

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT MALLORY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 21-1168  
 )  
NORFOLK SOUTHERN RAILWAY CO., )  
 )  
 ) Respondent. )  
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1168, Mallory versus Norfolk Southern Railway.

Mr. Keller.

ORAL ARGUMENT OF ASHLEY C. KELLER

ON BEHALF OF THE PETITIONER

MR. KELLER: Mr. Chief Justice, and may it please the Court:

As far back as 1827, states enacted laws like Pennsylvania's, and by 1868 or shortly thereafter, every state in the union had at least one and often several consent-by-registration statutes. This Court unanimously confirmed that such statutes comport with due process over a century ago in reasoning that's been embraced by jurists from Holmes to Cardozo to Hand to Frankfurter.

With history, tradition, and precedent on Mr. Mallory's side, how can my friend challenge Pennsylvania law under the original meaning of due process? By claiming that these statutes were really just about specific jurisdiction based on contacts. Never mind that

1 specific jurisdiction wasn't a thing in 1868 and  
2 for decades after the Fourteenth Amendment was  
3 ratified. Anachronistically, importing the  
4 principles of International Shoe into the  
5 ratification generation is my friend's maneuver,  
6 exactly what Justice Scalia counseled against in  
7 Burnham.

8           That approach is not originalism.  
9 It's paying lip service to originalism, treating  
10 the doctrine as an infinitely malleable pretext  
11 to reach a policy outcome that Norfolk Southern  
12 and other big businesses prefer.

13           But originalism is not a pretext.  
14 It's a neutral doctrine that aims to faithfully  
15 apply our nation's Constitution regardless of  
16 who benefits. Fidelity to the original public  
17 meaning of the Fourteenth Amendment in this case  
18 means that the flesh-and-blood little guy wins  
19 and the Fortune 500 company loses.

20           Irrespective of the exaggerated parade  
21 of horrors that my friend trots out, and if  
22 those policy considerations did somehow matter,  
23 corporations are quite adept at making their  
24 views known to state lawmakers.

25           And Congress has tools at its

1 disposal, from removal to preemption, if it  
2 appears that the sky is falling. There is no  
3 need for this Court to short-circuit the  
4 political process in the name of the  
5 Constitution.

6 I welcome your questions.

7 JUSTICE THOMAS: Mr. Keller, if we  
8 were to look through history and only find a  
9 handful of states that had laws similar to  
10 Pennsylvania's, how would we know when there's  
11 enough history to support your position?

12 MR. KELLER: That's a fair question,  
13 Justice Thomas. I don't know what the exact  
14 dividing line is, but, fortunately, here, there  
15 are many, many states that had laws like  
16 Pennsylvania's. So I don't think it's close to  
17 the line.

18 Perhaps Your Honor is asking about the  
19 fact that there aren't a lot of foreign cubed  
20 situations that come up in the case law, which  
21 is not surprising given the historical modes of  
22 transportation. But the text of these statutes  
23 is crystal clear. It applies to the foreign  
24 cubed situation. That's what a lot of the cases  
25 say, even though the facts were foreign squared.

1 And it doesn't really matter, because we were in  
2 a consent-based regime, that the facts aren't on  
3 all fours. So I think that's a pretty powerful  
4 indication that the states meant what they said  
5 when they enacted these statutes.

6 And there are other indications of  
7 that. So, for example, many states had multiple  
8 consent-by-registration statutes on their books  
9 simultaneously. Tennessee, Michigan, and  
10 Indiana said that, for insurance companies,  
11 you've got to consent to general jurisdiction.  
12 But, for other companies, other foreign  
13 companies, you don't have to do that. You only  
14 have to consent to what we would now call  
15 specific jurisdiction.

16 Were the legislatures confused? They  
17 didn't know that they were using different  
18 language? Of course not. They obviously  
19 intended for policy reasons to treat insurance  
20 companies differently from other foreign  
21 corporations. So that's a very powerful  
22 indication that the text of these statutes meant  
23 what they said.

24 My friend does find a handful of cases  
25 that say we're not going to give the statutory

1 text its full sweep. We're going to rein it  
2 back. The best example of this is Sawyer from  
3 the Vermont Supreme Court. But I actually think  
4 these cases support Mr. Mallory, not the other  
5 side, because look at what they actually said.  
6 They said, as a matter of policy, we don't think  
7 the legislature meant it. The litigants didn't  
8 reference the Due Process Clause. The courts  
9 didn't reference the Due Process Clause.  
10 Justice Wheeler for the Vermont Supreme Court  
11 says, if the statute were even clearer, I would  
12 apply it. And no court in the United States  
13 finds a single one of these statutes  
14 unconstitutional until 1971. That's very  
15 redolent of the situation in Burnham.

16 JUSTICE THOMAS: One --

17 JUSTICE BARRETT: Counsel, I -- oh,  
18 sorry.

19 JUSTICE THOMAS: -- one final  
20 question. The -- when we talk about consent, if  
21 you say that someone consented to waive their  
22 Fourth Amendment rights, you have an antecedent  
23 right under the Fourth Amendment. And there  
24 seems to be some disagreement here as to whether  
25 or not there is some right that a corporation



1 has that is outside of or beyond or that is  
2 antecedent to the consent that we're talking  
3 about.

4 So is there something that the  
5 railroad has that it's giving up, or is it  
6 simply a sovereign and a corporation entering  
7 into an agreement in order for that company, the  
8 corporation, to do business in the State of  
9 Pennsylvania?

10 MR. KELLER: The contract analogy  
11 isn't perfect, but I think it's closer to the  
12 contract analogy. And I think, again, history  
13 and tradition supplies the answer. This is not  
14 the same context as the waiver of a Fourth  
15 Amendment right or other rights, where we might  
16 require, you know, clear and knowing statements  
17 that you're giving up your right.

18 The fact that every state did this and  
19 consent was the ground for personal  
20 jurisdiction, regardless of the category of  
21 statute, whether it was general jurisdiction,  
22 like Pennsylvania's, whether it was general  
23 jurisdiction just for residents, which my friend  
24 doesn't really contest was constitutional, or  
25 what we would now call specific jurisdiction,

1 they all did it the same way.

2 File a piece of paper. Appoint an  
3 agent to accept service of all process or  
4 process just for claims arising out of your  
5 agent's activity in the forum. So I think that  
6 history and tradition tells us that this was  
7 considered valid consent. And then you  
8 obviously confirmed that in 1917 through  
9 Pennsylvania Fire.

10 JUSTICE KAGAN: Well --

11 CHIEF JUSTICE ROBERTS: History --  
12 history and tradition move on, and as Justice  
13 Scalia said in the Daimler case, you shouldn't  
14 put heavy reliance on precedents from the  
15 Pennoyer era.

16 Doesn't International Shoe sort of  
17 relegate that body of cases to the dust bin of  
18 history?

19 MR. KELLER: No, Your Honor. Two  
20 responses to that. I agree that history moves  
21 on. But my view is that the Constitution has a  
22 fixed meaning and, if the states used to have a  
23 sovereign ability to do this, unless the  
24 Constitution has changed through the Article V  
25 procedure, I can't really understand how they

1 lost that sovereign ability.

2 And I would respectfully ask my  
3 friend, identify the case that overturned  
4 Pennsylvania Fire. Don't just point to some  
5 general line of cases. What overturned it?

6 CHIEF JUSTICE ROBERTS: Well,  
7 International Shoe, I mean, the fact that they  
8 didn't have a footnote saying, oh, all these  
9 other cases inconsistent with our approach have  
10 been overruled doesn't mean that they're any  
11 less -- no longer good law.

12 MR. KELLER: International Shoe, Your  
13 Honor, is completely compatible with this  
14 regime. International Shoe expressly says it's  
15 talking about how to get jurisdiction over a  
16 non-consenting corporation. It leaves  
17 completely untouched the ground of consent.

18 And so, yes, we were living in a  
19 Pennoyer world. In 1945, this Court introduced  
20 minimum contacts as a way to ground  
21 jurisdiction, but it didn't supplant consent and  
22 other traditional means of establishing  
23 jurisdiction. That's what Justice Scalia's  
24 plurality opinion for this Court says in  
25 Burnham. International Shoe can live alongside

1 those traditional means.

2 So I don't think there's anything in  
3 International Shoe that's inconsistent with  
4 consent-by-registration, which, again, is why no  
5 court in the United States found one of these  
6 statutes unconstitutional until 1971.

7 JUSTICE KAGAN: Mr. Keller, I'm  
8 wondering what kind of consent you're talking  
9 about. So you say consent-by-registration. Let  
10 me give you a hypothetical.

11 Let's say, instead of the states  
12 saying registration as a foreign corporation, it  
13 instead said in its long-arm statute doing  
14 business in the state.

15 Is doing business in the state then  
16 consent by doing business?

17 MR. KELLER: No. Pennsylvania Fire,  
18 the holding of Pennsylvania -- excuse me,  
19 Pennsylvania Fire draws a line between --  
20 between constructive consent, deemed consent,  
21 the old Wayne Simon line of cases, and actually  
22 filing the piece of paper.

23 Now that might seem like a formalism,  
24 but formalism has an appropriate place in the  
25 law. In this particular area --

1 JUSTICE KAGAN: Well, I -- I guess I  
2 don't understand then. I mean, it's true  
3 registration is filing a piece of paper, but  
4 that piece of paper does not say -- I mean,  
5 there's another question if it did say, but it  
6 doesn't say I agree to be subject to  
7 jurisdiction based on my general activities in  
8 the state.

9 All the piece of paper does is comply  
10 with a state law requirement that everybody who  
11 does business in the state has to make their  
12 identities known and say, here I am, I'm doing  
13 business in the state.

14 So where -- where is the consent to  
15 jurisdiction in that?

16 MR. KELLER: I think it's a little bit  
17 more than that. Historically, some of the  
18 statutes used words like "consent" or "assent,"  
19 but, admittedly, most of them didn't. They said  
20 you have to file a paper, a piece of paper,  
21 appointing an agent to accept service of all  
22 valid process, with all writs and all claims  
23 that could be brought against your company by a  
24 plaintiff.

25 You have to file a board resolution.

1 You -- when you file that piece of paper, that  
2 act of formality, coupled with knowledge of the  
3 law, which nobody contests that Norfolk Southern  
4 actually had here, is good enough for a --

5 JUSTICE KAGAN: I guess what I'm  
6 suggesting is that this whole idea of  
7 consent-by-registration came about because it  
8 was, you know, necessary in a pre-International  
9 Shoe world.

10 In other words, there was no way to  
11 assert jurisdiction over corporate -- over  
12 foreign corporations for even the acts that they  
13 committed in the state. So somebody had to make  
14 up a fictional, like, here's an idea, we'll use  
15 fictional consent when they register. Even  
16 though they're not actually consenting to  
17 jurisdiction, we will deem it to be consent so  
18 that we can assert jurisdiction.

19 Then International Shoe, as the Chief  
20 Justice says, comes along and obviates the need  
21 for any such doctrines.

22 MR. KELLER: Yeah. So I -- I still  
23 respectfully disagree. Your precedent says that  
24 there's a difference between filing the piece of  
25 paper and not filing it. The not filing it but

1 still doing business in the state, that's the  
2 fiction. That's the deemed consent.

3 Filing the piece of paper matters.  
4 And let me offer two illustrations why I think,  
5 that are related, filing the piece of paper is  
6 actually important, and it's something that we  
7 take into account in this area of law.

8 Let's look at your general  
9 jurisdiction jurisprudence, the modern doctrine,  
10 Daimler and Goodyear. Everybody understands the  
11 contacts-based approach to where the company has  
12 its principal place of business.

13 Imagine a California company with all  
14 California employees, from the CEO down to the  
15 janitorial staff, all California sales, all  
16 California contacts. Not a single one of them  
17 has set foot ever in the State of Delaware.

18 The only contact that's going to  
19 ground jurisdiction for general jurisdiction  
20 purposes, if they are incorporated as a company  
21 in Delaware, is if they filed a piece of paper  
22 there. That formality matters.

23 If they hold themselves out as a  
24 Delaware company when they really aren't, they  
25 haven't gone through that formality, I'm not

1 sure this Court would say that any suit under  
2 the sun could be filed in Delaware and there  
3 would be general jurisdiction.

4 Let's take another related example.  
5 Norfolk Southern is here and has standing before  
6 this Court as a corporate person because it  
7 filed a piece of paper in Virginia that's  
8 probably collecting dust in the Virginia  
9 Secretary of State's office.

10 Filing that piece of paper is how  
11 Norfolk Southern was born as a person. It's not  
12 born like us flesh-and-blood people, obviously.  
13 It's a legal fiction. The paperwork matters.  
14 That indicia of formality historically has  
15 significance, and that's a very useful thing in  
16 the law.

17 JUSTICE ALITO: Can you prevail on  
18 your historical argument without showing a  
19 settled practice of upholding jurisdiction by  
20 consent in what you called foreign cubed cases?

21 MR. KELLER: I think I can, Your  
22 Honor, because even though it was a rare  
23 circumstance, the fact that it was foreign cubed  
24 versus foreign squared didn't matter in 1868.

25 The only thing that really mattered



1 was consent. And let's, again, go back to the  
2 category of statute that my friend doesn't  
3 really lay a glove on. There are many states,  
4 like New York, for instance, that said, if  
5 you're a resident of our state, the company has  
6 to consent to general jurisdiction.

7           And everybody thinks that that's okay.  
8 The only time that's going to matter is if the  
9 suit doesn't arise out of contacts in the state.  
10 Otherwise, those residents are in the same  
11 situation as the non-residents.

12           So, if that's okay, what's the  
13 constitutional reason that states like  
14 Pennsylvania have to discriminate against  
15 out-of-state residents? There is a longstanding  
16 principle in Anglo-American law that the courts  
17 are open to everyone.

18           And I'm not saying that New York  
19 wasn't allowed to discriminate. No one has  
20 challenged that they could discriminate in favor  
21 of their residents. But lots of state  
22 constitutions make access to the courts a  
23 fundamental right and they take it as a point of  
24 pride that it's open equally to everybody.

25           So I don't think states like

1 Pennsylvania and the many, many others that  
2 allowed foreign cubed situations were violating  
3 the Constitution when nobody thinks that states  
4 like New York were violating the Constitution.

5 JUSTICE ALITO: In your view -- in  
6 your view, are there any limits on a state's  
7 authority to condition access to its market?

8 MR. KELLER: There -- there are  
9 limits. The unconstitutional conditions  
10 doctrine is a real doctrine. I think the focus  
11 of this Court's jurisprudence has been on  
12 substantive limits, so depriving someone of  
13 their equal protection rights or their rights to  
14 private property or their rights to the First  
15 Amendment.

16 I'm not aware of any case -- and we  
17 can talk about Morris if Your Honors would like  
18 as my friend's counter-example, but I'm not  
19 aware of any case that applies the  
20 unconstitutional conditions doctrine in the  
21 procedural realm.

22 I'm not going to tell you you could  
23 never do it. There could probably be some  
24 example that's so egregious that you would be  
25 willing to extend it to that context. But it

1 hasn't been done to my knowledge in your  
2 jurisprudence.

3 JUSTICE BARRETT: I -- I'd like you to  
4 talk about Morris. I was going to ask you about  
5 that. Why isn't that counter to your position  
6 on unconstitutional conditions?

7 MR. KELLER: Because, respectfully,  
8 Your Honor, I think Morris is not an  
9 unconstitutional conditions case. It's a  
10 preemption case. It's an early example of  
11 so-called objectives and purposes or obstacles  
12 preemption.

