

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MALLORY,)
)
) Petitioner,)
)
) v.) No. 21-1168
)
NORFOLK SOUTHERN RAILWAY CO.,)
)
) Respondent.)

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ROBERT MALLORY,)

Petitioner,)

v.) No. 21-1168

NORFOLK SOUTHERN RAILWAY CO.,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 8, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ASHLEY C. KELLER, ESQUIRE, Chicago, Illinois; on behalf of the Petitioner.

CARTER G. PHILLIPS, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

CURTIS E. GANNON, Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the 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 of -- under the Fourth Amendment. And
24 there seems to be some disagreement here as to
25 whether or not there is some right that a

1 corporation has that is outside of or beyond or
2 that is antecedent to the consent that we're
3 talking 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: Well, 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. -- 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,
13 it 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 Pennsylvan -- vania -- 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 -- I
2 guess I don't understand then. I mean, it's
3 true registration is filing a piece of paper,
4 but 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 contest -- contests that
4 Norfolk Southern actually had here, is good
5 enough for a --

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

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

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

23 MR. KELLER: Yeah. So I -- I still
24 respectfully disagree. Your precedent says
25 that, there's a difference between filing the

1 piece of paper and not filing it. The not
2 filing it but still doing business in the state,
3 that's the fiction. That's the deemed consent.

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

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

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

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

24 If they hold themselves out as a
25 Delaware company when they really aren't, they

1 haven't gone through that formality, I'm not
2 sure this Court would say that any suit under
3 the sun could be filed in Delaware and there
4 would be general jurisdiction.

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

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

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

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

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

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

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

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

1 So I don't think states like
2 Pennsylvania and the many, many others that
3 allowed foreign cubed situations were violating
4 the Constitution when nobody thinks that states
5 like New York were violating the Constitution.

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

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

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

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

1 willing to extend it to that context. But it
2 hasn't been done to my knowledge in your
3 jurisprudence.

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

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

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

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

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

1 Clause. Here is proof, I think, that that is
2 correct. Go through the following thought
3 experiment.

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

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

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

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

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

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

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

25 So am I just thinking about it in --

1 in -- in too simple -- too simplistic of a way?

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

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

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

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

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

6 MR. KELLER: Correct.

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

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

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

1 MR. KELLER: It's certainly relevant
2 to look at how --

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

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

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

25 And my friend's essential response is:

1 Well, tag jurisdiction won't happen that often
2 because it's tough to find the individual at the
3 coffee shop, at Starbucks, or whatever, where
4 the process server can meet them.

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

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

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

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

22 JUSTICE KAGAN: Yeah.

23 MR. KELLER: Yes, there is.

24 JUSTICE KAGAN: In other words,
25 there's -- there's -- there's -- none -- none of

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

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

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

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

22 JUSTICE KAGAN: You and everybody
23 else.

24 (Laughter.)

25 MR. KELLER: I can't -- I can't

1 understand what the underlying principle is that
2 unites all of the cases. Sometimes the greater
3 power includes the lesser and sometimes it
4 doesn't.

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

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

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

16 JUSTICE KAGAN: I see. I see.

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

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

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

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

25 MR. KELLER: Not all the time.

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

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

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

22 So, once you say, the greater power
23 includes the lesser in those two contexts,
24 what's the principle that then says, but you
25 can't take the further step of going to a

1 foreign cubed situation? You might be able to
2 come up with something, but I would suggest it's
3 a little ad hoc as opposed to based on, you
4 know, bedrock principle.

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

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

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

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

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

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

24 JUSTICE KAVANAUGH: How about --
25 delete the "conditioned on." Does a state have

1 the power, as we sit here today, to exclude
2 out-of-state businesses from that state's
3 market?

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

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

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

15 MR. KELLER: Yes.

16 JUSTICE KAVANAUGH: And --

17 MR. KELLER: So -- so --

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

23 MR. KELLER: Yes. So the reason I
24 accepted the premise is because the
25 unconstitutional conditions doctrine always

1 assumes you have the greater power, and then it
2 asks, can you nonetheless have this lesser power
3 even though you have the greater one?

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

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

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

23 MR. KELLER: I --

24 JUSTICE GORSUCH: Isn't that --
25 doesn't --

1 MR. KELLER: There --

2 JUSTICE GORSUCH: -- that cut the
3 Gordian knot?

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

6 JUSTICE GORSUCH: I mean, if tag
7 jurisdiction was always permissible since time
8 immemorial for persons, how can it be
9 unconstitutional condition to say corporation
10 must abide by more or less the same rules as we
11 require of individuals?

12 MR. KELLER: Not only that, Justice
13 Gorsuch, but also under Pike's balancing, we
14 will show --

15 JUSTICE GORSUCH: Oh, goodness, Pike
16 balancing.

17 (Laughter.)

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

20 (Laughter.)

21 JUSTICE GORSUCH: We'll see.

22 MR. KELLER: -- under -- under Pike's
23 balancing, the purpose of these statutes was to
24 put foreign corporations on the same footing as
25 domestic -- corporations with respect to the

1 jurisdiction of the Commonwealth's courts. So I
2 think that it would pass modern doctrine.

3 I will -- I will also say Mr. Mallory
4 reserves the right to argue below that there is
5 no dormant Commerce Clause and your precedent to
6 the contrary should be reversed.

7 JUSTICE GORSUCH: So you're saying --

8 JUSTICE ALITO: Well, if --

9 JUSTICE GORSUCH: -- that it's the
10 same -- it -- it -- it passes unconstitutional
11 conditions doctrine because it treats
12 corporations historically both like persons and
13 domestic corporations?

