet. App. 54a.[2] It "does not constitute vol-

[2] The trial court interpreted Pennsylvania law as requiring foreign corporations in Pennsylvania to "either do business [in

untary consent to general jurisdiction but, rather, compelled submission to general jurisdiction by legislative command." *Id*. at 53a.

That supposed "choice" is illusory for railroads in particular. Railroads cannot dig up their tracks and move them to a neighboring state. And even if they could practically halt operations in a state, they cannot legally do so without the federal government's permission, which would almost certainly be denied.

This case illustrates the point. Norfolk Southern's predecessor lines have operated in Pennsylvania since the first half of the nineteenth century. Petitioner suggests that if Norfolk Southern does not wish to be subjected to suit in Pennsylvania's courts for *any* claim brought by *any* plaintiff—no matter where the claim arose or how unconnected to Norfolk Southern's activities in the state—it can simply choose to "withstand the economic loss of the Pennsylvania market." Pet. 25; *see also* Pet. Br. 28 (explaining that corporations must be willing to accept the condition that they "consent to jurisdiction *or do business elsewhere*") (emphasis added).

Withstanding the economic loss of the Pennsylvania market would be consequential. Fifty-five million tons and nearly 900,000 carloads of freight originate in Pennsylvania. Sixty-one million tons and 1.2 million

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Pennsylvania] while consenting to general personal jurisdiction, or not do business in Pennsylvania at all." Pet. App. 18a. Another court described the choice facing a non-registering foreign corporation as "either not do business in the state or do business illegally." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp.3d 532, 541, n.10 (E.D. Pa. 2019). And the Pennsylvania Supreme Court agreed, noting that corporations that failed to register to do business in Pennsylvania would be conducting business "unlawfully." Pet. App. 54a, n.20.

carloads terminate in Pennsylvania. Pennsylvania ranks in the top ten among the states in both of those categories. *See* Association of American Railroads, *State Rankings*, aar.org/wp-content/uploads/2021/02/AAR-State-Rankings-2019.pdf. And even if giving up that market was a rational business choice, withdrawing from Pennsylvania—or from any state in which any large railroad does business—would be practically and legally impossible.

This Court long ago recognized that the property of a railroad within a state "is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which . . . can be taken elsewhere and put to use at other places and under other circumstances." *Southern Ry. v. Greene*, 216 U.S. 400, 414 (1910). Congress too has recognized that railroads are "easy prey" for state and local authorities, because "they are nonvoting, often nonresident, targets" and "cannot easily remove themselves from the locality." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (quotation marks omitted). Holding that Norfolk Southern "voluntarily" subjected itself to general jurisdiction in Pennsylvania because it has "chosen" not to exit the Commonwealth is the purest legal fiction.

A. The Nature Of Railroad Operations Makes The Exit Option Impossible.

The Pennsylvania Supreme Court held that when faced with the choice of "submit[ting] to the general jurisdiction of Pennsylvania courts or not do[ing] business in Pennsylvania at all ... a foreign corporation's consent to general jurisdiction in Pennsylvania can hardly be characterized as voluntary, and instead is

coerced." Pet. App. 54a (quotation marks omitted).[3] Rightly so. "The option of refraining from doing business in [a] state is not really a viable one for most corporations." Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1390 (2015); *see also Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 509 (1926) (noting that a company that had done business in a state for many years would see its value destroyed "if it were excluded from the state by a denial of" its constitutional rights).

And that is especially true for railroads. For many companies, doing business in a state where they are not "at home" is characterized by an office, a plant, one or more stores where products are sold or services rendered, and the presence of employees carrying out activities to advance the company's business. That is, doing business typically is confined to one or several discrete locations within the state. Ceasing to do business in a state likely would result in financial hardship and other difficulties for most companies, at least in the short run. But in some cases, such a decision, though undesirable, might be manageable from a business standpoint.

Railroads are different. For freight railroads, which operate in every state except Hawaii, doing business consists of transporting a wide range of commodities in rail cars moving over a lengthy, fixed right-of-way consisting of a roadbed and tracks—which is almost always property owned and maintained by the

[3] A defendant may waive its due process right to resist the personal jurisdiction of a court. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). One method of waiver is to consent to a court's exercise of personal jurisdiction. *Nat'l Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964).

railroad. The railroads' business also includes operating large, fixed facilities, such as yards, terminals, and repair shops that support the transportation function and are physically connected to the railroad's line. All of those tracks and facilities are vital to the movement of freight across the United States—and between the United States and its neighbors. And many of the tracks were laid down and operated long before the states enacted their registration regime—indeed, before the states themselves existed.