13 What Morris was doing was it was  
14 interpreting Section 12 of the First Judiciary  
15 Act of 1789, where Congress said, if you're a  
16 defendant, you can remove if there's \$500 in  
17 controversy and there's diversity.

18 And what the Court essentially said in  
19 Morris is that's both a floor and a ceiling,  
20 sort of a situation like Gier.

21 And so any restraint on someone's  
22 ability to remove where those two conditions are  
23 satisfied is a violation of the Constitution  
24 because of Article VI, Clause 2, the Supremacy  
25 Clause. Here is proof, I think, that that is

1 correct. Go through the following thought  
2 experiment.

3           Imagine that the First Judiciary Act  
4 of 1789 had said you can remove if there's \$500  
5 in controversy or diversity, unless you've  
6 struck a deal through a registration statute  
7 with Wisconsin not to remove, in which case you  
8 can't remove.

9           I think there's little doubt that this  
10 Court would not have said Congress is not  
11 allowed to restrict a defendant's right to  
12 removal in that way. You don't have to go to  
13 the full limits of Article III diversity  
14 jurisdiction. We know that because of the  
15 amount in controversy requirement. We know that  
16 because of Strawbridge versus Curtiss. Congress  
17 regularly amends the situations to limit the  
18 amount of Article III jurisdiction that would  
19 otherwise exist if you went all the way to what  
20 Article III countenances.

21           So I don't think that Morris can  
22 properly be categorized as a true  
23 unconstitutional conditions case. And there are  
24 other clues of that in the opinion. The opinion  
25 says that you can't agree by contract to go to

1 arbitration instead of court. This Court has  
2 applied the Federal Arbitration Act many times,  
3 so that's obviously been abrogated. The opinion  
4 says you can't agree by contract to waive your  
5 right to a jury of 12 men. That has obviously  
6 been abrogated in a lot of different ways.

7 So I don't think that Morris is  
8 actually an unconstitutional conditions case in  
9 the procedural realm.

10 JUSTICE JACKSON: Mr. Keller, can I  
11 just ask you -- because I might be looking at  
12 this in a very simplistic way. I am -- I'm  
13 thinking about waiver and whether that is really  
14 the kind of easiest framing for what is  
15 happening in this case.

16 I don't see necessarily a conflict  
17 between International Shoe and consent insofar  
18 as I thought that this Court had determined that  
19 personal jurisdiction is an individual right and  
20 that in -- that individual rights can be waived,  
21 and consent is -- as long as it's knowing and  
22 voluntary, is ordinarily the way in which people  
23 waive their individual rights.

24 So am I just thinking about it in --  
25 in -- in too simple -- too simplistic of a way?

1           MR. KELLER: No, Justice Jackson, I  
2 don't think it's too simplistic. The reason I  
3 gravitate towards the word "consent" is that's  
4 historically how courts referred to it. So  
5 that's why I prefer that nomenclature.

6           But I don't think that that's too  
7 simplistic at all. That is in a modern way how  
8 we think about the personal jurisdiction right.  
9 It is waivable. That, by the way, is why  
10 there's no interstate federalism problem under  
11 Insurance of Ireland. So I don't -- I don't  
12 think that your framing is very far off from the  
13 historical framing.

14          JUSTICE JACKSON: And, therefore,  
15 there's no necessary conflict between the  
16 International Shoe holding or determination  
17 because that's -- that's what you would have  
18 absent consent?

19          MR. KELLER: That -- that is correct.  
20 And that's what International Shoe itself says.  
21 It says it's talking about the non-consenting  
22 corporation that can nonetheless be haled into  
23 court whether it wants to or not. It leaves  
24 consent untouched.

25          JUSTICE GORSUCH: Counsel, when it

1 comes to individuals, this Court has said, to  
2 use your vernacular, triple cubed situations are  
3 fine so long as you can tag the defendant in the  
4 jurisdiction --

5 MR. KELLER: Correct.

6 JUSTICE GORSUCH: -- under Burnham.  
7 So your friends on the other side have to come  
8 up with some reason for distinguishing  
9 corporations and why they get special treatment.

10 And, as I -- as I can discern it,  
11 they've got two lines of argument. One, it's  
12 just not fair because our consent is fictional,  
13 even if we are present and doing considerable  
14 business in the state. And second is that,  
15 unlike tag jurisdiction for individuals, we have  
16 a harder time finding statutes that support that  
17 historical tradition.

18 And I understand your response to the  
19 second part. I'd like your response on both.  
20 But, with respect to the second part, you point  
21 us to a number of statutes, but why -- why  
22 wouldn't it also be relevant to look at how  
23 individuals were treated when we look at  
24 corporations?

25 MR. KELLER: It's certainly relevant

1 to look at how --

2 JUSTICE GORSUCH: Why should we  
3 distinguish between the two? Why -- why is that  
4 even a relevant consideration?

5 MR. KELLER: It -- it's certainly  
6 relevant to look at how real flesh-and-blood  
7 people are treated. Obviously, the language of  
8 the Fourteenth Amendment speaks to persons, and  
9 it doesn't create a higher grade of person or --  
10 or a person that's entitled to better  
11 constitutional rights because they were birthed  
12 by filing a piece of paper in Virginia as  
13 opposed to, you know, being birthed by a mother  
14 at a hospital.

15 So the constitutional text says that  
16 you shouldn't treat them differently. And  
17 modern notions of fair play and substantial  
18 justice suggest that you shouldn't treat them  
19 differently. You know, Justice Sotomayor has  
20 talked about this too big for jurisdiction. Now  
21 we're talking about too big for consent. I  
22 don't think that that makes any analytical  
23 sense.

24 And my friend's essential response is:  
25 Well, tag jurisdiction won't happen that often



1 because it's tough to find the individual at the  
2 coffee shop, at Starbucks, or whatever, where  
3 the process server can meet them.

4 That's not really an answer, to say,  
5 well, we allow tag jurisdiction and it's really  
6 unfair, but it only impacts Mr. Burnham and a  
7 few other people. That -- that logic, as a  
8 constitutional principle, doesn't have any  
9 resonance with me, respectfully.

10 JUSTICE KAGAN: Mr. Keller, I'd like  
11 to take you back to a question that Justice  
12 Thomas asked very early about do you recognize a  
13 kind of preexisting right here, pre-waiver, that  
14 is.

15 So I just -- is there a right of a  
16 corporation not to be subject to general  
17 jurisdiction just because it does business in a  
18 state?

19 MR. KELLER: Just because it does  
20 business in a state?

21 JUSTICE KAGAN: Yeah.

22 MR. KELLER: Yes, there is.

23 JUSTICE KAGAN: In other words,  
24 there's -- there's -- there's -- none -- none of  
25 the business gave rise to the cause of action,

1 but, you know, there's a corporation that does  
2 business in the state. Is there a right not to  
3 be haled into court for things that are entirely  
4 unrelated to the state?

5 MR. KELLER: If the corporation did  
6 not consent, yes, there is.

7 JUSTICE KAGAN: Okay. Well, then, I  
8 mean, once we have that, then it seems to me you  
9 are in unconstitutional conditions land because  
10 here's the state saying, well, this right, we're  
11 going to demand that you give up this right to  
12 have access to our markets. So it's  
13 conditioning access to its markets on the waiver  
14 of the right, which you've just conceded not to  
15 be subject to general jurisdiction for doing  
16 business.

17 MR. KELLER: Yes, that -- that is  
18 correct. I'm going to make a confession. I  
19 find this Court's unconstitutional conditions  
20 doctrine very difficult.

21 JUSTICE KAGAN: You and everybody  
22 else.

23 (Laughter.)

24 MR. KELLER: I can't -- I can't  
25 understand what the underlying principle is that

1 unites all of the cases. Sometimes the greater  
2 power includes the lesser and sometimes it  
3 doesn't.

4 My first response would be history and  
5 tradition tells us that, here, the greater power  
6 includes the lesser, so it's not an  
7 unconstitutional condition. If that by itself  
8 is not satisfying --

9 JUSTICE KAGAN: Sorry, I lost you.  
10 The greater power is?

11 MR. KELLER: The greater power is the  
12 right to close down access to the market  
13 entirely, and, therefore, it includes the lesser  
14 power to say --

15 JUSTICE KAGAN: I see. I see.

16 MR. KELLER: -- we'll let you in --

17 JUSTICE KAGAN: Right. But that's --

18 MR. KELLER: -- but only if you  
19 consent.

20 JUSTICE KAGAN: -- but that's the  
21 whole premise of unconstitutional conditions  
22 doctrine, that we don't get to say that all the  
23 time.

24 MR. KELLER: Not all the time.  
25 Agreed. And that's my -- my confession to the

1 Court. I -- I don't know which times yes and  
2 which times no based on some underlying  
3 principle, but, here, I've got history and  
4 tradition, and so I'd lean on that to say states  
5 clearly acted as if the greater power did  
6 include the lesser, and nobody suggested that  
7 that was unconstitutional.

8 If the history and tradition alone  
9 doesn't do the work, let me point again to my  
10 friend's concession. He agrees that these  
11 statutes were constitutional with respect to  
12 claims arising out of the agent's contact with  
13 the forum. I know under modern doctrine that  
14 would have just been specific jurisdiction, but,  
15 back then, that was nothing.

16 So the greater power definitely  
17 included the lesser for that type of consent,  
18 and it also included the lesser power to say  
19 consent to general jurisdiction for all  
20 residents of the state.

21 So, once you say the greater power  
22 includes the lesser in those two contexts,  
23 what's the principle that then says but you  
24 can't take the further step of going to a  
25 foreign cubed situation? You might be able to

1       come up with something, but I would suggest it's  
2       a little ad hoc as opposed to based on, you  
3       know, bedrock principle.

4                   JUSTICE KAVANAUGH: Do you still have  
5       -- do you still have the greater power?

6                   MR. KELLER: That is obviously a  
7       negative Commerce Clause question, so I won't  
8       dodge your question.

9                   JUSTICE KAVANAUGH: I thought -- I  
10      thought the Court's precedents made clear that  
11      the state does not have the right any longer to  
12      exclude out-of-state businesses from that  
13      state's market.

14                  MR. KELLER: I actually don't think  
15      that the precedent of this Court is clear. Let  
16      me --

17                  JUSTICE KAVANAUGH: So -- so then do  
18      you think a state, as we sit here today, does  
19      have the power to exclude out-of-state  
20      businesses from that state?

21                  MR. KELLER: Conditioned on consent to  
22      jurisdiction, yes, I do.

23                  JUSTICE KAVANAUGH: How about --  
24      delete the "conditioned on." Does a state have  
25      the power, as we sit here today, to exclude

1 out-of-state businesses from that state's  
2 market?

3 MR. KELLER: It depends on what  
4 conditions they're imposing. So not always, but  
5 sometimes. And this would definitely be one of  
6 the sometimes situations.

7 I'm happy to go more into the dormant  
8 Commerce Clause. I will. I do want to say --

9 JUSTICE KAVANAUGH: But if the --  
10 you're -- you're linking the two things. The  
11 premise of your answer to Justice Kagan's  
12 question, as I understood it, was that there was  
13 a greater power to exclude.

14 MR. KELLER: Yes.

15 JUSTICE KAVANAUGH: And --

16 MR. KELLER: So -- so --

17 JUSTICE KAVANAUGH: -- without any  
18 conditions, just the State of Pennsylvania wants  
19 to exclude businesses from certain states, from  
20 its market, or from certain kinds of businesses  
21 from its market, can it do that?

22 MR. KELLER: Yes. So the reason I  
23 accepted the premise is because the  
24 unconstitutional conditions doctrine always  
25 assumes you have the greater power, and then it

1 asks, can you nonetheless have this lesser power  
2 even though you have the greater one?

3 Your question is a separate one, which  
4 is forget unconstitutional conditions, because  
5 all of -- are all of these statutes  
6 unconstitutional under the negative Commerce  
7 Clause?

8 The first point I'd make is,  
9 respectfully, that has not been briefed by  
10 myself, by my friend. It's an issue for remand,  
11 as Professor Sachs says. So I would -- I would  
12 suggest that we not get into in great detail the  
13 dormant Commerce Clause when the actual  
14 litigants to this case or controversy will have  
15 an opportunity to do so on remand.

16 JUSTICE GORSUCH: Counsel, I would  
17 have thought your -- your response would have  
18 been pretty simple, which is there may be  
19 unconstitutional conditions doctrine, but one  
20 thing that can't be a problem is treating  
21 corporations on par with individuals. Isn't  
22 that -- doesn't that cut the Gordian knot?

23 MR. KELLER: I think it does. And it  
24 also cuts the Gordian knot to say --

25 JUSTICE GORSUCH: I mean, if tag

1 jurisdiction was always permissible since time  
2 immemorial for persons, how can it be  
3 unconstitutional condition to say a corporation  
4 must abide by more or less the same rules as we  
5 require of individuals?

6 MR. KELLER: Not only that, Justice  
7 Gorsuch, but also under Pike's balancing, we  
8 will show --

9 JUSTICE GORSUCH: Oh, goodness, Pike  
10 balancing.

11 (Laughter.)

12 MR. KELLER: Don't worry. You'll like  
13 the rest of my answer. But --

14 (Laughter.)

15 JUSTICE GORSUCH: We'll see.

16 MR. KELLER: -- under -- under Pike's  
17 balancing, the purpose of these statutes was to  
18 put foreign corporations on the same footing as  
19 domestic corporations with respect to the  
20 jurisdiction of the Commonwealth's courts. So I  
21 think that it would pass modern doctrine.

22 I will -- I will also say Mr. Mallory  
23 reserves the right to argue below that there is  
24 no dormant Commerce Clause and your precedent to  
25 the contrary should be reversed.



1 JUSTICE GORSUCH: So you're saying --

2 JUSTICE ALITO: Well, if --

3 JUSTICE GORSUCH: -- that it's the  
4 same -- it -- it -- it passes unconstitutional  
5 conditions doctrine because it treats  
6 corporations historically both like persons and  
7 domestic corporations?

8 MR. KELLER: Correct.

9 JUSTICE GORSUCH: Okay.

10 JUSTICE JACKSON: Can I also ask  
11 about, just as a factual matter, it's not a  
12 total exclusion in this case, correct?

13 MR. KELLER: That is correct.

14 JUSTICE JACKSON: So it's just related  
15 to intrastate business, the -- the condition?

16 MR. KELLER: Also correct.

17 JUSTICE JACKSON: Thank you.

18 JUSTICE ALITO: Are there any natural  
19 persons who are present at the same time in all  
20 50 states?

21 MR. KELLER: Of course not.

22 (Laughter.)

23 JUSTICE ALITO: If -- if excluding a  
24 foreign corporation from the state would violate  
25 the dormant Commerce Clause, can you prevail?

1           MR. KELLER: I can here, and you can  
2 say that the Due Process Clause countenances --

3           JUSTICE ALITO: Well, that really  
4 wasn't the question.

5           MR. KELLER: Of course not. If -- if  
6 these statutes violate the dormant Commerce  
7 Clause, then they're unconstitutional under the  
8 dormant Commerce Clause.

9           JUSTICE ALITO: No, I'm not talking  
10 about this statute. I'm talking about a -- a  
11 statute that simply bars foreign corporations  
12 from operating in the state.

13                    Would that violate the Constitution?

14           MR. KELLER: No, not based on the  
15 original public meaning of Article I, Section 8,  
16 and Article VI, Clause 2. Yes, potentially  
17 under your precedent.

18           JUSTICE ALITO: One more question  
19 along -- along those lines. The Solicitor  
20 General cites Davis versus Farmers Co-Op Equity  
21 Company, 1923, which held that a registration  
22 statute similar to the one in Pennsylvania Fire  
23 violates the dormant Commerce Clause. You  
24 didn't address that in your brief.

