No. 25-1046

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

TANNER LYNN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Minnesota

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amicus Curiae

120990

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission for the past five decades has been to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

Clarity, predictability, and uniformity concerning the circumstances under which an out-of-state corporation can be haled into a state's courts by an out-of-state plaintiff—especially where, as here, the

---

[1] Petitioner's and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party, counsel for a party, or person other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

cause of action has no connection to the forum state—are critical to civil justice. Until recently, the Court's modern personal-jurisdiction jurisprudence largely achieved these objectives. But the split decision in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), is a step backwards. It has left unanswered important constitutional questions that have produced significant uncertainty about whether or when an out-of-state corporation can be subjected to a state's general ("all purpose") jurisdiction merely by registering to do business in the state.

This appeal squarely presents the key question left unanswered by *Mallory*: Do state consent-by-registration statutes (i.e., statutes requiring a corporation to accede to a state's general jurisdiction in order to register to do business) violate the dormant Commerce Clause? Justice Alito discussed this crucial question at length in his concurring opinion and strongly suggested that the answer is yes. *See Mallory*, 600 U.S. at 150–162 (Alito, J., concurring in part and concurring in the judgment). It is a question that courts and litigants throughout the United States urgently need answered in light of *Mallory*'s holding that consent-by-registration statutes do not violate due process, at least in states where a corporation has substantial operations.

ALF leaves the merits of the dormant Commerce Clause issue to Petitioner BNSF Railway Co. Instead, this amicus brief emphasizes the need for review by focusing on one of the principal adverse consequences of consent-by-registration: *forum shopping*. Unless

and until the Court addresses the unanswered dormant Commerce Clause question, *Mallory* not only will enable, but also encourage, plaintiff-side forum shopping, especially in notoriously plaintiff-friendly state trial courts. Relatedly, this brief also explains why *Mallory*, and the forum shopping that it enables, undermines interstate federalism.

ALF urges the Court to grant the petition for a writ of certiorari and complete the constitutional analysis of consent-by-registration that it began but did not finish in *Mallory*.

SUMMARY OF ARGUMENT

Mallory has destabilized the Court's previously well-refined personal-jurisdiction jurisprudence. The Court's precedents on general personal jurisdiction and specific personal jurisdiction seem meaningless if a state can exercise personal jurisdiction over an out-of-state corporate defendant in any and all cases merely because it has registered to do business in the state. The Court needs to remedy this situation immediately by addressing the dormant Commerce Clause question that *Mallory* did not answer. Until the Court does so, *Mallory* will continue to undermine the civil justice system by incentivizing forum shopping and eroding interstate federalism.

By holding that consent-by-registration does not offend due process—while declining to decide whether consent-by-registration statues violate the dormant Commerce Clause—*Mallory* has enabled *every* state to transform its perfunctory corporate registration

system into an all-plaintiffs-are-welcome scheme for exercising general jurisdiction over every registered corporation regardless of where it is "at home" or where a cause of action arose.

This in turn has unleashed significant, unprecedented, forum-shopping opportunities for the plaintiffs bar. Indeed, there is no shortage of plaintiff-friendly forums throughout the United States. *See* Am. Tort Reform Found., *Judicial Hellholes* 2025–2026;[2] *id.* at 87 ("Judicial Hellholes are known for being plaintiff-friendly and thus attract personal injury cases with little or no connection to the jurisdiction. Judges in these jurisdictions often refuse to stop this forum shopping.").

For many decades, and in a wide variety of contexts, this Court has expressed concern about, and sought to deter, abusive forum shopping. But *Mallory*'s holding instigates rather than restrains it. This is a compelling reason why the Court should grant review and decide whether state consent-by-registration statutes conflict with the dormant Commerce Clause.

State personal-jurisdiction overreach also undermines interstate federalism. The coequal status of each state's sovereignty is a pillar of the Constitution's federalist structure. By asserting general jurisdiction over each and every corporation

---

[2] https://judicialhellholes.org/wp-content/uploads/2025/12/ATRA_JH25_text_05.pdf.

that merely registers to do business, a state imposes its sovereignty beyond its borders in a way that interferes with other states' sovereignty—such as the sovereignty of the state where a corporation is incorporated or headquartered, or the state where a cause of action arose.

ARGUMENT

The Court Should Grant Certiorari To Decide Whether Consent-By-Registration Violates the Dormant Commerce Clause

A. Consent-by-registration undermines the civil justice system by promoting forum shopping

1. *Mallory*'s incomplete constitutional analysis has engendered significant uncertainty about the validity, or at least the permissible limits, of state consent-by-registration statutes. The Court's 5 to 4 due-process holding does not clarify whether it is limited to out-of-state corporations with "substantial operations" in the forum state. *See* 600 U.S. at 150 (Alito, J., concurring in part and concurring in the judgment). And although the Court expressly declined to consider whether state consent-by-registration statutes violate the dormant Commerce Clause, *id.* at 127 n.3, Justice Alito's separate opinion discusses at length why "there is a good prospect" that they do where, as here, a state asserts general jurisdiction "over an out-of-state

company in a suit brought by an out-of-state plaintiff on claims wholly unrelated" to the state. *Id.* at 160.[3]

The net result is that "*Mallory* cleared a path allowing all states to adopt and apply 'consent by registration.'" Will Lattimore, *"Consent by Registration" After Mallory*—A Fifty State Summary, 12 Belmont L. Rev. 83, 85 (2024). "All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do)." *Mallory*, 600 U.S. at 163-64 (Barrett, J., dissenting). "If States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be 'superfluous.'" *Id.* at 180 (Barrett, J., dissenting) (citing *Daimler AG v. Bauman*, 571 U.S.