The interstate rail system in the United States dates to the early nineteenth century. The nation's first intercity railroad, the Baltimore & Ohio Railroad, a 13-mile line, was chartered in 1827 and completed in 1830. *See* Association of American Railroads, *Chronology of America's Freight Railroads*, aar.org/wp-content/uploads/2020/07/AAR-Chronology-Americas-Freight-Railroad-Fact-Sheet.pdf; Association of American Railroads, *A Short History of U.S. Freight Railroads*, aar.org/wp-content/uploads/2020/08/AAR-Railroad-Short-History-Fact-Sheet.pdf. The industry grew quickly, spreading to New England and throughout the Mid-Atlantic. *See* John Westwood & Ian Wood, *The Historical Atlas of North American Railroads* 38-41, 51 (2011).

Pennsylvania soon became a focal point of a fast-growing network. Built as an alternative to canals, the Philadelphia & Columbia Railroad began operating in 1832, and by 1834 operated 81 miles of track in Pennsylvania. *See* Rudolph Daniels, *Trains Across the Continent* 7 (1997). In 1857, it became part of the Pennsylvania Railroad, a dominant line in the eastern United States in the second half of the nineteenth century and early twentieth century. The Pennsylvania Railroad began construction in 1847, was operating lines connecting Philadelphia, Pittsburgh, and Harrisburg

in the early 1850s, and soon after was moving freight and passengers to Chicago. *Id*. at 25.

Thus, there were significant railroad operations in Pennsylvania—including by Norfolk Southern's predecessor—long before the Commonwealth first imposed its registration regime in 1874. *See* Pet. Br. 1. Norfolk Southern began operating in Pennsylvania when it acquired some of the lines of the Consolidated Rail Corp. (Conrail) in the late 1990s. Conrail, in turn, was composed of the lines of various railroads that had long operated in the northeastern United States, including the Pennsylvania Railroad.[4]

The interstate rail system expanded rapidly throughout the United States. By 1850, more than 9,000 miles of track were operated in the United States; just ten years later that number jumped to more than 30,000 miles of track, mostly east of the Mississippi River. *See Chronology of America's Freight Railroads*, *supra*.

And during the second half of the nineteenth century, encouraged and incentivized by the federal government, railroads expanded over vast regions of the western United States. *E.g.*, Act of Mar. 3, 1875, ch. 152, 18 Stat. 482; *see also California v. Cent. Pac. R.R.*, 127 U.S. 1, 39-40 (1888) (describing how Congress exercised its authority under the Commerce

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[4] Conrail was created by the federal government as a government organization to stabilize the freight railroad system in 1973, soon after the Pennsylvania Railroad had merged into the Penn Central Railroad and the new railroad declared bankruptcy. *See* Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985. Congress acted again to support the freight rail industry, including in Pennsylvania, by enacting the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, and thereafter privatized Conrail only once it had become profitable, *see* Conrail Privatization Act of 1986, Pub. L. No. 99-509, 100 Stat. 1892.

Clause to promote "the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories"). The first transcontinental system, which spanned the central part of the western United States, was completed in 1869. *See Trains Across the Continent*, *supra*, at 52-53; *see generally* David Haward Bain, *Empire Express* (1999). Other transcontinental systems, spanning the northern and southern regions of the west, were completed within the next few decades. *See Trains Across the Continent*, *supra*, at 54-60; *The Historical Atlas of North American Railroads*, *supra*, at 192.

As railroads expanded westward, they frequently established extensive operations in territory that had not yet been admitted as a state, much less enacted a registration statute. For example, the Northern Pacific Railroad "greatly increased the population of the northern territories and was instrumental in North Dakota and Montana *becoming* states." *Trains Across the Continent*, *supra,* at 56 (emphasis added). Arizona, Idaho, New Mexico, Utah, and Wyoming too all had significant railroad operations before being admitted as states. *See The Historical Atlas of North American Railroads*, *supra,* at 193.