25                    Do you have anything to say about it?

1                   MR. KELLER: I do. The reason I  
2                   didn't address it in my brief is because, again,  
3                   my friend didn't bring up the negative Commerce  
4                   Clause at cert or on the merits, and, obviously,  
5                   we're litigants to a case or controversy and the  
6                   United States is a very persuasive friend of the  
7                   court, but only a friend, but I'll address it  
8                   now.

9                   The negative Commerce Clause precedent  
10                  in this area is muddied. Professor Sachs talks  
11                  about this in a cogent way in his amicus  
12                  submission. You are correct that there is that  
13                  case that the United States cites.

14                 There's also the Terte case, which is  
15                 a subsequent case that distinguishes that  
16                 earlier case. I think Turte is 1932. And it  
17                 says, in a situation where you have a railroad  
18                 that has actually filed the necessary paperwork,  
19                 even though I believe that was a foreign squared  
20                 situation, not a foreign cubed situation, there  
21                 is no negative Commerce Clause violation.

22                 It's a very terse opinion. Once,  
23                 again, I'll be, you know, honest with the Court.  
24                 I can't actually understand what the distinction  
25                 is that the Court is drawing, but it

1 distinguishes it. It's the later in time  
2 precedent of this Court.

3           And then a lot of this negative  
4 Commerce Clause jurisprudence doesn't really  
5 keep getting applied to these registration  
6 statutes because there's a regime shift with  
7 International Shoe. So that's the state of the  
8 dormant Commerce Clause vis-à-vis registration  
9 statutes in the 1930s.

10           JUSTICE ALITO: Norfolk Southern is a  
11 big corporation, and big corporations like that  
12 can litigate anyplace in the country. So the  
13 practical consequences for them may not be so  
14 serious.

15           But all corporations are not big  
16 entities. So take the case of a small company,  
17 a small corporation, someplace far away from  
18 Pennsylvania, and they ship some products into  
19 the state based on Internet sales. Put aside  
20 the question -- put aside the question of  
21 specific jurisdiction.

22           What are the consequences if all of  
23 the states can condition the shipment of a few  
24 -- of some products into the state, which they  
25 regard as doing business into the state, on that

1 little corporation's consenting to general  
2 jurisdiction?

3 MR. KELLER: Yeah. So it's not clear  
4 that that small business would actually have to  
5 register under Pennsylvania's statute, but I'll  
6 concede, to not fight the premise of your  
7 question, Pennsylvania could amend its law and  
8 actually require them to register. I wouldn't  
9 back away from that.

10 The consequence is they'll have to  
11 make a choice: Are they willing to subject  
12 themselves to the general jurisdiction of the  
13 Commonwealth's courts or choose to forego  
14 Pennsylvania's market?

15 And I -- I recognize the policy  
16 implications of that, but sovereigns have this  
17 prerogative, and it hasn't changed since 1868.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Just one question. The price of doing  
21 business in Pennsylvania is to consent to  
22 jurisdiction. What if the price were \$100,000?

23 MR. KELLER: There's no historical  
24 precedent for that, so it doesn't --

25 CHIEF JUSTICE ROBERTS: Well, but --

1 but maybe the Pennsylvania statute is historical  
2 precedent for that because the required consent  
3 could in many cases, this one, for example,  
4 result in financial consequences to the  
5 corporation.

6 Why not just have the consequences up  
7 -- up front, put the \$100,000 in the however  
8 many millions Pennsylvania will be able to  
9 extract into some fund to help people who are  
10 injured by out-of-state corporations?

11 MR. KELLER: Can I ask a question  
12 about your hypothetical, Mr. Chief Justice?

13 CHIEF JUSTICE ROBERTS: Okay.

14 (Laughter.)

15 MR. KELLER: Okay. Thank you.  
16 Appreciate your indulgence.

17 Does the state require domestic  
18 corporations to pay the same penalty or fine or  
19 --

20 CHIEF JUSTICE ROBERTS: No.

21 MR. KELLER: That would probably be  
22 unconstitutional under Hanover Fire as a  
23 violation of the Equal Protection Clause.

24 CHIEF JUSTICE ROBERTS: Well, what --

25 MR. KELLER: I still don't think it

1 would be a due process violation, but it would  
2 be an equal protection violation.

3 CHIEF JUSTICE ROBERTS: Well, what is  
4 the difference in substance? Because being sued  
5 in Pennsylvania is going to increase the costs  
6 on the corporation, particularly --

7 MR. KELLER: Maybe.

8 CHIEF JUSTICE ROBERTS: -- if it  
9 becomes an attractive forum since a lot of  
10 corporations will have had to register.

11 MR. KELLER: I'm not sure whether it  
12 will increase the costs. That's an empirical  
13 question that --

14 CHIEF JUSTICE ROBERTS: Yeah.

15 MR. KELLER: -- I admittedly haven't  
16 analyzed. But I think it's a -- it's a very  
17 different thing to say you're going to be  
18 subject to the jurisdiction of our courts.

19 Pennsylvania has a republican form of  
20 government that guarantees that the oldest  
21 continually operating court system in the United  
22 States is going to mete out impartial justice,  
23 and saying, if you want to do business here,  
24 it's 100 grand, but we don't impose the same  
25 requirement on domestic corporations, I -- I

1 think that's different.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE SOTOMAYOR: I have just a  
6 couple questions. The complaint notes that the  
7 Petitioner lived in Pennsylvania from 2005 until  
8 his retirement and that he was diagnosed with  
9 cancer in 2016.

10 Was he diagnosed in Pennsylvania?

11 MR. KELLER: No.

12 JUSTICE SOTOMAYOR: He wasn't treated  
13 there, so this is -- okay. That's number one.

14 Number two, you've answered that we  
15 shouldn't address the dormant Commerce Clause  
16 because it wasn't addressed by the court below,  
17 and I accept that.

18 But how about the unconstitutional  
19 takings condition? The constitutional scholars  
20 who have put in a memo here. Professor Sachs  
21 goes on the dormant Commerce Clause in support  
22 of that. The constitutional scholars say that  
23 in -- that there is an unconstitutional  
24 condition if there's no sovereign interest that  
25 is served by a condition.



1                   Do we have to deal with that here, and  
2 why wouldn't we deal with that here?

3                   MR. KELLER: Well --

4                   JUSTICE SOTOMAYOR: And what's your  
5 answer to that view?

6                   MR. KELLER: -- though I think the  
7 dormant Commerce Clause is separate and I  
8 appreciate you accepting that that is for  
9 remand, I do think you have to deal with --

10                  JUSTICE SOTOMAYOR: I don't know if  
11 I've accepted it, but I accept your answer.

12                  MR. KELLER: Okay. I was getting too  
13 ambitious.

14                  (Laughter.)

15                  MR. KELLER: You accepted my answer.  
16 I do think you have to address, Justice  
17 Sotomayor, unconstitutional conditions. That  
18 issue has been properly joined by the parties.

19                  I think you should -- again, I very  
20 much appreciate the green briefs, but, for the  
21 most part, the litigants to the case or  
22 controversy should define the scope of the  
23 unconstitutional conditions issue that you  
24 address.

25                  But I don't see how the sovereign

1 interest principle applies with respect to  
2 consent to personal jurisdiction. Insurance of  
3 Ireland, I think, makes this point very clear  
4 that once you've consented the sovereign does  
5 have an interest in adjudicating the dispute,  
6 and I think it's notable that that opinion for  
7 the Court was penned by Justice White, who is  
8 the same Justice White --

9 JUSTICE SOTOMAYOR: I'm sorry, which  
10 case are you referring to?

11 MR. KELLER: Insurance of Ireland.

12 JUSTICE SOTOMAYOR: Ah. Thank you.

13 MR. KELLER: The same Justice White,  
14 of course, who penned Worldwide Volkswagen,  
15 which has the common language about what the Due  
16 Process Clause means as an instrument of  
17 interstate federalism, he says, yeah, but that  
18 doesn't apply when we're talking about consent  
19 because, once you've consented, whether it's  
20 waiver or, you know, other language --

21 JUSTICE SOTOMAYOR: You know, in equal  
22 protection, a state can impose a condition if it  
23 has a rational basis to do so.

24 MR. KELLER: Correct.

25 JUSTICE SOTOMAYOR: All right. Tell

1 me what the rational basis is for requiring  
2 consent when there is no sovereign interest.

3 I accept that the sovereign interest  
4 might get you past specific jurisdiction needs  
5 or minimum contact needs, et cetera, because  
6 that's pretty clear.

7 MR. KELLER: Yeah. This answer --

8 JUSTICE SOTOMAYOR: But what's the  
9 rational basis for this?

10 MR. KELLER: Forgive me for  
11 interrupting you. This answer is going to sound  
12 old-fashioned, but sovereigns often thought that  
13 they had a very compelling interest in opening  
14 the doors to their courthouse for anyone,  
15 resident or foreigner, and they would mete out  
16 justice if they saw a wrong and attempt to right  
17 it.

18 That's one of the great gifts of the  
19 Anglo-American legal system, I think. It's one  
20 of the great gifts of our independent judiciary.  
21 Many state constitutions write that in as one of  
22 the fundamental rights of persons, that the  
23 courthouse doors are going to be open to anyone.

24 So the state's interest is we want to  
25 give our residents a forum against these

1 dangerous railroads or these insurance companies  
2 that do things nationwide, even if it has no  
3 connection to our forum. And then, exactly as  
4 you said, rational basis, this isn't strict  
5 scrutiny, and we're going to stay true --

6 JUSTICE SOTOMAYOR: Except you just  
7 gave it away. Certainly, the constitutional  
8 scholars talk about the fact that if a  
9 jurisdiction wants to give its residents a  
10 forum, that makes eminent sense. But he's not a  
11 resident of Pennsylvania, and this cause of  
12 action had no contact with Pennsylvania. So --

13 MR. KELLER: I -- I don't think I --

14 JUSTICE SOTOMAYOR: -- that -- where's  
15 the sovereign interest in opening up your forum  
16 to an out-of-state plaintiff whose cause of  
17 action has no connection to the forum?

18 MR. KELLER: Respectfully, I don't  
19 think I've given it away. I think that I then  
20 said the state has a sovereign interest in  
21 treating all people equally and not  
22 discriminating against out-of-state residents.  
23 So we're not going to create special privileges  
24 for our own residents and give them a better  
25 access to our courts; we're going to give

1 everybody the same thing based on longstanding  
2 Anglo-American principles of law.

3 JUSTICE SOTOMAYOR: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Mr. Keller, the clear  
6 effect of a ruling in your favor would be to gut  
7 Daimler and Goodyear and you might even say  
8 effectively overrule them. And even beyond  
9 that, for, I think, many of the Justices who  
10 joined those decisions, they were taken to  
11 represent a principle that had existed since  
12 International Shoe. They were not new things.  
13 They were just a recognition of International  
14 Shoe's approach to the problem of jurisdiction.

15 And I would say that that approach is  
16 very inconsistent with what you just said with  
17 respect to federalism interests, where the  
18 approach for, you know, how many years has it  
19 been, 80 years, is Pennsylvania does not have a  
20 state interest here. Virginia is the state that  
21 has an interest in this litigation.

22 And also inconsistent with  
23 International Shoe's approach to fairness, which  
24 suggests, in line with Justice Alito's  
25 questions, that it's not fair and reasonable to

1 haul any company into the court of any state on  
2 any ground, even if it has nothing to do with  
3 the company's business in that state.

4 So I guess this goes back to the Chief  
5 Justice's question of you're taking us back to  
6 the enactment of the Fourteenth Amendment, but,  
7 for almost a century, we've lived under rules  
8 that are entirely different from the ones that  
9 you're suggesting we now adopt.

10 MR. KELLER: Yeah. So a couple of  
11 responses, Justice Kagan. I'll confess at the  
12 outset I'm a bottom-of-the-slippery-slope kind  
13 of guy and my first argument is originalism.  
14 But let me try and put your mind at ease. I am  
15 not suggesting that we overrule Daimler and  
16 Goodyear. They're -- only my friend is asking  
17 to overturn precedent today. We are not.

18 And I don't think that it would  
19 actually gut those opinions. It would  
20 definitely change the jurisdictional landscape,  
21 but I think big businesses, in particular, the  
22 ones that are national in scope, they are  
23 capable of making choices about what they're  
24 going to do in the wake of rules that are  
25 embraced by policymakers.

1           And we see this all the time in our  
2 highly charged political environment, where both  
3 political parties are doing certain things at  
4 the state level and corporations are saying  
5 that's not in keeping with our values, so we're  
6 going to take our stuff and leave. They've made  
7 a free choice to do so in view of those policy  
8 disagreements. Corporations, I think, are not,  
9 particularly large ones, these hapless babes in  
10 the woods. They are more than capable of  
11 explaining to the places that some of the green  
12 briefs describe as judicial hell holes -- you  
13 know, one person's hell hole is another's  
14 nirvana, but put that to one side -- they're  
15 more than capable of making their views known,  
16 and they should. It's important that they make  
17 their views known.

18           This may come as a surprise given my  
19 profession. I am not anti-business. I value  
20 the jobs and the tax base and the services that  
21 they provide to local economies, and they have  
22 every right to explain to policymakers why it  
23 would be a terrible idea to embrace  
24 Pennsylvania's rule. I'm not even sure I fully  
25 agree with Pennsylvania's rule. But it is

1 completely constitutional and compatible with  
2 Daimler and Goodyear. Nothing will be  
3 overturned if Mr. Mallory prevails.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: A couple  
8 questions. Only Pennsylvania has a statute like  
9 this, correct?

10 MR. KELLER: Pennsylvania modernized  
11 its statute, I believe, in 1978, so it does look  
12 unusual.

13 JUSTICE KAVANAUGH: As of today, it's  
14 a yes, isn't it?

15 MR. KELLER: Correct.

16 JUSTICE KAVANAUGH: Okay. If you win,  
17 every state could have a statute like this,  
18 which would mean, I assume, that every business  
19 would be at home in -- throughout the country?

20 MR. KELLER: I respectfully would just  
21 quibble with the nomenclature. I wouldn't call  
22 it "at home." I would say they would make a  
23 choice whether to consent to do business in the  
24 state and, therefore, be subject to general  
25 jurisdiction. But "yes" is the thrust of the



1 answer to your question.

2 JUSTICE KAVANAUGH: Okay. And Justice  
3 Alito's question raised the issue of whether you  
4 can win on the unconstitutional conditions issue  
5 if a state can't exclude out-of-state  
6 competitors from its market. I just want to  
7 make sure I understood your answer to that.

8 I thought you said to him, under the  
9 precedent, a state can't exclude out-of-state  
10 competitors from its market, but, under the  
11 original public meaning, the state could do so?  
12 Is that your answer?

13 MR. KELLER: That is. And to make  
14 sure that I stated it correctly, I could win  
15 under the --the Due Process Clause, which is the  
16 question presented here, excepting the premise  
17 that they're not allowed to do this under  
18 precedent and Pike's balancing doesn't go my way  
19 and lots of other things. If I lose under the  
20 dormant Commerce Clause in the Pennsylvania  
21 courts, of course, I lose.

22 JUSTICE KAVANAUGH: Okay. And --

23 JUSTICE SOTOMAYOR: You'll be back up  
24 here?

25 MR. KELLER: I -- I will be filing for

1 cert if we lose below. That is correct.