---

[3] Justice Alito explained that "a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate commerce or when it imposes undue burdens on interstate commerce. Discriminatory state laws are subject to a virtually per se rule of invalidity." *Id.* (cleaned up). In Justice Alito's view "[t]here is reason to believe that Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies. But at the very least, the law imposes a significant burden on interstate commerce by [r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those with no forum connection." *Id.* (cleaned up).

117 (2014); *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011)).[4]

"[C]onsent-by-registration statutes, if adopted more broadly, would make it impossible for businesses to predict where they will be sued, leading to massive litigation costs that will be especially burdensome for small and medium-sized businesses." U.S. Chamber of Commerce Institute for Legal Reform ("ILR"), *Personal Jurisdiction After Mallory*, ILR Briefly, Nov. 2023, at 2.[5]

"Left unchecked the [*Mallory*] ruling will give rise to a patchwork quilt of conflicting general jurisdiction rules." Anthony J. Gaughan, *The Unsettled State of Corporate General Personal Jurisdiction*, 103 Neb. L. Rev. 131, 132 (2024). "Large companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each State, but the impact on small companies, which constitute the majority of all

---

[4] Under *Goodyear* and *Daimler*, a corporation must be "at home" in the forum state for it to be subjected to the state's general jurisdiction. *See Goodyear*, 564 U.S. at 919, 924; *Daimler*, 571 U.S. at 137; *see also BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 405-06 (2017) ("Our precedent . . . explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere.").

[5] https://instituteforlegalreform.com/wp-content/uploads/2023/11/ILR-Briefly-Mallory-Personal-Jurisdiction-FINAL.pdf.

U.S. corporations, could be devastating." *Mallory*, 600 U.S. at 161-62 (Alito, J., concurring in part and concurring in the judgment).

2. In the wake of *Mallory*, states that assert general jurisdiction over out-of-state corporations based merely on registration to do business have become magnets for plaintiff-side forum shopping.

Forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim may be heard." Black's Law Dictionary (12th ed. 2024). "Motive and opportunity breed forum shopping, which reflects the reality that a plaintiff who must initially choose between available forums is likely to choose one favorable to the plaintiff's interests." Scott Dodson, *Civil Procedure: The Culture of Forum Shopping in Civil Litigation*, in *The Judges' Book* 26 (Berkeley Jud. Inst. ed., 2025).

But forum shopping often is demonstrably unfair, especially to corporate defendants confronted with class actions or other mass litigation. "As a rule, counsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit." Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tulane L. Rev. 553 (1989); *see also* Richard Maloy, *Forum Shopping – What's Wrong With That?*, 24 Quinnipiac L. Rev. 25, 28 (2005) ("[F]orum shopping is the taking of an unfair advantage of a party in litigation.")

Plaintiffs' attorneys forum shop for a variety of reasons. For example, they file suits in courts with—

- plaintiff-friendly judges and juries;
- long statutes of limitations;
- favorable substantive law and receptivity to novel and expansive theories of corporate liability;
- discovery and trial-court procedures slanted toward plaintiffs;
- lax standards, or enforcement of standards, for admission of expert testimony; and
- high damages caps (if any), coupled with a reputation for "nuclear verdicts" or excessive damages awards.

"More nefariously, plaintiffs might shop for a forum that, geographically, is highly inconvenient for the defendant. . . . Less nefariously, plaintiffs might shop for a forum that is most convenient for them." Dodson, *supra*, at 30.

In today's ultra-litigious climate, third-party litigation funding, targeted advertising to attract potential claimants and bias the jury pool, and widespread coordination within the plaintiffs bar, facilitate forum shopping to the detriment of corporate

defendants. *See* James E. Pfander & Jackie O'Brien, *Realism, Formalism, and Personal Jurisdiction: Due Process after Mallory and Ford Motor*, 103 Tex. L. Rev. 65, 100 (2024).

3. Plaintiff-side forum shopping not only is unfair to corporate defendants, but also can undermine a state's judiciary, especially in states where judges are elected. This is because the availability of forum shopping "can lead to 'forum selling,' the creation of excessively pro-plaintiff law by judges who want to hear more cases." Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. Legal Analysis 245, 247 (2014).

"Loose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation." *Id.* "Without constitutional constraints on assertions of jurisdiction, some courts are likely to be biased in favor of plaintiffs in order to attract litigation and thus benefit themselves or their communities." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016). For example, some state-court judges may want to attract high-profile cases to enhance their own reputations and careers or to impose their own ideological views. This troubling corollary to forum shopping "leads to inefficient distortions of substantive law, procedure, and trial management practices." *Id.* at 246.