Today, the railroad system in the United States forms an integrated, continental network—connecting with the railroad systems of Canada and Mexico—with huge volumes of freight moving from origin to destination over the lines of more than one railroad. In many states, the railroad rights-of-way extend hundreds or even thousands of miles. For example, Norfolk Southern operates over 2,400 miles of track in Pennsylvania; CSX Transportation, another major eastern railroad, operates over 1,000 miles of track in Pennsylvania. Ten other railroads each operate over

at least 100 miles of track in the Commonwealth. In total, railroads operate over 5,000 miles of track in Pennsylvania. *See* Association of American Railroads, *Freight Railroads in Penn*., aar.org/wp-content/uploads/2021/02/AAR-Pennsylvania-State-Fact-Sheet.pdf.

Throughout the continental United States, railroads operate over more than 135,000 miles of track, spanning every state, from over 10,000 miles in Texas to 93 miles in Rhode Island. *See* Association of American Railroads, *Railroad Facts* 48 (2021 ed.). In both Texas and California, two railroads each operate over 2,000 miles of track; in Ohio, two railroads each operate over 1,800 miles of track; and in Illinois, four railroads each operate over 1,000 miles of track. *See* Association of American Railroads, *Freight Rail in Your State,* aar.org/data-center/railroads-states/ (fact sheets for each state). In all but eight states, railroads operate at least 1,000 miles of track. *See Railroad Facts*, *supra*, at 48.

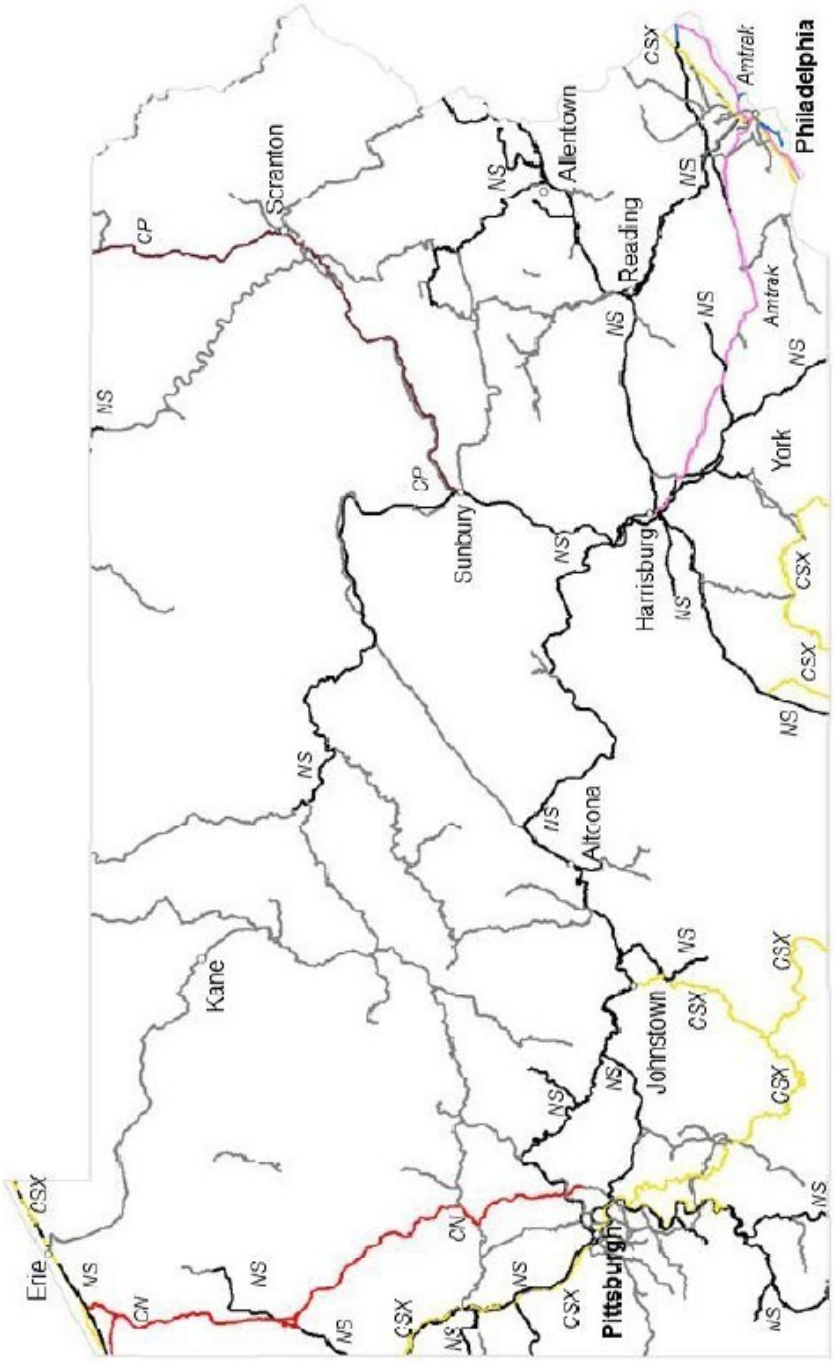
The initial construction of rail lines, which often occurred well more than a century ago, represented a huge capital investment. So does the ongoing upkeep of the roadbed and tracks—the rail, crossties, and ballast which make up the track structure must constantly be maintained, and periodically replaced. Over the past decade, railroads have, on average, annually put down more than 600,000 tons of new track and laid between 10 and 20 million crossties. *See* Railroad Facts, *supra*, at 49. In addition to tracks, railroads' rights-of-way consist of bridges, tunnels, and other infrastructure that also must be maintained. During the past decade (through 2020), railroads invested between $8 and $11 billion each year in their rights-of-way and structures. *See id.* at 25.