2 JUSTICE KAVANAUGH: And why sue in  
3 Philadelphia?

4 MR. KELLER: So, as was noted by  
5 Justice Sotomayor, Mr. Mallory used to live, not  
6 in Philadelphia, in Pennsylvania, and his  
7 lawyers are from there. The union lawyer who  
8 initially solicited for this case and then made  
9 a referral, both of those counsel were in  
10 Pennsylvania, in Philadelphia, but I won't  
11 pretend for a moment that those ground  
12 jurisdiction. They have nothing to do with  
13 jurisdiction. Those contacts are not sufficient  
14 to create jurisdiction. We're relying on  
15 consent and consent alone. Without consent, we  
16 don't prevail.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20 JUSTICE BARRETT: So your argument  
21 about the original meaning of the Fourteenth  
22 Amendment depends on a lot of statutes that you  
23 cite from the time. And let's just say that I  
24 might not read all those statutes the same way  
25 that you do, and one batch that I have some

1 trouble with are the ones that have to do with  
2 service of process.

3 I don't think those necessarily  
4 represent consent to general jurisdiction  
5 because having an agent who can accept process  
6 in a state could be, say, for a specific  
7 jurisdiction, putting aside whether or not --  
8 you know, and the government says not -- the  
9 ideas of specific and general jurisdiction, you  
10 know -- I mean, sorry, the government says that  
11 yes, those ideas of specific and general  
12 jurisdiction, unlike your position, did obtain  
13 at the time.

14 Why do you think that we should accept  
15 your argument that these service of -- service  
16 of process statutes are like consent to general  
17 jurisdiction?

18 MR. KELLER: Because service of  
19 process statutes require the creation of an  
20 agency relationship. And so I can't imagine a  
21 world where the corporation is just deemed to  
22 consent under those circumstances. If the board  
23 is passing a resolution saying we deputize  
24 Smith, we deputize Jones as the person who's  
25 going to be in the jurisdiction who can accept

1 service of all valid process for all claims, all  
2 writs, all causes of action, to me, that is a  
3 very clear indication that the corporation is  
4 consenting. They might not want to do it. They  
5 might prefer to do business without those  
6 strings attached, but they know what they are  
7 getting into in that species of statute. And,  
8 historically, that's how courts treated them.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: Yes. Going back to  
13 Justice Sotomayor's question about the sovereign  
14 interest, I sort of thought that the interest  
15 was apparent in the condition that so many  
16 people seem to have problems with, that is, that  
17 a sovereign wants to open its doors, courthouse  
18 doors, to its residents if they have disputes  
19 with companies that are doing business in the  
20 state, that the doing business in the state part  
21 of it does the important work of making it  
22 related to the state, as opposed to just having  
23 a statute that opens the courthouse doors to sue  
24 any corporation, period.

25 I would think that would be the

1     unfair, problematic, potentially  
2     unconstitutional reaching out to grab  
3     corporations, but, to the extent that the  
4     corporation, as you say, is agreeing  
5     voluntarily, knowingly, to do business in the  
6     state, I would think the state would have a very  
7     significant interest in making sure that its  
8     residents have a forum to bring their lawsuits.

9             Am I thinking about this in the wrong  
10     way?

11             MR. KELLER: Not at all. I completely  
12     agree with you, Justice Jackson, but, in the  
13     spirit of candor, I have to go a step further  
14     because Mr. Mallory is not from Pennsylvania.

15             So absolutely for the residents. And  
16     that's why I think my friend doesn't challenge  
17     the statutes that say general jurisdiction for  
18     residents are fine, even if the dispute has  
19     nothing to do with the forum.

20             Obviously, that wouldn't work under  
21     Goodyear or Daimler, right? I'm from Florida.  
22     If I get hit by a train in California, I can't  
23     just sue in Florida because I'm a resident of  
24     Florida, unless the train company has consented  
25     to that suit.

1                   But Mr. Mallory is one step removed  
2                   from that. Again, in the spirit of candor, he's  
3                   not from Pennsylvania. But I do think  
4                   Pennsylvania has a strong interest in saying  
5                   we're going to treat everybody equally. It  
6                   doesn't matter if you're a plaintiff from here  
7                   or a plaintiff from somewhere else. There's a  
8                   longstanding tradition of our courthouse doors  
9                   being open to all.

10                   JUSTICE JACKSON: Thank you.

11                   CHIEF JUSTICE ROBERTS: Thank you,  
12                   counsel.

13                   MR. KELLER: Thank you.

14                   CHIEF JUSTICE ROBERTS: Mr. Phillips.

15                   ORAL ARGUMENT OF CARTER G. PHILLIPS

16                   ON BEHALF OF THE RESPONDENT

17                   MR. PHILLIPS: Thank you, Mr. Chief  
18                   Justice, and may it please the Court:

19                   I think it's worth making sure we're  
20                   all on exactly the same page in terms of the  
21                   facts of this particular case. All we have here  
22                   is a lawsuit by a non-resident of Pennsylvania  
23                   against another corporation that -- against a  
24                   corporation that is a non-resident of  
25                   Pennsylvania on a cause of action that arose

1 outside of the State of Pennsylvania.

2 And -- and, under the way this Court  
3 looks -- has interpreted general jurisdiction in  
4 Daimler, that would say that it would violate  
5 due process to hale my client before the  
6 Pennsylvania courts.

7 The only basis on which the plaintiff  
8 argues you should ignore the precedent in  
9 Daimler is because there was a sheet of paper  
10 filled out by which my client registered to do  
11 business.

12 There's been a lot of talk about doing  
13 business. And there is no question that Norfolk  
14 Southern does a substantial amount of business  
15 in the State of Pennsylvania. But that's not  
16 what the statute requires.

17 All the statute requires is that you  
18 fill out a registration in order to be able to  
19 do business in the state. Once having done  
20 that, you have then consented to general  
21 jurisdiction in all cases.

22 So, if you go back to Justice Alito's  
23 hypothetical of the single guy who's --  
24 actually, take the case that the Court used in  
25 one of the earlier decisions about duck decoys

1 in Maine.

2 If somebody wants to -- wants to ship  
3 duck decoys from Maine into Pennsylvania, hasn't  
4 even done it yet but, nevertheless, decides out  
5 of -- out -- you know, out of an abundance of  
6 caution I'm going to register to do business in  
7 the State of Pennsylvania, what you're saying  
8 is, under those circumstances, you have  
9 consented to being sued on actions that have  
10 nothing to do with Pennsylvania and, indeed, in  
11 circumstances where you have not even done any  
12 business in the State of Pennsylvania.

13 And my friend's argument on the other  
14 side of that is to say: Yes, but Pennsylvania  
15 has this enormous interest in allowing everyone  
16 to access its courts and that that -- you know,  
17 which is fine, except, first of all, in defense  
18 of this litigation, the State of Pennsylvania  
19 didn't defend this statute.

20 And, second of all, no other state has  
21 adopted a statute like this one for the -- at --  
22 at any time within the modern memory of people.  
23 And so, therefore, this state -- this statutory  
24 scheme stands alone.

25 So, to answer Justice Kavanaugh's



1 question, is it alone? Yes.

2 And if this Court affirms the decision  
3 of the Pennsylvania Supreme Court, the only  
4 effect of that will be to end a statute that the  
5 State of Pennsylvania doesn't care about and  
6 that no other state has come here to defend  
7 under these circumstances.

8 JUSTICE ALITO: Well, Mr. -- Mr.  
9 Phillips -- is his time -- I'm sorry, have you  
10 past your time or not?

11 MR. PHILLIPS: It started flickering.  
12 (Laughter.)

13 JUSTICE ALITO: Can't the same thing  
14 that you just said be said about tag  
15 jurisdiction? What -- what sense does it make?  
16 Somebody's on a -- you know, somebody's on a  
17 train between Washington and Boston and switches  
18 trains in New York and somebody tags in there.

19 MR. PHILLIPS: Right. The answer to  
20 that is, I don't know how much sense it makes,  
21 they come from two very fundamental --  
22 fundamentally different traditions. Tag  
23 jurisdiction has been recognized for time  
24 immemorial, continues to be recognized both at  
25 the -- at the framing of the Constitution,

1 framing of the Fourteenth Amendment, and up to  
2 this day it continues to be.

3           So it's not only the history,  
4 tradition, and the practice that tells you that  
5 tag jurisdiction is permissible. By contrast,  
6 corporations, while there were these statutes,  
7 first of all, if you read the Chamber of  
8 Commerce brief, it'll tell you there's no  
9 statute and no case prior to the Fourteenth  
10 Amendment that would -- that would cover what  
11 Pennsylvania does here.

12           But, even if you take the handful or  
13 the smattering of statutes that come out after  
14 that, that doesn't come anywhere close to the  
15 kind of tradition and practice that this Court  
16 relied -- or at least that Justice Scalia's  
17 plurality opinion relied upon in deciding that  
18 that was appropriate. And part of that is  
19 because, as somebody asked, corporations  
20 otherwise exist everywhere that they do  
21 business.

22           And that is a fundamentally unfair  
23 approach, that there is this notion of  
24 interstate federalism and that these were  
25 sovereigns and that we have a right to be -- to

1 be sued and to have the exercise of coercive  
2 power in those states that have a legitimate  
3 interest in the -- in the resolution of the  
4 litigation --

5 JUSTICE JACKSON: But why isn't --

6 MR. PHILLIPS: -- on behalf of the  
7 corporation.

8 JUSTICE JACKSON: -- that right  
9 connected to your consent in some way? You seem  
10 -- your -- your narrative doesn't seem to take  
11 into account what I thought was common ground  
12 about the nature of this right that personal  
13 jurisdiction is an individual right, it comes  
14 from the Due Process Clause and not Article III,  
15 and that personal rights such as this one can be  
16 waived.

17 MR. PHILLIPS: Right.

18 JUSTICE JACKSON: I mean, all the --  
19 the -- the kind of background principles that  
20 you just articulate exist absent consent. It  
21 seems to me that you're suggesting that  
22 consenting to have a state court exercise  
23 personal jurisdiction can't happen consistent  
24 with the Constitution.

25 MR. PHILLIPS: Well, it can clearly

1       happen.  Obviously, if -- if -- we could have  
2       consented to this lawsuit.

3                   JUSTICE JACKSON:  So why -- why isn't  
4       it happening in a situation in which you  
5       knowingly file the registration and it's clear  
6       from the law that when you file -- choose, when  
7       you choose to file the registration, you're  
8       thereby consenting?

9                   MR. PHILLIPS:  Well, I mean, this  
10      Court -- I mean, that's not the normal way the  
11      Court thinks about consent or waiver of  
12      fundamental constitutional rights.  Typically,  
13      that's a more transactional inquiry.

14                   And if you -- and if you look at the  
15      Irish case that -- and Justice White's analysis  
16      of consent, it's -- this is not the kind of  
17      consent that's ever been used.

18                   And, indeed, if you look at the  
19      Pennsylvania statute, the Pennsylvania statute  
20      says that you can be sued in Pennsylvania for  
21      consent to the extent of your consent.  
22      Plaintiff didn't invoke that provision.  He  
23      didn't say there was consent as that's  
24      understood.

25                   JUSTICE JACKSON:  No, I understand,

1 but why does it matter? I don't -- I guess I  
2 don't see the difference between Pennsylvania  
3 having a law that says, if you would like to do  
4 intrastate business, you have to register and,  
5 per the registration, you are consenting.

6 I don't see the difference between  
7 that and Pennsylvania negotiating with each  
8 individual business but standing to its term,  
9 this is a term in the agreement, you're --  
10 you're going to do business and this is what we  
11 require. In fact, I think it seems fairer to  
12 have it be the law applying to everybody rather  
13 than a transactional thing business by business.

14 MR. PHILLIPS: So I don't think -- I  
15 mean, I understand that point. And my -- my --  
16 my response remains the same, which is that's  
17 not the way the Court normally thinks about  
18 waiving constitutional rights. It's not the way  
19 anybody thinks about consent to personal  
20 jurisdiction.

21 But the -- the flip side of that is --  
22 and that's -- that's the unconstitutional  
23 conditions problem -- is that, okay, if you  
24 think this is consent, then the question is: Is  
25 that an unconstitutional condition? And since

1 we have a right not to be sued in Pennsylvania  
2 on actions that have nothing to do with  
3 Pennsylvania, insisting that we have to waive  
4 that right --

5 JUSTICE JACKSON: Right, but we don't  
6 ask that unconstitutional conditions question in  
7 all of the other situations in which people  
8 waive their rights, very, very significant  
9 rights, in their interactions with the  
10 government.

11 I'm thinking about all of the criminal  
12 law rights that came up in the context of the  
13 briefing here --

14 MR. PHILLIPS: Sure.

15 JUSTICE JACKSON: -- where a state  
16 will condition your, you know, getting a lesser  
17 recommendation at -- at sentencing, for example,  
18 with you giving up your right to a trial, giving  
19 up your right to appeal. I mean, those are  
20 really significant things.

21 And the Court apparently doesn't ask  
22 the question, is an unconstitutional condition  
23 happening in that circumstance. So why would it  
24 do that here?

25 MR. PHILLIPS: Because, under those

1       circumstances, and generally, you know, those  
2       are the kinds of waivers you have to do in open  
3       court that are knowing and voluntary and that  
4       that's a choice that the litigant makes under  
5       those circumstances.

6                   JUSTICE JACKSON:  So you're saying you  
7       had no choice, it wasn't knowing and voluntary?  
8       Is that --

9                   MR. PHILLIPS:  If we were going to do  
10       business.  Well, you know, I don't -- I don't  
11       want to play the railroad card, but the reality  
12       is, is that my -- you know, my client was doing  
13       business in Pennsylvania long before the statute  
14       was enacted and will -- and -- and will be  
15       forced to continue to do business long after.  
16       So the --

17                   JUSTICE GORSUCH:  Let me ask it this  
18       way if I might.  I'm sorry to interrupt.

19                   But, if we're worried about fairness  
20       of consent and -- and knowledge, there's no  
21       doubt the railroad understood by filing that  
22       piece of paper that it was subject to this law.

23                   MR. PHILLIPS:  Right.

24                   JUSTICE GORSUCH:  Okay.  Right?

25                   MR. PHILLIPS:  Right.  Although I --

1 JUSTICE GORSUCH: And -- and don't you  
2 think --

3 MR. PHILLIPS: -- might have thought  
4 that the statute could be construed more  
5 broadly.

6 JUSTICE GORSUCH: Sure, you have the  
7 right to bring the suit, of course.

8 MR. PHILLIPS: And we would have that.

9 JUSTICE GORSUCH: Yeah, this argument,  
10 I understand that. But you understood the law.  
11 And isn't that a -- a far way down the railroad  
12 compared to the individual in Justice Alito's  
13 hypothetical who's traveling on a train who has  
14 no idea about tag jurisdiction?

15 So why is it unconstitutional  
16 conditions when we're talking about corporations  
17 but not persons?

18 MR. PHILLIPS: So it's -- it's -- it's  
19 important to recognize, right, the complaint in  
20 this case doesn't allege that we are a large  
21 knowledgeable corporation. It says, simply  
22 because we filed a form --

23 JUSTICE GORSUCH: Fair enough. I take  
24 your point.

25 MR. PHILLIPS: -- that that's



1 sufficient to say --

2 JUSTICE GORSUCH: I take that point.

3 MR. PHILLIPS: -- that all of those  
4 other things don't count.

5 JUSTICE GORSUCH: But -- but, if we're  
6 going to treat corporations and persons alike  
7 for purposes of fairness, abstract notions of  
8 fairness, why is it any less fair to treat  
9 corporations as subject to consenting here if we  
10 treat individuals as subject to jurisdiction on  
11 a tag basis?