4. At least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court, in many different contexts, has decried forum shopping. *See, e.g.*,

- *Berk v. Choy*, 146 S. Ct. 546, 554 (2026) ("A state law is substantive if . . . failing to apply it in federal court would promote forum shopping and the inequitable administration of the law.");

- *Trump v. CASA, Inc.*, 606 U.S. 831, 899-900 (2025) (Sotomayor, J., dissenting) ("[U]niversal injunctions encourage forum shopping, by allowing preferred district judges in a venue picked by one plaintiff to enjoin governmental policies nationwide."); *Labrador v. Poe*, 144 S. Ct. 921, 927 (2024) (mem.) ("In universal-injunction practice . . . [j]ust do a little forum shopping for a willing judge and . . . you can win a decree barring the enforcement of a duly enacted law against anyone."); *United States v. Texas*, 599 U.S. 670, 694 (2023) ("Universal injunctions . . . encourage parties to engage in forum shopping . . . .");

- *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 72 (2024) ("Choice-of-law provisions . . . discourage forum shopping, further cutting the costs of litigation.");

- *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015) (rejecting a state judge recusal rule "that would enable transparent forum shopping");

- *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) ("The federal limitations prescription governing copyright suits serves . . . to prevent the forum shopping invited by disparate state limitations periods . . . .");

- *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 65 (2013) (federal change-of-venue statute "should not create or multiply opportunities for forum shopping" where parties have agreed to a contractual forum-selection clause) (internal quotation marks omitted);

- *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415 (2010) ("We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping.").

- *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping.");

- *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("discouragement of forum-shopping" is one of the *Erie* rule's aims).

See also Note, *Forum Shopping Reconsidered*, 103 Harv. L. Rev. 1677, 1681 (1990) ("The Supreme Court

has relied on the 'danger of forum shopping' in reaching many decisions.").

5. "[T]he *Goodyear* trilogy"—*Goodyear*, *Daimler*, and *BNSF, see supra* note 4—"reduced forum shopping." Gaughan, *supra*, at 181. *Mallory* is having exactly the *opposite* effect.

"*Goodyear* and its companion cases placed plaintiffs and defendants on a level playing field. But the *Mallory* decision destroys that equilibrium and creates a new era of instability in corporate general jurisdiction. . . . *Mallory* thus gives forum shopping special new potency." *Id.* at 136, 137.

> The plaintiffs' bar has seized upon *Mallory* to press for a return to the days of abusive forum shopping when, prior to cases like *Daimler*, they could bring a case almost anywhere—even if the state lacked any connection to the parties or the dispute. . . .
>
> [U]nrestricted forum shopping makes it almost impossible for defendants to get a fair trial in some of the magic jurisdictions favored by the plaintiffs' bar, where trial lawyers have established relationships with the judges that are elected.

ILR, *supra*, at 9 (internal quotation marks omitted).

The Court needs to get "to the end of the story for registration-based jurisdiction" by granting certiorari and restoring credibility and vitality to its personal

jurisdiction precedents. *Mallory*, 600 U.S. at 154 (Alito, J., concurring in part and concurring in the judgment).

B. Consent-by-registration erodes interstate federalism

Consent-by-registration undermines the civil justice system not only by facilitating forum shopping, but also by upsetting the balance of "interstate federalism."

This term "refers to the relationship between the states within our federal system, their status as coequal sovereigns, and the limits on state power that derive from that status." A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 616, 624, 637 (2006). The fifty States are "coequal sovereigns," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). "'The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.'" *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 263 (2017) (quoting *World-Wide Volkswagen*, 444 U.S. at 293).

Five Justices in *Mallory* expressed serious concerns about the effect of consent-by-registration on interstate federalism. In her dissenting opinion, Justice Barrett, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, argued that

> [t]he Due Process Clause protects more than the rights of defendants—it also protects interstate federalism. We have

> emphasized this principle in case after case. . . . [W]hen a State announces a blanket rule that ignores the territorial boundaries on its power, federalism interests are implicated too.
>
> Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States in a way no less "exorbitant" and "grasping" than attempts we have previously rejected.

Mallory, 600 U.S. at 169 (Barrett, J., dissenting).

Along the same lines, Justice Alito explained in his *Mallory* concurrence that "[t]he notion that the Commerce Clause restrains States . . . vindicates a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation." *Id.* at 157 (Alito, J., concurring in part and concurring in the judgment).

In Justice Alito's view,

> [i]t is especially appropriate to look to the dormant Commerce Clause in considering the constitutionality of the authority asserted by Pennsylvania's registration scheme. Because the right of an out-of-state corporation to do business in another State is based on the dormant

> Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right.

Id. at 158-59.

Rather than respecting each state's role as a coequal sovereign, a state that imposes a consent-by-registration scheme so that it can assert general jurisdiction over out-of-state corporations regardless of where they are at home or where a cause of action arose violates interstate federalism by encroaching upon the sovereignty of other states.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

March 2026