For railroads, ceasing to do business in a state would mean abandoning those huge investments. (In contrast,

railroads' main competitors, trucks, use public roads as their rights-of-way, so ceasing to do business in a state would not have the same financial implications.) Even if some track and other assets could be moved, the underlying roadbed is essentially part of the land and could not be salvaged. *See Southern Ry.*, 216 U.S. at 414 (railroad property "cannot be withdrawn at the pleasure of the investors").

The staggering loss of assets that a railroad would incur as a result of leaving a state would not be the only consequence. The operations of one railroad in a given state are inextricably linked to the operations of other railroads, as well as to other transportation modes, in that state and beyond. The lines of major railroads in a state are physically connected to their lines in adjacent states, forming a continuous system. But the lines of even the largest railroads do not constitute a fully independent system. Rather, virtually all railroads connect, and interchange traffic, with other railroads both large and small. *See* Railroad Information Services, *Professional Railroad Atlas of North America* (3d ed. 2004) (maps of each state showing the state's railroad lines and where they connect with other railroads' lines). And though railroads and trucks compete for business, they also interchange traffic, with railroads moving millions of trailers and containers each year that often begin or end their journey by truck. *See Railroad Facts*, *supra*, at 29.

Take Norfolk Southern, for example. The railroad's tracks form an extensive network of connections between Pennsylvania's railroads, cities, and manufacturing hubs that crisscross the Commonwealth. *See Professional Railroad Atlas of North America*, *supra*, at 86-87. The following map illustrates the breadth of these connections.


Erie
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Scranton
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Reading
Philadelphia
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Sunbury
Harrisburg
Altoona
Johnstown
Pittsburgh
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CN

If Norfolk Southern were compelled to cease doing business in Pennsylvania, it would create a huge void, devastating not only its own Pennsylvania operations, but also the business of its connecting railroads, the many manufacturers and other companies that rely on freight rail to ship their products or deliver raw materials, and the economy of the Commonwealth as a whole. Worse still, Norfolk Southern's tracks do not stop at the Pennsylvania border, but continue into Maryland, West Virginia, Ohio, New York, Delaware, and New Jersey. *See Professional Railroad Atlas of North America*, *supra*, at 86-87. Thus, withdrawing from Pennsylvania would have a crippling effect on interstate commerce.

Pennsylvania is only one of many states—and Norfolk Southern is only one of many railroads—that play similarly essential roles in commerce within, between, and among the states and neighboring countries. If any other large railroad were compelled to withdraw from a state where it is doing business because it was faced with the choice of submitting to general personal jurisdiction or ceasing to do business in the state, the consequences would be just as devastating. The notion that Norfolk Southern—or any railroad—has the option to withstand the loss of doing business in a state is fantasy. In reality, railroads facing this decision have no choice at all.

B. Railroads Do Not Have The Unilateral Right To Abandon A Market.

Even if a railroad elected to cease doing business in a state where it currently operates, it would not have the leeway to make that decision unilaterally. Recognizing the consequences of a railroad deciding to halt operations, Congress required government approval of such decisions. If a railroad wishes to "abandon any

part of its railroad lines" or "discontinue the operation of all rail transportation over any part of its railroad lines," it must file an application with, and obtain the approval of, the Surface Transportation Board. 49 U.S.C. §10903(a). The Board, in turn, may approve such a request only if it determines that abandonment or discontinuance is consistent with "the present or future public convenience and necessity." *Id.* § 10903(d). In applying that standard, the Board must balance the competing interests of the railroad, the affected shippers and communities, and interstate commerce generally. *See City of Cherokee v. Interstate Commerce Comm'n*, 727 F.2d 748, 751 (8th Cir. 1984); *Waterloo Ry. Co.—Adverse Abandonment*, 2004 STB LEXIS 280 at *9 (Apr. 30, 2004).