12 MR. PHILLIPS: Because -- because  
13 you're -- you're comparing apples and oranges.

14 JUSTICE GORSUCH: I mean, it does seem  
15 a little bit like due process Lochnerism for  
16 corporations here, doesn't it?

17 MR. PHILLIPS: I would never say that,  
18 Your Honor.

19 JUSTICE GORSUCH: Oh, I know you  
20 wouldn't.

21 (Laughter.)

22 MR. PHILLIPS: No, but what it looks  
23 like is that these -- that there is a -- is a  
24 fundamentally different historic tradition  
25 dealing with individuals than there is with

1 corporations. That may be --

2 JUSTICE GORSUCH: That's the best  
3 we've got?

4 MR. PHILLIPS: -- good or bad, but it  
5 is --

6 JUSTICE GORSUCH: Okay. So --

7 MR. PHILLIPS: -- a fact.

8 JUSTICE GORSUCH: -- so, on that, if  
9 corporations are really special, how about the  
10 foreign squared circumstance, okay? What if we  
11 had a Pennsylvania resident, okay, suing about  
12 out-of-state events against your -- your  
13 company, your client? What then? Would that be  
14 permissible consent in those circumstances?

15 MR. PHILLIPS: I mean, this Court has  
16 pretty consistently said that the inquiry under  
17 the Due Process Clause with corporations is to  
18 look at the relationship among the -- the  
19 defendant, the state, and the litigation --

20 JUSTICE GORSUCH: I've just given you  
21 the --

22 MR. PHILLIPS: -- and that the  
23 plaintiff's residence doesn't play a role in  
24 that analysis. So the answer, I think, would be  
25 the -- would be the same. But, obviously --

1 JUSTICE GORSUCH: The same being no --

2 MR. PHILLIPS: -- that's not this  
3 case.

4 JUSTICE GORSUCH: -- that that consent  
5 would be insufficient --

6 MR. PHILLIPS: Right. That --

7 JUSTICE GORSUCH: -- too despite the  
8 historical tradition there?

9 MR. PHILLIPS: Well, I don't -- I  
10 don't know -- I mean, the -- we have to look at  
11 that historical tradition in the same way we  
12 looked at the historical --

13 JUSTICE GORSUCH: That's why I'm  
14 asking you.

15 MR. PHILLIPS: I mean, I haven't  
16 analyzed the plaintiff's cases as carefully, you  
17 know, when -- where the plaintiff was a resident  
18 as I have all of the other cases, some of which  
19 were --

20 JUSTICE GORSUCH: So it's at least  
21 possible that consent there would be permissible  
22 in your view?

23 MR. PHILLIPS: I -- I doubt it because  
24 I don't -- those statutes didn't -- you know,  
25 there's no tradition that lived on. I mean,

1 those cases are -- those -- those cases --

2 JUSTICE GORSUCH: Well, there are a  
3 number of states that have those statutes today.

4 MR. PHILLIPS: -- those statutes have  
5 all -- I'm sorry.

6 JUSTICE GORSUCH: There are a number  
7 of states who have those statutes today and who  
8 continue to enforce them.

9 MR. PHILLIPS: I'm not so sure that  
10 there's --

11 JUSTICE GORSUCH: There's a circuit  
12 split about that.

13 MR. PHILLIPS: -- I don't know --

14 JUSTICE GORSUCH: State --

15 MR. PHILLIPS: -- how much evidence  
16 there is about the extent to which those are  
17 continuing to be enforced, whether they've been  
18 challenged. My guess is that a lot of  
19 defendants decide not to fight on those grounds.  
20 But that has a different historical --

21 JUSTICE GORSUCH: But you're leaving  
22 --

23 MR. PHILLIPS: -- pedigree.

24 JUSTICE GORSUCH: I guess what I'm  
25 asking isn't -- isn't -- maybe I should abstract

1 from my question. It is possible that consent  
2 jurisdiction would be permissible in some  
3 circumstances, even under your theory?

4 MR. PHILLIPS: Yes, it is possible.

5 JUSTICE GORSUCH: So, if -- if that's  
6 true, if that's true, this doesn't implicate  
7 Daimler or those cases at all, where we're  
8 dealing with no consent, no question of consent  
9 jurisdiction. Consent jurisdiction could exist  
10 alongside International Shoe here, just as tag  
11 jurisdiction exists alongside personal  
12 jurisdiction in individual cases?

13 MR. PHILLIPS: Right. But the -- but  
14 the truth -- the same is true for specific cases  
15 like -- where the -- where the specific  
16 defendant has -- has, in fact, consented, you  
17 know, comes in and defends, enters into an  
18 agreement with the party to defend under those  
19 circumstances.

20 Of course, consent can, in fact, live  
21 in the -- in the International Shoe world, but  
22 that's not the circumstance we're talking about  
23 here. I think the first line of defense ought  
24 to be this is not consent in the sense that  
25 anybody thinks about consent.

1                   And to get to the point where you say  
2                   that this is consent in the way that you  
3                   normally think about it, you'd have to look at  
4                   the history and the tradition. And if you look  
5                   at that history and -- you know, you have a  
6                   smattering of state laws that tell you  
7                   something. I think Justice Barrett was right.  
8                   I don't -- you know, service of process I would  
9                   -- I would argue doesn't get you home because  
10                  it's pretty clear under those circumstances that  
11                  they're -- want to make sure that if they have  
12                  one of their residents injured in their -- or  
13                  anybody injured in their state, that they can  
14                  respond to that and, again, open the courts.

15                  JUSTICE SOTOMAYOR: I'm sorry,  
16                  counselor. I -- I think I'm now finally  
17                  understanding. You don't accept the SG's  
18                  position that -- that takes -- well, I think you  
19                  admitted that historical case law permits  
20                  consent-by-registration to cases arising from  
21                  doing business in the state, correct?

22                  MR. PHILLIPS: No, not from doing  
23                  business.

24                  JUSTICE SOTOMAYOR: If the case arises  
25                  from something that happened in the state.

1           MR. PHILLIPS:  If there's an injury,  
2  but you don't need consent --

3           JUSTICE SOTOMAYOR:  Exactly.

4           MR. PHILLIPS:  -- in that situation.

5           JUSTICE SOTOMAYOR:  But -- so those  
6  statutes you're saying are unnecessary, having  
7  consent statutes that require you to have --

8           MR. PHILLIPS:  That's right.  Justice  
9  Sotomayor --

10          JUSTICE SOTOMAYOR:  You're saying --

11          MR. PHILLIPS:  Right.  I think those  
12  --

13          JUSTICE SOTOMAYOR:  So what's the --

14          MR. PHILLIPS:  -- that's why those  
15  statutes went into disuse or -- or evaporated.

16          JUSTICE SOTOMAYOR:  So what you're --  
17  basically, the position you're taking is, even  
18  when the state has a separate sovereign interest  
19  the way the government has argued, like giving  
20  its residents a forum, you're basically saying  
21  due process would not permit that express  
22  consent?

23          MR. PHILLIPS:  Well, I actually would  
24  --

25          JUSTICE SOTOMAYOR:  And --

1 MR. PHILLIPS: -- as Justice  
2 Gorsuch's -- I would -- I would have to look at  
3 the historical pedigree by which you got there.

4 JUSTICE SOTOMAYOR: All right. Can I  
5 ask you -- you know in Daimler that I disagree  
6 with the Court's jurisprudence in the  
7 non-consent there.

8 MR. PHILLIPS: I'm -- I'm hoping  
9 you'll come around, Justice Sotomayor.

10 (Laughter.)

11 JUSTICE SOTOMAYOR: It's very  
12 doubtful.

13 (Laughter.)

14 JUSTICE SOTOMAYOR: And I'll tell you  
15 why, because your case shows it to me. We have  
16 one of the amicus that tells us that you had  
17 more miles of railroad track and more employees  
18 in Pennsylvania than any other state, even  
19 Virginia. So except for the fiction of you  
20 having your incorporation in Virginia and you  
21 choosing artificially to say this is my  
22 principal place of business, in fact, you are  
23 doing the most business of anywhere else in  
24 Pennsylvania.

25 So what logic does it make to me to



1 say that you cannot consent, because you were  
2 already doing business in Pennsylvania, you had  
3 three railroad yards, you have miles and miles  
4 of trains and miles and miles of employees, how  
5 can I say you were coerced --

6 MR. PHILLIPS: Right.

7 JUSTICE SOTOMAYOR: -- into signing a  
8 general jurisdiction waiver? I can see where we  
9 might have a doctrine that says, in an  
10 individual application, there's coercion, but I  
11 can't see how we could say there's coercion for  
12 a company in your situation.

13 MR. PHILLIPS: Well, I don't think  
14 there's any question about the coercion. I  
15 mean, we are required to register in order to do  
16 business there. We were already doing business  
17 there.

18 JUSTICE SOTOMAYOR: Well, you've  
19 already said the --

20 MR. PHILLIPS: And as a condition of  
21 -- I'm sorry.

22 JUSTICE SOTOMAYOR: -- you've already  
23 said the state can waive -- can coerce you into  
24 signing a waiver for an accident that happens in  
25 Pennsylvania because they -- they don't need the

1 waiver.

2 MR. PHILLIPS: They don't need the  
3 waiver.

4 JUSTICE SOTOMAYOR: All right.

5 MR. PHILLIPS: They don't need  
6 consent.

7 JUSTICE SOTOMAYOR: So you're  
8 basically saying there's no -- there's no  
9 sovereign right to ask for any consent ever?

10 MR. PHILLIPS: Ex ante, yes, I think  
11 that's exactly the position I would take. I  
12 would say, after the --

13 JUSTICE GORSUCH: Well, I --

14 MR. PHILLIPS: -- after the event and  
15 the litigation that might arise, it would be  
16 perfectly okay.

17 Can I -- can I make one other point in  
18 response to --

19 JUSTICE GORSUCH: Please.

20 MR. PHILLIPS: -- Justice Sotomayor,  
21 though, Justice Gorsuch?

22 JUSTICE GORSUCH: Yeah. Please.

23 MR. PHILLIPS: Just, you know, I  
24 recognize that -- that as a -- as a matter of  
25 judicial notice, you can say that Norfolk

1 Southern has these contacts with the -- with the  
2 State of Pennsylvania, but realize that none of  
3 that is in the complaint in this case. There is  
4 no allegation of anything other than that we do  
5 business in interstate commerce.

6 And, therefore, the only basis on  
7 which jurisdiction is -- is -- is invoked in  
8 this particular case is the fact of having  
9 filled out a registration form.

10 So I would argue that even if the  
11 Court -- even if you individually want to think  
12 about a case somewhere down the line where  
13 that's the issue, I would say in this particular  
14 case, those facts are irrelevant to the proper  
15 outcome of this because that's not the theory on  
16 which the plaintiff brought the case. Candidly,  
17 it can't be the theory on which -- on which the  
18 Petitioner is going to try to -- try to set  
19 aside what the Supreme Court of Pennsylvania did  
20 in this case. I apologize. Thank you for  
21 allowing me to --

22 JUSTICE BARRETT: Go ahead.

23 JUSTICE GORSUCH: No, please.

24 JUSTICE BARRETT: If you have --

25 JUSTICE GORSUCH: No, no.

1 JUSTICE BARRETT: Okay. Mr. Phillips,  
2 would it make a difference to you if the  
3 registration form had been explicit about the  
4 consent? So, you know, you pointed out, listen,  
5 all we did was fill out a registration form.  
6 Justice Kagan pointed out earlier to your friend  
7 on the other side that it might be a different  
8 case if there was a form that had some explicit  
9 consent. Would it matter to you?

10 MR. PHILLIPS: No, it wouldn't matter  
11 to me. I mean, it would -- I mean, it would --  
12 it would make it more arguable as to whether the  
13 consent existed. It would still put you  
14 squarely in the position where it's consent  
15 that's -- that's extorted by the state in order  
16 to -- in order to provide -- in order to -- to  
17 litigate issues where the sovereign has no  
18 interest because there's no contact otherwise  
19 with the state.

20 JUSTICE BARRETT: But what if the  
21 state gives a benefit and says, corporations  
22 that consent to general jurisdiction, we're  
23 going to waive the registration fee -- let's say  
24 it's a thousand dollars -- you don't have to pay  
25 the fee as long as you consent?

1                   MR. PHILLIPS: At the end of the day  
2                   -- I mean, I don't know at what point you can  
3                   say that it sort of washes out. But, at the end  
4                   of the day, you're not allowed -- you know, the  
5                   -- the unconstitutional conditions principle  
6                   says you cannot insist that we give up our right  
7                   not to have to be haled into court by the  
8                   coercive powers of the State of Pennsylvania,  
9                   Commonwealth of Pennsylvania.

10                   JUSTICE JACKSON: But why is that  
11                   insisting, Mr. Phillips? I don't understand. I  
12                   mean, it sounds like an exchange. It sounds  
13                   like the state is saying, if you would like to  
14                   do business in the state, you don't have to do  
15                   business in the state, you can, as your friend  
16                   on the other side said, make a choice. You  
17                   don't have to come here.

18                   So it's not coercive. It's just a  
19                   term in the agreement that we're making with the  
20                   businesses that come to our state. And I  
21                   understand it's not negotiated individually,  
22                   but, surely --

23                   MR. PHILLIPS: Sure.

24                   JUSTICE JACKSON: -- surely, a  
25                   business who doesn't want to be held to that

1 standard could go to the legislature and ask for  
2 an exemption. I mean, there's an option -- you  
3 have options to try to get around it if you  
4 would like to, but you don't have to do business  
5 in the state. So why is it coercive?

6 MR. PHILLIPS: So, again, I -- I'm a  
7 little reductant to play the railroad card here,  
8 but it's not as though we actually have a choice  
9 whether or not we're going to do business in the  
10 State of Pennsylvania.

11 The federal government will require us  
12 to continue to do business in the State of  
13 Pennsylvania. And the State of Pennsylvania  
14 will, although it doesn't defend this statutory  
15 scheme here today, the State of Pennsylvania  
16 under the plaintiff's theory is that that  
17 requires us to give up our rights under Daimler.

18 JUSTICE JACKSON: But, here -- here,  
19 it's only intrastate, though, right? I mean,  
20 you just -- you just articulated an interstate  
21 circumstance, where the federal government is  
22 going to make you continue to go interstate, but  
23 I thought the condition here only related to  
24 intrastate business.

25 MR. PHILLIPS: Well --

1 JUSTICE JACKSON: Am I wrong about  
2 that?

3 MR. PHILLIPS: -- I just -- well, it  
4 doesn't require you to do business at all. It  
5 only requires -- it only says if you register --

6 JUSTICE JACKSON: No, I'm sorry.

7 MR. PHILLIPS: -- to do business.

8 JUSTICE JACKSON: The waiver -- the  
9 waiver extends only -- the condition only  
10 relates to -- to companies that want to do  
11 intrastate business. That's what I thought.

12 MR. PHILLIPS: No. No. All it talks  
13 about is a foreign corporation that's registered  
14 to do business. And under the long-arm statute,  
15 then you're subject to this.

16 We -- we -- I mean, the idea that we  
17 voluntarily accepted this when we -- when we  
18 checked that box is simply -- is not the way I  
19 think of -- of waiver and consent under any  
20 circumstance. But, if it is -- if you think of  
21 it that way, it's still an unconstitutional  
22 condition then.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Thomas?

25 JUSTICE THOMAS: Mr. Phillips, I am

1 still -- I'm just not very good at metaphysics,  
2 and --

3 MR. PHILLIPS: I'm not very good at  
4 physics either.

5 JUSTICE THOMAS: Yeah. Well, no, I  
6 was good at physics. It's just metaphysics that  
7 were a problem.

8 (Laughter.)

9 MR. PHILLIPS: Then you're way ahead  
10 of me.

11 JUSTICE THOMAS: But the -- the -- you  
12 said that you, if you had consented, that you  
13 could consent to jurisdiction.

14 MR. PHILLIPS: Yes, if there is such a  
15 thing.

16 JUSTICE THOMAS: So there's -- but you  
17 can't -- so you're going -- we're going back and  
18 forth between waiver and consent ex ante. You  
19 said that's what you're opposed to.

20 And, at some point, some of the  
21 argument it sounds as though, well, this wasn't  
22 a voluntary waiver.

23 MR. PHILLIPS: Right.

24 JUSTICE THOMAS: And then, at other  
25 times, it sounds, well, we can agree to this and



1 it's not so much a waiver, but it seems to  
2 satisfy due process requirements.

3 What I'd like you to do for me is to  
4 tell me what the antecedent rights are that the  
5 railroad has that it could possibly be waiving  
6 and whether or not you are waiving those rights  
7 or you are consenting not to assert those  
8 rights. It may not be a difference.

9 MR. PHILLIPS: Right.

10 JUSTICE THOMAS: But I think if we  
11 could at least be -- you started by saying let's  
12 be on common ground. That would help me at  
13 least understand where we are a little better.

14 MR. PHILLIPS: So, Justice Thomas, the  
15 way I would articulate it is it is our right not  
16 to be coerced to appear before a court, except  
17 by lawful judicial power. And this Court has  
18 made clear that lawful judicial power in dealing  
19 with a corporation is to be -- is to be haled  
20 into a court where it is at home.

21 And whatever else Pennsylvania may be,  
22 Justice Sotomayor's views notwithstanding, we  
23 are not at home in Pennsylvania. And that's the  
24 right we've been asked to give up, is -- is the  
25 right not to be sued anywhere except where we

1 are at home.

2 JUSTICE THOMAS: So are we -- are --  
3 is this really about whether or not you are  
4 voluntarily consenting or you voluntary --  
5 voluntarily consented? Because you've said you  
6 could sign an agreement today or you could write  
7 a consent form or sign a consent form today and  
8 you could bypass the jurisdictional problems.

9 MR. PHILLIPS: Right.

10 JUSTICE THOMAS: So what the other  
11 side is saying, Petitioner is saying is you  
12 signed that form ex ante and that gets you  
13 there.

14 MR. PHILLIPS: Right. And --

15 JUSTICE THOMAS: You're saying, well,  
16 I signed it, but I was forced -- it is -- it's  
17 doing something more than I signed it for.

18 MR. PHILLIPS: Right. My -- I mean,  
19 my -- my first line of response would be that's  
20 not consent as this Court has traditionally  
21 thought about consent in this context. If you  
22 -- if you look at the -- the Ireland case, where  
23 the Court goes through all of the versions of  
24 consent to personal jurisdiction, this one  
25 doesn't come up.

1                   But, second, if I'm wrong about that,  
2 if you want to extend consent beyond those that  
3 were articulated by the Court already, I would  
4 say that's an unconstitutional condition.

5                   JUSTICE THOMAS: What would it look  
6 like? What would -- if -- if you had signed  
7 this -- and then I'll be done -- what would that  
8 adequate consent look like?

9                   MR. PHILLIPS: Well, what I think of  
10 as adequate consent is if we had defended this  
11 litigation on the merits in the Commonwealth of  
12 Pennsylvania.

13                   JUSTICE THOMAS: No, I -- I mean, the  
14 -- the -- the form, when we're talking about a  
15 form to do business in Pennsylvania. If there  
16 was such a way -- if there was a way to consent  
17 that is agreeable to you, let's say you're a  
18 generous railroad company and you want to be  
19 fair to -- to -- to -- to these litigants, even  
20 more than fair, how would that form look?  
21 Because what I'm hearing you say is this is  
22 inadequate.

23                   MR. PHILLIPS: Well, clearly, if all  
24 you have to do is check a box that says I  
25 register to do business --

1 JUSTICE THOMAS: No, we've got that.  
2 We've passed that.

3 MR. PHILLIPS: -- you know, and that's  
4 why I would say -- say that's not adequate  
5 consent. What would be adequate consent? The  
6 flip side of it is, if -- if being sued, I say,  
7 good, fine. I'm a generous railroad. I'm happy  
8 to be sued in a Commonwealth that you're  
9 comfortable with. I can -- I can consent under  
10 those circumstances.

11 Wherein between those two is -- is  
12 hard for me to say. Anything ex ante I -- I  
13 have problems with, Your Honor.

14 JUSTICE THOMAS: Yeah.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Well, I think the  
17 question is what you would say if Pennsylvania  
18 or another state required you as a condition of  
19 doing business in the state to sign something  
20 that says I will not contest personal  
21 jurisdiction in this state under any  
22 circumstances.

23 MR. PHILLIPS: Right. And I would say  
24 in that, that that -- that was extorted out of  
25 me as a condition of being able to do business,

1 that they had no right to under those  
2 circumstances, and, therefore, it's still  
3 unconstitutional.

4 But I agree. I mean, I -- I -- you  
5 know, it's harder to say that that's not  
6 consent, but it doesn't make it constitutionally  
7 permissible.

8 JUSTICE ALITO: So your argument --  
9 you really have to argue that this is a right  
10 that you can't be forced to waive. Lots of  
11 rights are waivable.

12 MR. PHILLIPS: Right. But you should  
13 be --

14 JUSTICE ALITO: And this one you have  
15 to argue --

16 MR. PHILLIPS: -- but most rights are  
17 not -- are not waivable by coercion. You know,  
18 you can't put a gun to the person's head and  
19 say, you know, Fourth Amendment -- give up your  
20 Fourth Amendment rights or I blow your head off.  
21 Right?

22 JUSTICE ALITO: A big part of -- one  
23 other question -- a big part of Mr. Keller's  
24 argument is Pennsylvania Fire, and we haven't  
25 discussed that at all.

1 MR. PHILLIPS: Right.

2 JUSTICE ALITO: Can we rule in your  
3 favor without overruling Pennsylvania Fire?  
4 When I read your brief and the Solicitor  
5 General's brief, I count up, I don't know, five  
6 or six different --

7 MR. PHILLIPS: Distinctions?

8 JUSTICE ALITO: -- potential ways of  
9 getting around Pennsylvania Fire. What's the  
10 best one?

11 MR. PHILLIPS: Well, I -- I mean, you  
12 -- you can say that there was a -- a clearer  
13 document in that case, a la what Justice Thomas  
14 said, and that that's the basis for saying that  
15 there was consent there and there's not consent  
16 here. That's -- that's a legitimate ground.

17 If you get past that, I think it's  
18 easier to say, frankly, that the Court already  
19 overruled Pennsylvania Fire when it said in  
20 Daimler that if you -- if you look at the cases  
21 between Pennoyer and International Shoe that are  
22 based on the Pennoyer territoriality concept,  
23 those cases are no longer valid, this one would  
24 fall squarely in that camp.

25 JUSTICE SOTOMAYOR: How? Given how --

1 CHIEF JUSTICE ROBERTS: I'm sorry,  
2 we'll -- I'm sorry, we'll be --

3 JUSTICE SOTOMAYOR: Are we on the  
4 round robin? Sorry. I didn't realize.

5 MR. PHILLIPS: I didn't hear the  
6 question anyway. I apologize.

7 CHIEF JUSTICE ROBERTS: Well, Justice  
8 Alito, are you --

9 JUSTICE ALITO: No, I'm done. Thank  
10 you.

11 CHIEF JUSTICE ROBERTS: Okay. Justice  
12 Sotomayor?

13 JUSTICE SOTOMAYOR: I'm sorry. I  
14 didn't realize we were in the round robin.

15 My question was, how? Daimler  
16 International -- Daimler was a non-consent case.  
17 All of the cases that you rely upon for specific  
18 jurisdiction and general jurisdiction are all  
19 non-consent statute cases. So how can we say  
20 that overrules Pennsylvania?

21 MR. PHILLIPS: Well, what the Court --  
22 I mean, what the Court said in Daimler, and as  
23 repeated in other cases, is that all of the --  
24 all of the precedents between Pennoyer and  
25 International Shoe, all of them, that ultimately

1 rely on some basic concept of territoriality --

2 JUSTICE SOTOMAYOR: But not one -- but  
3 not one of them has dealt with consent. That  
4 was always put in a separate category.  
5 International Shoe was basically about when  
6 there was no consent.

7 MR. PHILLIPS: Well, right. But I  
8 think the -- the flip side of the question then  
9 goes to, what -- what is consent within the  
10 meaning of that? And I would argue that this is  
11 not consent under that.

12 JUSTICE SOTOMAYOR: Mr. Phillips, one  
13 last question.

14 MR. PHILLIPS: And, clearly, I didn't  
15 mean to overrule the idea that a defendant can  
16 come into court and say, fine, I'm happy to --  
17 I'm happy to defend this case in this court,  
18 clearly not.

19 JUSTICE SOTOMAYOR: One last question.

20 MR. PHILLIPS: I apologize.

21 JUSTICE SOTOMAYOR: I know that  
22 there's some of my colleagues who believe that  
23 every state will pass a law like Pennsylvania,  
24 but every state had that opportunity at the  
25 ratification and very few did. Others had more



1 limitations.

2 I suspect today that very crowded  
3 courts are not going to want for cubed cases to  
4 come to them and will continue having their laws  
5 as they are. And we have other doctrines like  
6 forum non conveniens and choice of law that will  
7 guard -- will present guardrails.

8 I know, in your brief, you say they're  
9 not adequate constitutional guardrails, but, if  
10 we say consent is consent, then -- and we don't  
11 find an unconstitutional conditions case, those  
12 doctrines will provide some guardrails, won't  
13 they?

14 MR. PHILLIPS: Well, they -- to some  
15 extent. And -- and I don't -- I don't doubt  
16 you're right that it's improbable that all 50  
17 states would necessarily adopt this view.

18 But, as the business interests have  
19 said to this Court, the more concerning portion  
20 of this would be those few states that say we're  
21 going to open our doors to the -- to the huddled  
22 masses to come in yearning for a place to  
23 litigate in a -- in a popular forum from the  
24 plaintiffs' perspective. And that, it seems to  
25 me, goes right to the core of the right not to

1 be haled into a court coerced against your will  
2 under these circumstances.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?  
5 Justice Gorsuch?

6 JUSTICE GORSUCH: I just want to make  
7 sure I understand where we're at. Consent lives  
8 on after International Shoe, right?

9 MR. PHILLIPS: Yes.

10 JUSTICE GORSUCH: Okay.

11 MR. PHILLIPS: Some version of  
12 consent.

13 JUSTICE GORSUCH: Some version of  
14 consent. In Pennsylvania Fire, the Court found  
15 that consent that, I think, looks -- let's just  
16 spot me this -- looks very much like  
17 Pennsylvania's statute was sufficient to  
18 establish consent. That was Justice Holmes. He  
19 was affirming discussions and thoughts by  
20 Learned Hand.

21 And you're asking us to overrule that  
22 form of consent as extortion, is that right?

23 MR. PHILLIPS: Yes, Your Honor. And  
24 -- and -- and my answer to that would be, if  
25 Justice Holmes were here today, he would

1 recognize that --

2 JUSTICE GORSUCH: He would get it  
3 right this time?

4 MR. PHILLIPS: Exactly.

5 (Laughter.)

6 MR. PHILLIPS: The -- the benefit of a  
7 little better advocacy.

8 JUSTICE GORSUCH: I appreciate your  
9 candor.

10 (Laughter.)

11 JUSTICE KAVANAUGH: Just to follow up  
12 on Justice Gorsuch's question, when he says  
13 consent lives on, you mean, if you're sued in  
14 Philadelphia and you show up and say I have a  
15 right not to be sued here, but, nonetheless, I'm  
16 going to let it go --

17 MR. PHILLIPS: Right. That --

18 JUSTICE KAVANAUGH: -- and that's what  
19 you mean by consent --

20 MR. PHILLIPS: -- that's what I --

21 JUSTICE KAVANAUGH: -- lives on?

22 MR. PHILLIPS: Yes, that's consent  
23 that lives on.

24 JUSTICE KAVANAUGH: And your point  
25 about consent and waiver more generally is that,

1 you know, it's involuntary, it's coerced, that  
2 the terms "consent" and "waiver" are not  
3 appropriate terms --

4 MR. PHILLIPS: Right. Those --

5 JUSTICE KAVANAUGH: -- for what's  
6 going on?

7 MR. PHILLIPS: That's not the way I  
8 think of consent. Yes, you're right.

9 JUSTICE KAVANAUGH: Yeah. But that  
10 depends on -- I think, on a premise that we were  
11 talking about or I was talking about with your  
12 friend on the other side, which is that you have  
13 a right to do business in Pennsylvania.

14 MR. PHILLIPS: Yes.

15 JUSTICE KAVANAUGH: And our precedents  
16 certainly grant you that right.

17 MR. PHILLIPS: Yes.

18 JUSTICE KAVANAUGH: Your friend on the  
19 other side said, actually, as a matter of  
20 original public meaning, a state could exclude  
21 out-of -- out-of-state competitors from its  
22 market. That's not my reading of the  
23 Constitution or the history.

24 MR. PHILLIPS: Well, and --

25 JUSTICE KAVANAUGH: But I -- but I

1 want to give you a chance to --

2 MR. PHILLIPS: Right. Well --

3 JUSTICE KAVANAUGH: -- explain why  
4 that's -- I mean, I thought the Constitution in  
5 part was created to create a common economic  
6 market and that was a key part of the whole  
7 enterprise.

8 MR. PHILLIPS: That -- I would --

9 JUSTICE KAVANAUGH: But he says no --

10 MR. PHILLIPS: Right.

11 JUSTICE KAVANAUGH: -- that's wrong.

12 And I want your response.

13 MR. PHILLIPS: I mean, three terms  
14 ago, this Court in Tennessee Wine Retail  
15 specifically outlined that history and said you  
16 cannot -- you know, you're not free to exclude  
17 foreign corporations from coming in and do  
18 business in your state, even in circumstances  
19 where you're talking about --

20 JUSTICE KAVANAUGH: But I think he's  
21 saying, well, you've said that, but that's not  
22 correct.

23 MR. PHILLIPS: Well, but -- but -- but  
24 the Court went through that entire history and  
25 said that that -- that conclusion was completely

1 consistent with that entire history and that, in  
2 fact, the framers would be horrified to find out  
3 that the states could balkanize the economy the  
4 way that my -- my friend would suggest in this  
5 case.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 JUSTICE BARRETT: Mr. Phillips, I just  
10 want to follow up on Justice Gorsuch and Justice  
11 Kavanaugh's questions about consent. So I get,  
12 you know, you're saying it's consent if you're  
13 sued in Pennsylvania and you actually show up,  
14 make an appearance, and defend against the suit.

15 But are you really saying that you  
16 cannot consent in advance or waive your rights  
17 in advance in any way?

18 MR. PHILLIPS: I -- I think, if you  
19 enter into a contract -- a true contract, I  
20 mean, there -- that's the other -- another  
21 example that the Court adopted where there's a  
22 contract between two private parties and you say  
23 you can choose the forum in which you're going  
24 to have this brought, and even though that  
25 wouldn't be a forum that I would otherwise have

1       been permitted to be sued, that's a -- that's a  
2       permissible exercise of that.  But that's not  
3       what we're talking about here.  I would go back  
4       --

5                   JUSTICE BARRETT:  So it's when you're  
6       with the state?  So you can't consent ex ante if  
7       the state is asking you to do so, even though  
8       you could consent not to object to general  
9       jurisdiction --

10                  MR. PHILLIPS:  Right.

11                  JUSTICE BARRETT:  -- in a private  
12       contract?

13                  MR. PHILLIPS:  Right, because it's not  
14       the state asking you to --

15                  JUSTICE BARRETT:  What about a tax  
16       break?  Like what if Pennsylvania says you can  
17       come do business, any corporation can register  
18       to come do business in our state, but, if you  
19       consent to general jurisdiction, we'll give you  
20       a tax break?