Thus, even to entertain the possibility of giving up its business in a particular state, a railroad would need to obtain regulatory approval. In light of the devastating consequences on interstate commerce of a large railroad abandoning a significant part of its line, it is hard to imagine the Board finding wholesale abandonment of all operations in a particular state consistent with the public interest.

The history of the lines Norfolk Southern operates in Pennsylvania shows that the federal government is unwilling to jeopardize freight railroad systems. When the Penn Central railroad declared bankruptcy, Congress responded by pouring money into Conrail. It then amended the law so that Conrail could operate profitably. And it privatized Conrail only after the railroad began turning a profit. *See* n.4 *supra*. The suggestion that the federal government would allow major freight railroads to abandon the Commonwealth is as fantastical as the notion that the railroads could

practically do so. For this reason too, the exit option is illusory for the nation's freight railroads.

II. Coercing Personal Jurisdiction Through Mandatory Registration Will Reopen The Door To Forum Shopping, Particularly In FELA Cases.

A. FELA Litigation Is Plagued By Forum Shopping.

When given leeway on where to file a lawsuit, some plaintiffs will select a forum for the purpose of gaining a litigation advantage, even at apparent inconvenience to themselves. *See*, *e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240 (1981) (plaintiff admitted that the law of the chosen forum was more favorable to her position than the law of the jurisdiction where the accident occurred and most of the witnesses were located); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (noting that a plaintiff sometimes will attempt to force a trial to a jurisdiction in order to disadvantage an adversary, "even at some inconvenience to himself").

Interstate railroads are not only uniquely unable to avoid registration-based jurisdiction, but they are also uniquely at risk of forum shopping. Unlike virtually all other employers, there is no state-based workers' compensation regime for interstate railroads. Instead, since 1908 FELA has served as the exclusive federal regime governing injuries suffered on the job by railroad workers. *See* 45 U.S.C. §§ 51-60.

Several features of FELA make it an especially inviting target for forum shopping. First, the Class I and regional railroads—the defendants in the vast

majority of FELA cases—operate in multiple states.[5] Second, although FELA suits arise under and are governed by federal law, they cannot be removed to federal court. *See* 28 U.S.C. § 1445(a). Third, FELA is a negligence-based regime imposing liability on defendants even if they are responsible for the employee's injury only "in part." 45 U.S.C. § 51, *see also id.* § 53 ("[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."). That means that when FELA claims are not settled, they are more often than not decided by juries, rather than on dispositive motions. *See Bailey v. Central Vermont Ry.,* 319 U.S. 350, 354 (1943) (a jury trial is "part and parcel" of the remedy provided by FELA); *Mendoza v. Southern Pac. Transp. Co.,* 733 F.2d 631, 633 (9th Cir. 1984) ("By enacting FELA, Congress wanted to secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions.") (citations and quotation marks omitted). Thus, the FELA plaintiffs' bar has its pick of juries in any state or federal court that can exercise personal jurisdiction over the railroad defendant.

Unsurprisingly, forum shopping has long been a feature of FELA litigation, and Philadelphia's courts in particular have long been a favorite forum for FELA suits having little or no connection to Pennsylvania. *See*, *e.g.*, *Luther v. Consol. Rail Corp.*, 1999 WL 387075 (E.D. Pa. May 25, 1999) (plaintiff alleged injury in Ohio and resided in Ohio; four witnesses lived in

[5] The Surface Transportation Board classifies railroads by annual operating revenue, with Class I railroads being the largest. 49 C.F.R. § 1201.1-1. Currently, there are seven Class I railroads operating in the United States.