21                  MR. PHILLIPS:  Right.  It -- it still  
22       seems to me you're asking us to give up a  
23       fundamental constitutional right under these  
24       circumstances.  I mean, that's a tougher case,  
25       to be sure, and it's not this case.  I would say

1 that's not -- that's still not consent. Even  
2 though -- even though you try to dress it up in  
3 a more attractive fashion, that's not the way  
4 this Court has thought about consent up to this  
5 point.

6 And I don't see any reason to -- to  
7 continue the debate at this stage. I mean, all  
8 of the states have lined up saying we don't need  
9 consent as a mechanism for properly taking care  
10 of the interests that we need to take care of.  
11 And so the better course for the Court to follow  
12 is to say this is not worth the candle.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Jackson?

15 JUSTICE JACKSON: I had exactly the  
16 same question as Justice Barrett, and let me  
17 just ask another variation of it.

18 MR. PHILLIPS: Mm-hmm.

19 JUSTICE JACKSON: What -- what if the  
20 state or an interaction with the state is not  
21 really in it? We have -- the hypothetical is a  
22 good corporate citizen who says, I'm going to do  
23 business in Pennsylvania, the state hasn't said  
24 anything about me waiving my right, but, because  
25 I'm going to be here, I would like to announce



1 ex ante that if, you know, someone is injured  
2 or, for whatever reason, I'm going to submit  
3 myself to the -- to -- to the -- to the  
4 jurisdiction of the courts.

5 Is that a due process -- is there a  
6 due process problem there? Can -- can you waive  
7 it categorically ex ante, not in the context of  
8 the interaction with the state?

9 MR. PHILLIPS: Well, I would guess the  
10 question is whether or not that -- that kind of  
11 a statement in the abstract is in some sense  
12 enforceable against you when the time comes and  
13 you're being sued on something that otherwise  
14 fundamentally violates your due process right.

15 I would say it's -- I don't know how  
16 you would enforce that.

17 JUSTICE JACKSON: No, no, no. I'm  
18 asking --

19 MR. PHILLIPS: I don't know who would  
20 enforce it.

21 JUSTICE JACKSON: -- I'm basically  
22 asking, is that a right that can be waived? I'm  
23 trying to isolate whether it's the waiver that's  
24 the constitutional problem, meaning that  
25 personal jurisdiction can't be waived --

1 MR. PHILLIPS: No.

2 JUSTICE JACKSON: -- or whether it's  
3 the conditional nature of the state asking you  
4 to waive it in the context of your interaction  
5 that's the problem.

6 MR. PHILLIPS: So my first position  
7 has always been that I would start with this  
8 isn't consent as the Court has identified  
9 consent. But, if you -- if you get past that,  
10 if you're comfortable with some variation either  
11 of -- of the theme here or some other  
12 hypothetical and you still say there's consent,  
13 you still run -- then you run squarely into the  
14 unconstitutional conditions problem, which is  
15 that we have a fundamental due process right not  
16 to be coerced into the State of Pennsylvania.

17 JUSTICE JACKSON: So it's the  
18 conditions that's the -- that's the problem?

19 MR. PHILLIPS: Yes. At the end of the  
20 day, yes. I'm totally comfortable -- if the  
21 Court -- if the Court's more comfortable with  
22 that ground, I'm fine with that. Personally, I  
23 always thought saying this isn't consent as this  
24 Court has recognized, it's an easier way to go,  
25 but, you know, I'll win on any basis you want.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I -- I just wanted to  
4 go back to Justice Barrett's hypothetical  
5 because I might have answered it the opposite  
6 way, and what I'm thinking is this: Your  
7 argument depends on some idea of a preexisting  
8 entitlement. Actually, there are two  
9 preexisting entitlements in your argument. One  
10 is that you have a right to be -- not to be sued  
11 when you're not at home on any old suit.

12 MR. PHILLIPS: Right.

13 JUSTICE KAGAN: And another is that  
14 you have a right to access --

15 MR. PHILLIPS: Of course.

16 JUSTICE KAGAN: -- a state's markets.  
17 And that goes back to Tennessee and Justice  
18 Kavanaugh's question. What you don't have is a  
19 right to a tax break.

20 So what Justice Barrett has done in  
21 her hypothetical is to leave the world of  
22 entitlements and go into the world of something  
23 that you're not at all entitled to. So, if the  
24 state says, hey, we're going to give you a tax  
25 break if you agree to be subject to

1 jurisdiction, that's a different question.  
2 That's -- that's an exchange. That's a  
3 contract. That's fair and square because  
4 there's no entitlement to the tax break, but  
5 there is an entitlement to access every state's  
6 -- every state's markets.

7 MR. PHILLIPS: I mean, I -- I don't  
8 feel strongly. I mean, as I said to her, that's  
9 a different case. And I don't -- I don't -- I'm  
10 not -- I mean, no state has come to us asking us  
11 to give us a tax break to operate within their  
12 state. And I don't know any state that operates  
13 that way. So I'm perfectly comfortable giving  
14 that up.

15 On the other hand, I would be --

16 JUSTICE KAGAN: I think it's --

17 MR. PHILLIPS: -- I would -- I would  
18 take a hard look at that to see whether it's  
19 coerced.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
21 Phillips.

22 MR. PHILLIPS: Thank you, Mr. Chief  
23 Justice.

24 CHIEF JUSTICE ROBERTS: Mr. Gannon.

25

1                   ORAL ARGUMENT OF CURTIS E. GANNON  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING THE RESPONDENT

4                   MR. GANNON: Mr. Chief Justice, and  
5 may it please the Court:

6                   Petitioner's theory of general  
7 jurisdiction on the basis of supposed consent is  
8 inconsistent with all of this Court's recent  
9 cases about general and specific jurisdiction.  
10 It is also inconsistent with the principles  
11 underlying the Court's cases because it would  
12 allow Pennsylvania to inject itself into a suit  
13 that implicates only other states' interests.  
14 And it would threaten international comity by  
15 doing the same thing to foreign corporations  
16 doing business in the United States.

17                  My friend says all that's irrelevant  
18 under the Fourteenth Amendment's original  
19 meaning. But his reading is not supported by  
20 the historical record. In the latter half of  
21 the 19th Century, this Court repeatedly  
22 described corporate consent as valid for causes  
23 of action arising from in-state contracts and  
24 transactions. And many state courts in that era  
25 imposed such a limit, even when statutes were

1 unlimited on their face, as indeed the  
2 Pennsylvania Supreme Court did here.

3 This Court should also reject  
4 Petitioner's jurisdictional free-for all. I  
5 welcome the Court's questions.

6 JUSTICE THOMAS: We've had quite a bit  
7 of discussion about waiver and consent, and I  
8 remain confused.

9 The -- would you be able to comment or  
10 to at least give us some clarification as to how  
11 you see consent in this context?

12 MR. GANNON: I hope so. We think  
13 that, first of all, of course, a defendant can  
14 waive the personal jurisdiction objection. The  
15 Court held that in International Corporation of  
16 Ireland and -- Insurance Corporation of Ireland.  
17 And so we know that this defense, this personal  
18 jurisdiction defense, is waivable when there is  
19 actual choice.

20 The thing that is different here isn't  
21 that it's ex ante versus in an individual case.  
22 We think it's the fact that it's not an actual  
23 choice that's being made by the defendant. It's  
24 being done under the coercive pressure of the  
25 state that is otherwise withholding a

1 constitutional right that the defendant would be  
2 entitled to.

3 And that would be, as Justice Kagan  
4 was pointing out, first of all, the  
5 constitutional right not to be haled into  
6 Pennsylvania courts to litigate a -- a case that  
7 has nothing to do with Pennsylvania, under  
8 Goodyear, Daimler, all of that, under the Due  
9 Process Clause.

10 There may also be other constitutional  
11 rights under dormant Commerce Clause, as have  
12 been discussed, but aren't within the scope of  
13 the question presented.

14 JUSTICE JACKSON: Can I just ask you,  
15 though, because I -- I take Justice Kagan's  
16 point, and I think it's a very good one, that  
17 we're talking about two different kinds of  
18 constitutional rights that are being implicated.

19 But I thought that the right not to be  
20 sued was a due process right and the right to  
21 access the state's markets was coming from,  
22 like, the Daimler -- the dormant Commerce  
23 Clause. It wasn't a due process right.

24 And to the extent that you can waive  
25 the due process right, isn't that just what

1 we're talking about here? So you might still  
2 have, as your friend on the other side  
3 acknowledged, some kind of dispute or debate  
4 over the -- the -- the dormant Commerce Clause  
5 in the situation in which Pennsylvania is making  
6 it a condition, but it seemed to me, the reason  
7 why I am so confused, I'm with Justice Thomas on  
8 the confusion about waiver, is that you are  
9 talking about not allowing corporations to waive  
10 the due process right that they have in this  
11 situation.

12           And once they do that, we -- they  
13 might still not -- they, Pennsylvania -- might  
14 still not be able to do this, but it would be on  
15 other constitutional grounds, not because you're  
16 not allowed to knowingly and voluntarily waive  
17 your due process right.

18           MR. GANNON: I -- I take the point,  
19 Justice Jackson. And we -- we certainly think  
20 that there is a due process right here that's  
21 sufficient in order to decide on an  
22 unconstitutional conditions basis that this is  
23 not a voluntary consent, that this is a coerced  
24 consent and, therefore, isn't legitimate.

25           The Court's cases in this area, the



1 due process area, and even before the Fourteenth  
2 Amendment, all of the cases dealing with the  
3 question of how to solve for the problem when an  
4 out-of-state corporation doing business in a  
5 state, they have asked about principles of  
6 interstate federalism. All the Court's recent  
7 cases take interstate --

8 JUSTICE JACKSON: Yes, but --

9 MR. GANNON: -- federalism into  
10 account, not --

11 JUSTICE JACKSON: -- what do you do --  
12 what -- what do you do with the -- the -- the  
13 International Corporation of Ireland case --

14 MR. GANNON: Yeah.

15 JUSTICE JACKSON: -- which made very  
16 clear that the due process right was a personal,  
17 individual waivable thing and it was the  
18 federalism part you're talking about was not  
19 really being protected by this due process  
20 right?

21 MR. GANNON: Well, it is being  
22 protected by the underlying due process right  
23 not to be haled into a forum that has no  
24 interest in the suit. That doesn't mean that  
25 the defendant can't still waive it. And

1 Insurance Corporation of Ireland acknowledged  
2 that there's waiver. And the other -- other  
3 cases have allowed forum selection --

4 JUSTICE JACKSON: But, if you waive --

5 MR. GANNON: -- clauses.

6 JUSTICE JACKSON: -- if you waive it,  
7 you don't have the right anymore.

8 MR. GANNON: But the point -- but the  
9 point is that the -- the right was not to be  
10 haled into a forum that has no interest in the  
11 suit. And --

12 JUSTICE JACKSON: Unwillingly.

13 MR. GANNON: Unwillingly, and -- but  
14 the question of consent is one that you can't  
15 just bake that in, as in the Court's case in  
16 Birchfield, the Fourth Amendment case, the  
17 Fourth Amendment was mentioned earlier, when the  
18 -- when you could consent to a search or to the  
19 blood draw for a blood alcohol testing in  
20 Birchfield, but the Court held that it had to  
21 draw the line.

22 Once it had concluded that you had a  
23 Fourth Amendment right not to be subject to  
24 criminal proceedings without -- for -- for the  
25 -- on the basis of refusing to do a blood draw,

1 the fact that you notionally consented to that  
2 blood draw wasn't going to evade your underlying  
3 Fourth Amendment right.

4           And what I was trying to say here  
5 about the -- the right that is at issue in all  
6 of the Court's cases that have continually  
7 recognized the importance of interstate  
8 federalism, even since Insurance Corporation of  
9 Ireland, not just Goodyear and Daimler, but all  
10 of this goes back, if you go back to the first  
11 important case that we cite, Lafayette Insurance  
12 Company, which is about the question of how to  
13 deal with an out-of-state corporation, that case  
14 is talking about whether it is inconsistent with  
15 "rules of public law which secure the  
16 jurisdiction and authority of each state from  
17 encroachment by all others."

18           This has always been about recognizing  
19 that it's not just the individual defendant's  
20 right that is at stake. The original question  
21 is whether the state has a sufficient interest  
22 to inject itself to -- to entertain this dispute  
23 when maybe it should be entertained by other  
24 states.

25           And so, here, we see Virginia has

1 appeared and said this -- this shouldn't be a  
2 lawsuit in Pennsylvania. It should be a lawsuit  
3 in -- in Virginia.

4 JUSTICE GORSUCH: Mr. Gannon, so I  
5 just have three -- three questions.

6 First, the way I understand it, you're  
7 saying this is coerced consent and, therefore,  
8 isn't real consent.

9 That would seem to be counter to  
10 Pennsylvania Fire, Justice Holmes, Learned Hand,  
11 so we'd have to overrule that or somehow say  
12 it's died of its own weight or something, right,  
13 because that -- that was a statute pretty much  
14 like this.

15 MR. GANNON: We -- we don't dispute  
16 that the statute in Pennsylvania Fire was  
17 sufficiently similar here. We think that in  
18 many ways Pennsylvania Fire has been left -- has  
19 been superseded by --

20 JUSTICE GORSUCH: We have to do --

21 MR. GANNON: -- multiple doctrines.

22 JUSTICE GORSUCH: -- something with  
23 Pennsylvania Fire.

24 MR. GANNON: Yes.

25 JUSTICE GORSUCH: Okay. All right.

1           MR. GANNON: We -- we agree. We think  
2 that it -- it doesn't have vitality under  
3 multiple strands of the current -- of the  
4 Court's case law.

5           JUSTICE GORSUCH: Okay.

6           MR. GANNON: Including some that  
7 pre-date International Shoe.

8           JUSTICE GORSUCH: Got it. All right.  
9 That's one. Two, Justice Barrett's  
10 hypothetical. If there were a benefit provided  
11 to the out-of-state corporation in exchange for  
12 signing this form, would that take care of the  
13 problem and, if so, won't Pennsylvania just, and  
14 other states, just enact that and we'll be right  
15 back here three years from now?

16           MR. GANNON: Well, I think it will  
17 depend on how coercive the condition is. And  
18 so, under the unconstitutional conditions  
19 doctrine, as the Court summarized in its Koontz  
20 opinion, there needs to be a nexus and rough  
21 proportionality between the condition that's  
22 being imposed and the right that's being waived.

23           JUSTICE GORSUCH: So that -- that  
24 would be a question for another day that we'd  
25 have to decide and it might be okay.

1           MR. GANNON: I -- we -- it -- it might  
2 be okay, depending upon what is the nature of  
3 the gratuity. It's not something that you  
4 otherwise have a right to. I take the point of  
5 the hypothetical.

6           But then there still is the question  
7 of whether it's related. And so, in the case of  
8 all the waiver of criminal rights, the  
9 individual trials, which Justice Jackson  
10 mentioned earlier, those are all related.