Ohio); *Detrick v. Baltimore & Ohio R.R.*, 330 F. Supp. 257 (E.D. Pa. 1971) (plaintiff alleged injury in Maryland and resided in West Virginia; the key witnesses lived in Maryland, West Virginia, and Virginia); *Carbeck v. Baltimore & Ohio R.R.*, 160 F. Supp. 626 (E.D. Pa. 1958) (plaintiff alleged injury and resided in Maryland and all witnesses resided in Maryland); *Rhoton v. Interstate R.R.*, 123 F. Supp. 34, 35 (E.D. Pa. 1954) (plaintiff alleged injury and resided in Virginia and witnesses all lived in the same vicinity "approximately six hundred miles from Philadelphia"); *Palumbo v. N.J. Transit Rail Ops., Inc.*, 2003 WL 256939 (Pa. Commw. Ct. Feb. 3, 2003) (plaintiff alleged injury and resided in New Jersey and all potential witnesses resided in New Jersey).

Today, FELA plaintiffs continue to file in Pennsylvania courts, hoping to take advantage of the Commonwealth's jurisdiction-by-registration law. *E.g.*, *Jordan v. Del. & Hudson Ry. Co.*, 2021 U.S. Dist. LEXIS 118056, at *8-9 (M.D. Pa. June 24, 2021) (The plaintiff did "not argue that [the railroad] has sufficient minimum contacts to confer specific or general 'at home' personal jurisdiction . . . but rather contends that [the railroad] consented to general personal jurisdiction . . . when it registered to do business in Pennsylvania.").

This case illustrates the problem. Petitioner sued Norfolk Southern under FELA in state court in Philadelphia. But his case has no connection whatsoever with the Commonwealth: he does not reside there, Norfolk Southern is not at home there, and his injury did not occur there. *See* Pet. App. 13a, 45a. Nonetheless, petitioner apparently believed that having his case tried in Philadelphia would be advantageous.

FELA forum shopping has not been limited to Pennsylvania courts. Until recently, Montana was a

special favorite of the FELA plaintiffs' bar, not least because of its anomalous regime that requires FELA defendants to investigate, litigate, and settle FELA claims in "good faith"—and threatens punitive damages if they do not. *See Dannels v. BNSF Ry. Co*., 483 P.3d 495 (Mont. 2021), *cert. denied,* 142 S. Ct. 754 (2022). When BNSF petitioned for certiorari in *BNSF Railway Co. v. Tyrrell*, No. 16-405, it faced nearly three dozen FELA lawsuits pending in Montana state court that had no connection at all to Montana. Reply Br. for BNSF Ry. Co. at 11 (Dec. 13, 2016).

Beyond Pennsylvania and Montana, filing suit in jurisdictions with no connection to the underlying litigation has been a prominent feature of FELA litigation for decades. *See*, *e.g*., Br. of AAR as Amicus Curiae at 9, *BNSF Ry. Co. v. Tyrrell* (Oct. 28, 2016) ("AAR's large freight members have advised AAR that at least 170 FELA cases are pending against them in the courts of states that are neither (1) the railroad's state of incorporation; (2) the railroad's principal place of business; nor (3) the state where the alleged injury giving rise to the suit occurred."); *Fennell v. Ill. Cent. R.R*., 987 N.E.2d 355, 362 (Ill. 2012) (plaintiff resided and was injured in Mississippi, and "almost no one connected with plaintiff's side of the case resides in Illinois"); *Bailey v. Union Pac. R.R*., 364 F. Supp.2d 1227, 1229 (D. Colo. 2005) (plaintiff resided and was injured in Nebraska and most witnesses were Nebraska-based); *Cuzzupoli v. Metro-N. Comm. R.R*., 2003 WL 21496879 (S.D.N.Y. June 30, 2003) (plaintiff resided and was injured in Connecticut and treating physician was in Connecticut); *Hayes v. Chi., Rock Island & Pac. R.R*., 79 F. Supp. 821 (D. Minn. 1948) (litigation involving eight plaintiffs, one of whom was injured in Texas, one in Illinois, and six in Oklahoma).

B. Upholding Pennsylvania's Law Will Breathe New Life Into FELA Forum Shopping.

This Court's decision in *Daimler* should have put a stop to the worst forms of forum shopping. Absent exceptional circumstances, plaintiffs' attorneys could secure general jurisdiction over corporations only in their "place of incorporation and principal place of business." 571 U.S. at 137. And in *BNSF*, 137 S. Ct. 1549, this Court shut down Montana's attempt to continue exercising general jurisdiction over foreign corporations in cases arising under FELA.

Yet the plaintiffs' bar—and the FELA bar in particular—has not been deterred. In state after state, plaintiffs have sought to sue foreign corporations on claims having no connection to the forum on the theory that registration to do business somehow equals consent to general jurisdiction. And in state after state, courts have refused to allow that end-run of *Daimler* and *BNSF*. *See*, *e.g.*, *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 371 (Neb. 2020) (concluding that "treating [the defendant's] registration to do business in Nebraska as implied consent to personal jurisdiction would exceed the due process limits prescribed in . . . *Daimler*"); *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 9 (Mont. 2018) ("If a corporation consents to general personal jurisdiction by registering to do business in Montana, then the corporation has no genuine, meaningful choice to not consent to jurisdiction, aside from refraining from doing business in Montana."); *State ex rel. Norfolk S. Ry. Co., v. Dolan*, 512 S.W.3d 41, 44 (Mo. 2017) (rejecting plaintiff's argument that "by complying with Missouri's foreign corporation registration statute, [the defendant] impliedly consented to general jurisdiction in Missouri"); *see also Chavez v.*

Bridgestone Ams. Tire Operations, LLC, 503 P.3d 332, 348 (N.M. 2021) ("Considering the constitutional constraints involved, we conclude that it would be particularly inappropriate to infer a foreign corporation's consent to general personal jurisdiction in the absence of clear statutory language expressing a requirement of this consent.").

But if this Court upholds Pennsylvania's registration-jurisdiction law, any state would be able to impose registration-based general jurisdiction. As the Pennsylvania Supreme Court observed, if Pennsylvania can lawfully require consent by registration, then "all states could enact [similar laws], rendering every national corporation subject to the general jurisdiction of every state." Pet. App. 54a; *see also In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp.3d at 540 (If Pennsylvania's consent by registration statute is "deemed constitutional, other states would only need to add language to their registration statutes spelling out the jurisdictional consequences of registering to do business, while at the same time giving no real alternative to registration."). And in *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021), the New York Court of Appeals held that New York's corporate registration statute does not "condition the right to do business on consent to the general jurisdiction of New York courts," *id.* at 1260, but noted "proposed legislation that would amend the business registration statutes to expressly state that a foreign corporation consents to general jurisdiction in New York when it registers to do business here," *id*. at 1266, n.9.[6]

[6] The New York legislature did pass such a bill last year, but it was vetoed by the New York Governor on December 31, 2021. *See* Senate Bill S7253, nysenate.gov/legislation/bills/2021/S7253.

As a result, reversal here could soon render *Daimler* and *BNSF* dead letters. In limiting general jurisdiction to forums where a corporation is "at home" rather than everywhere it has substantial operations, this Court explained that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 571 U.S. at 139 n.20. But if states are empowered to condition a corporation's right to do business in a state on being subject to general personal jurisdiction, the consequence will be to render corporations "at home" in the "many places" in which they operate. What this Court deemed an "unacceptably grasping" concept of general jurisdiction, *id*. at 138, may well become the norm, *see Genuine Parts Co. v. Cepec*, 137 A.3d 123, 143 (Del. 2016) ("Human experience shows that 'grasping' behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good.") (footnote omitted).

The characteristics that made railroads easy targets for forum shopping in the past—significant operations in multiple states and the unique features of FELA—will remain, leaving railroads particularly susceptible to suit in jurisdictions having little connection to the parties or the underlying cause of action. Large railroads conduct substantial operations across numerous states: BNSF operates in 28 states; Union Pacific in 23 states; CSX in 23 states and the District of Columbia; and Norfolk Southern in 22 states and the District of Columbia. Amtrak, which provides intercity passenger rail service nationwide, and which also is covered by FELA, operates in 46 states. If this Court reverses and other states elect to follow Pennsylvania's lead, FELA plaintiffs suing those railroads could have a wide range of jurisdictions to choose from. Those cases would likely be brought and maintained in state court,

see 28 U.S.C. § 1445(a), and would proceed before state juries.

Daimler made clear that "a substantial, continuous, and systematic course of doing business" is not sufficient to give a state's courts general personal jurisdiction over a corporation. 571 U.S. at 138. *BNSF* confirmed that the same is true in FELA cases. 137 S. Ct. at 1558. Those holdings will no longer matter if this Court permits Pennsylvania to condition registration to do business on the imposition of general personal jurisdiction. Such a ruling would likely prompt some, maybe many, states to replicate the Pennsylvania law. As a result, FELA and other kinds of lawsuits will be brought in courts throughout the country, in states where the defendant does some business but that have little or no connection to the underlying claims.

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

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