11           This is a condition that's completely  
12 unrelated to the lawsuit by definition. Because  
13 it's a foreign cubed case --

14           JUSTICE GORSUCH: Okay.

15           MR. GANNON: -- there's no  
16 relationship between the waiver --

17           JUSTICE GORSUCH: That's my -- that's  
18 my --

19           MR. GANNON: -- and the -- and the  
20 right at issue.

21           JUSTICE GORSUCH: That leads me to my  
22 third question. Let's suppose this were a  
23 foreign squared case rather than a foreign cubed  
24 case and -- and so Pennsylvania had a resident  
25 who had been injured. Would the consent here

1 then have to be analyzed differently?

2 MR. GANNON: I think potentially yes.  
3 If the plaintiff were a resident, there probably  
4 still needs to be, under -- under the Court's  
5 recent cases, there probably still needs to be  
6 more of a state interest than just the -- the  
7 residence of the plaintiff because, otherwise,  
8 it's an easy circumvention of Goodyear, where  
9 the victims to the bus accident in France were  
10 actually North Carolina citizens, and other  
11 courts -- other cases where the Court has  
12 emphasized the ties between the defendant and  
13 the forum, but -- and there could -- there  
14 aren't just interstate federalism concerns  
15 there. I mean, just --

16 JUSTICE GORSUCH: But there would come  
17 a point somewhere between everything happening  
18 in state and everybody being in state and  
19 everything happening out of state and everybody  
20 being out of state where consent like this under  
21 your theory would be permissible?

22 MR. GANNON: Yes. We have not taken a  
23 position on that particular question, and, yes,  
24 so it might be permissible.

25 And in -- like Mr. Phillips, we

1 haven't analyzed all of the historical cases for  
2 that particular thing because we thought that  
3 that was not what was at issue in this case.

4 JUSTICE GORSUCH: Thank you.

5 MR. GANNON: But I would note that a  
6 case like Old Wayne, where -- where this Court  
7 just a few years before Pennsylvania Fire is  
8 talking about the problem of what to do with a  
9 contract of insurance that was sold in -- in  
10 another state, that was an in-state resident,  
11 and the Court still did not think that was  
12 enough.

13 The Court said we're not going to  
14 distinguish between in-state and out -- and  
15 out-of-state residents for purposes of -- of  
16 this suit because the contract --

17 JUSTICE SOTOMAYOR: Your -- your  
18 bottom line --

19 MR. GANNON: -- was transacted out of  
20 the state.

21 JUSTICE SOTOMAYOR: -- your bottom  
22 line is like Respondent: There's no real  
23 consent. We -- just going to go back to general  
24 and specific jurisdiction, because you -- I  
25 don't even know where you're getting the



1 possibility that a state could require consent  
2 if it had a specific interest. You're basically  
3 saying the Constitution -- I don't see where the  
4 Constitution says that, that you can't waive  
5 personal jurisdiction, because that everybody  
6 has accepted since the founding of the country,  
7 correct?

8 MR. GANNON: Yes, we have no dispute  
9 that -- that the defense can be waived,  
10 notwithstanding the fact --

11 JUSTICE SOTOMAYOR: All right. Now --  
12 now you have some --

13 MR. GANNON: -- that the underlying  
14 constitutional right --

15 JUSTICE SOTOMAYOR: -- now you have a  
16 different argument that either the dormant  
17 Commerce Clause, I think, or the  
18 unconstitutional conditions doctrine stop a  
19 state from saying to a corporation what?

20 MR. GANNON: It stops the state from  
21 saying to the corporation that we're going to  
22 hold up something that you have a constitutional  
23 right to, unless you make this choice that isn't  
24 a choice.

25 JUSTICE SOTOMAYOR: You know, there's

1 a --

2 MR. GANNON: If it were an actual  
3 choice --

4 JUSTICE SOTOMAYOR: -- there's a lot  
5 of states who bar certain products from a  
6 particular state. I think we look at those as  
7 equal protection issues. So you can bar states  
8 from doing business. This, we've said, you  
9 can't do this kind of condition for intrastate  
10 commerce, so the railroad could continue its  
11 interstate commerce. The only thing it can't do  
12 is intrastate commerce according to Pennsylvania  
13 Fire, correct?

14 MR. GANNON: Well, I mean, I -- I  
15 think that that question probably gets more into  
16 the question of what the right answer is under  
17 dormant Commerce Clause, which nobody's --

18 JUSTICE SOTOMAYOR: Exactly.

19 MR. GANNON: -- quite taken a position  
20 here on, but --

21 JUSTICE SOTOMAYOR: And that's why I  
22 keep going back to I don't know where you get  
23 the right not to be sued on the basis of  
24 consent, and I don't know where you find a right  
25 to unfettered access to a market. There's all

1 sorts of fettering that we permit.

2           You may argue that this is too  
3 fettered for some independent reason, like the  
4 dormant Commerce Clause, or it's an  
5 unconstitutional taking. But I don't know that  
6 you can say that either right is so absolute  
7 that the state can't rely on consent in more  
8 circumstances than specific jurisdiction would  
9 permit or general jurisdiction would permit.

10           MR. GANNON: As my answers to Justice  
11 Gorsuch were trying to say, we acknowledge that  
12 there may be some circumstances that go beyond  
13 specific jurisdiction that -- that still might  
14 be a problem for purposes of what that means for  
15 -- for -- for those cases.

16           But we think that consent needs to be  
17 an actual choice. And when it's -- when it's  
18 done with this coercion, it's not. If -- and --  
19 but that doesn't mean that it can't be done ex  
20 ante. I think that the hypothetical in the  
21 reply brief that says if the corporation  
22 required registration -- if the state said that  
23 a registration filed on blue paper would include  
24 this consent, but it didn't require registration  
25 to be filed on blue paper, as you could file on

1 blue paper, you could file on non-blue paper,  
2 there's no pressure one way or the other, one  
3 includes consent, the other doesn't, we don't  
4 think that that would be coerced consent. That  
5 would be fine, even though it's -- it's being  
6 done with the state's invitation rather than in  
7 a private negotiation on the side.

8           We think that there can be ex ante  
9 waiver but that it can't be coerced with a power  
10 of the state under the unconstitutional  
11 conditions doctrine that's going to require a  
12 question about whether there's a sufficient  
13 relationship between the right at issue that's  
14 being waived and the condition that's being  
15 imposed on it.

16           JUSTICE JACKSON: In some other  
17 circumstances where we've looked at  
18 unconstitutional conditions, the coercion is  
19 coming from another aspect of the relationship  
20 of the sovereign to the individual. So it's not  
21 just that what is being asked in the context of  
22 the particular condition is so problematic.  
23 It's -- you know, the federal government says,  
24 if you don't do this thing, we're going to  
25 withhold all of your Medicaid funding, you know,

1 which is sort of like another way to hold the  
2 person over the barrel.

3 What would you say if we thought that  
4 that was the quintessential circumstance and --  
5 and that's not happening here, right?

6 MR. GANNON: Well, I agree that that  
7 particular form of leverage isn't happening  
8 here, but our basic point is that when we're  
9 talking about a foreign cubed situation, there  
10 isn't a sufficient interest in the State of  
11 Pennsylvania in this lawsuit in order for it to  
12 justify the waiver of the right of the defendant  
13 not to be haled into this Court when there  
14 aren't sufficient ties to otherwise justify the  
15 dispute being resolved there.

16 JUSTICE JACKSON: Which is just --

17 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
18 Gannon.

19 Justice Alito, anything further?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: Well, you know I  
22 think there were sufficient ties. This is the  
23 state in which it does the most business.

24 MR. GANNON: That's --

25 JUSTICE SOTOMAYOR: More business than

1 it does in its state of registration or where it  
2 incorporated, correct?

3 MR. GANNON: I take the point, Justice  
4 Sotomayor. But plaintiff's rule is not limited  
5 to big corporations with lots of in-state  
6 facilities. And --

7 JUSTICE SOTOMAYOR: No, but that --

8 MR. GANNON: -- I don't think that  
9 there is --

10 JUSTICE SOTOMAYOR: -- but that fact  
11 may affect another case and how we apply the  
12 doctrine there.

13 MR. GANNON: Well --

14 JUSTICE SOTOMAYOR: That doesn't  
15 require us to generally --

16 MR. GANNON: -- I mean, with respect,  
17 I -- I think that that would affect the -- the  
18 outcome under specific jurisdiction in any  
19 individual case. Whether the  
20 consent-by-registration is sufficient to make  
21 the difference is a different question.

22 But I also don't think that this is a  
23 situation where we're ever going to guarantee  
24 parity between individuals and corporations  
25 because -- because tag jurisdiction is different

1 for natural persons than it is for corporations.  
2 You can't get general jurisdiction over an  
3 out-of-state sole proprietor by tagging his  
4 salesman who happens to be in the state.

5 And the case-linked jurisdiction that  
6 the Court's cases repeatedly recognized in the  
7 19th -- 19th Century, before Pennsylvania Fire,  
8 is sufficient to solve the problem of how to  
9 deal with an out-of-state corporation that has  
10 wronged an in-state resident on the basis of --  
11 of business that actually occurred in the state.

12 JUSTICE SOTOMAYOR: All right. Thank  
13 you, counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Mr. Gannon, the  
16 Solicitor General has a choice whether to  
17 participate in this suit or not, and so please  
18 don't take this as at all a criticism. It's  
19 genuine interest and curiosity.

20 What is it about this suit that has  
21 made you decide to participate? In other words,  
22 what interests of the United States or dangers  
23 to the United States do you see at stake in this  
24 suit?

25 MR. GANNON: Well, thank you, Justice

1 Kagan. In The Interests of the United States  
2 section of our brief, we pointed out not just  
3 that the excessive rules of -- of general -- the  
4 excessive availability of general jurisdiction  
5 could cause international concerns for trade  
6 with the United States and our commercial  
7 interests, but also the Petitioner had called  
8 into question the constitutionality of a federal  
9 statute, and so we thought that it was important  
10 to make sure that the Court's decision here  
11 wouldn't implicate the constitutionality of  
12 federal statutes.

13 We have several reasons at the end of  
14 our brief where we explain why the main statute  
15 that's been mentioned we think wouldn't need to  
16 be decided by the Court here. It's a case that  
17 in -- we think there that there's potential  
18 differences between the Fifth and Fourteenth  
19 Amendment, as the Court has repeatedly mentioned  
20 and reserved the question most recently in  
21 Bristol-Myers.

22 But even apart from that, we think  
23 that the Congress and the executive branch in  
24 the context at issue there have a greater  
25 ability to assess international and interstate



1 considerations. So the interstate federalism  
2 aspect drops out. So we think that the rule  
3 would be different if Congress were to come in  
4 here and try to -- to make different  
5 arrangements. The removal statute that was at  
6 issue, that was a right that was -- Congress  
7 passed.

8           The interstate federalism issues drop  
9 out in a way when Congress is the arbiter,  
10 instead of having individual states inject  
11 themselves into lawsuits that they otherwise  
12 don't have interests in.

13           So those are some of the reasons why,  
14 even though I haven't been asked about that  
15 particular statute, we wanted to make sure that  
16 you heard our arguments in this case.

17           CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19           Justice Kavanaugh?

20           Justice Barrett?

21           Justice Jackson?

22           Thank you, counsel.

23           Mr. Keller, rebuttal?

24

25

1 REBUTTAL ARGUMENT OF ASHLEY C. KELLER  
2 ON BEHALF OF THE PETITIONER

3 MR. KELLER: Thank you, Mr. Chief  
4 Justice. I won't use all five minutes.

5 I think I heard my friend say that  
6 there's no statute prior to the Fourteenth  
7 Amendment that allows this. There are so many  
8 examples I don't have time to list them all, so  
9 I'll give you two of my favorites.

10 The very first statute that we found,  
11 Virginia in 1827, this is the Petition Appendix  
12 at 251a. What I love about this statute is the  
13 legislature of Virginia enacted a law for a  
14 specific railroad company from Maryland. It  
15 didn't just make the railroad company consent to  
16 personal jurisdiction; it made the railroad  
17 company incorporate in Virginia. So talk about  
18 becoming subject to general jurisdiction. Under  
19 modern doctrine, it would be undisputed that the  
20 railroad would be fined there.

21 Then you can look at Vermont in 1862.  
22 This is in the appendix at 246a. I cite this  
23 example because a lot of statutes had similar  
24 language that said that you have to consent to  
25 be served with process as if the process had

1       been served on the principal or the company  
2       subject to the laws of this state.

3               There's lots of other illustrations of  
4       that prior to 1868 and then just after the  
5       Fourteenth Amendment was ratified.

6               I think I also heard my friend say  
7       that there's no question of coercion because  
8       this is akin to pointing a gun to the  
9       corporation's head and saying I'm going to blow  
10      your head off if you don't agree to this.

11              I take a very different view as to  
12      what sort of choices big businesses like Norfolk  
13      Southern can make. I recognize they have  
14      shareholders. They want to make profit. Losing  
15      the Pennsylvania market wouldn't be great for  
16      them. But the idea that this is akin to  
17      pointing a gun to their head, let's tie this  
18      back to flesh-and-blood people.

19              We make flesh-and-blood people honor  
20      their contracts to waive their rights to assert  
21      personal jurisdiction all the time with big  
22      companies like Norfolk Southern and Amazon and  
23      Apple.

24              And I'm not picking on them, but it's  
25      very difficult for consumers not to have access

1 to an iPhone or to get the products and services  
2 that Norfolk Southern delivers or to get Amazon  
3 to provide them with things that they need every  
4 day.

5 And that's not an ex ante/ex post  
6 dichotomy where the consumer can say I get to  
7 make a choice individually in each lawsuit about  
8 whether I'm going to waive my right to personal  
9 jurisdiction. No, it's categorical.

10 Now it's true that's between private  
11 parties and not the state. But the state  
12 ultimately has to ratify that contract because  
13 it's exercising adjudicatory authority. So it  
14 needs to say this contract is going to give me  
15 the power to issue a binding judgment in a case  
16 or controversy.

17 So I think the analogy to real people  
18 is apt and we should stop treating corporations  
19 as special.

20 Let me talk about the F-squared versus  
21 the F-cubed situation. Respectfully, I do think  
22 you have to address that. You can't just toss  
23 it for another day for two reasons.

24 One, this Court doesn't find statutes  
25 unconstitutional facially as a general rule.

1 So, to the extent Pennsylvania law still has  
2 some as-applied validity, that needs to be  
3 addressed. Obviously, I want Mr. Mallory to win  
4 and I think the statute is perfectly fine with  
5 an F-cubed situation, but I don't think you  
6 should dodge the F-squared situation, which has  
7 a lot of historical precedent and more case law  
8 admittedly applying those principles.

9 And so the other practical point I  
10 would make, you're obviously aware of this,  
11 Cooper Tire, I think, is on hold pending this  
12 case. That's an F-squared situation with a  
13 resident from Georgia.

14 So this issue is coming, and I don't  
15 think the Court should punt on some sort of  
16 technicality. We should get into the history  
17 and traditions of the country and see what's  
18 valid.

19 The final point I would make, Justice  
20 Kavanaugh, I completely agree a purpose of the  
21 union was to allow national markets. No one is  
22 disputing that Congress has power over commerce  
23 between the several states.

24 My only point is they have to  
25 affirmatively exercise it. There is no dormant

1 state of the Commerce Clause that then has  
2 preemptive effect under Article VI, Clause 2.

3 And then, back to Justice Jackson's  
4 point, the statute here talks about intrastate  
5 businesses that are doing business in  
6 Pennsylvania having to register. So that's  
7 already been accounted for.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 11:51 a.m., the case  
11 was submitted.)

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## Official - Subject to Final Review

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