14 MR. KELLER: Correct.

15 JUSTICE GORSUCH: Okay.

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

19 MR. KELLER: That is correct.

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

22 MR. KELLER: Also correct.

23 JUSTICE JACKSON: Thank you.

24 JUSTICE ALITO: Are there any natural
25 persons who are present at the same time in all

1 50 states?

2 MR. KELLER: Of course not.

3 (Laughter.)

4 JUSTICE ALITO: If -- that -- if
5 excluding a foreign corporation from the state
6 would violate the dormant Commerce Clause, can
7 you prevail?

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

10 JUSTICE ALITO: Well, that really
11 wasn't the question.

12 MR. KELLER: Of course not. If -- if
13 these statutes violate the dormant Commerce
14 Clause, then they're unconstitutional under the
15 dormant Commerce Clause.

16 JUSTICE ALITO: No, I'm not telling
17 you about this statute. I'm talking about a --
18 a statute that simply bars foreign corporations
19 from operating in the state.

20 Would that violate the Constitution?

21 MR. KELLER: No, not based on the
22 original public meaning of Article I, Section 8,
23 and Article VI, Clause 2. Yes, potentially
24 under your precedent.

25 JUSTICE ALITO: One more question

1 along -- along those lines. The Solicitor
2 General cites Davis versus Farmers Co-Op Equity
3 Company, 1923, which held that a registration
4 statute similar to the one in Pennsylvania Fire
5 violates the dormant Commerce Clause. You
6 didn't address that in your brief.

7 Do you have anything to say about it?

8 MR. KELLER: I do. The reason I
9 didn't address it in my brief is because, again,
10 my friend didn't bring up the negative Commerce
11 Clause at cert or on the merits, and, obviously,
12 we're litigants to a case or controversy and the
13 United States is a very persuasive friend of the
14 court, but only a friend, but I'll address it
15 now.

16 The negative Commerce Clause precedent
17 in this area is muddied. Professor Sachs talks
18 about this in a cogent way in his amicus
19 submission. You are correct that there is that
20 case that the United States cites.

21 There's also the Terte case, which is
22 a subsequent case that distinguishes that
23 earlier case. I think Turte is 1932. And it
24 says, in a situation where you have a railroad
25 that has actually filed the necessary paperwork,

1 even though I believe that was a foreign squared
2 situation, not a foreign cubed situation, there
3 is no negative Commerce Clause violation.

4 It's a very terse opinion. Once,
5 again, I'll -- I'll be honest with the Court. I
6 can't actually understand what the distinction
7 is that the Court is drawing, but it
8 distinguishes it. It's the later in time
9 precedent of this Court.

10 And then a lot of this negative
11 Commerce Clause jurisprudence doesn't really
12 keep getting applied to these registration
13 statutes because there's a regime shift with
14 International Shoe. So that's the state of the
15 dormant Commerce Clause vis-à-vis registration
16 statutes in the 1930s.

17 JUSTICE ALITO: Norfolk Southern is a
18 big corporation, and big corporations like that
19 can litigate anyplace in the country. So the
20 practical consequences for them may not be so
21 serious.

22 But all corporations are not big
23 entities. So take the case of a small company,
24 a small corporation, someplace far away from
25 Pennsylvania, and they ship some products into

1 the state based on Internet sales. Put aside
2 the question -- put -- put aside the question of
3 specific jurisdiction.

4 What are the consequences if all of
5 the states can condition the shipment of a few
6 -- of some products into the state, which they
7 regard as doing business into the state, on that
8 little corporation's consenting to general
9 jurisdiction?

10 MR. KELLER: Yeah. So it's not clear
11 that that small business would actually have to
12 register under Pennsylvania's statute, but I'll
13 concede, to not fight the premise of your
14 question, Pennsylvania could amend its law and
15 actually require them to register. I wouldn't
16 back away from that.

17 The consequence is they'll have to
18 make a choice: Are they willing to subject
19 themselves to the general jurisdiction of the
20 commonwealth's courts or choose to forego
21 Pennsylvania's market?

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Just one question. The price of doing
3 business in Pennsylvania is to consent to
4 jurisdiction. What -- what if the price were
5 \$100,000?

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

8 CHIEF JUSTICE ROBERTS: Well, but the
9 -- but maybe the Pennsylvania statute is
10 historical precedent for that because the
11 required consent could in many cases, this one,
12 for example, result in financial consequences to
13 the corporation.

14 Why not just have the consequences up
15 -- up front, put the \$100,000 in the however
16 many millions Pennsylvania will be able to
17 extract into some fund to help people who are
18 injured by out-of-state corporations?

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

21 CHIEF JUSTICE ROBERTS: Okay.

22 (Laughter.)

23 MR. KELLER: Okay. Thank you.

24 Appreciate your indulgence.

25 Does the state require domestic

1 corporations to pay the same penalty or fine or

2 --

3 CHIEF JUSTICE ROBERTS: No.

4 MR. KELLER: That would probably be
5 unconstitutional under Hanover Fire as a
6 violation of the Equal Protection Clause.

7 CHIEF JUSTICE ROBERTS: Well, what --

8 MR. KELLER: I still don't think it
9 would be a due process violation, but it would
10 be an equal protection violation.

11 CHIEF JUSTICE ROBERTS: Well, what is
12 the difference in substance? Because being sued
13 in Pennsylvania is going to increase the costs
14 on the corporation, particularly --

15 MR. KELLER: Maybe.

16 CHIEF JUSTICE ROBERTS: -- if it
17 becomes an attractive forum since a lot of
18 corporations will have had to register.

19 MR. KELLER: I'm not sure whether it
20 will increase the costs. That's an empirical
21 question that --

22 CHIEF JUSTICE ROBERTS: Yeah.

23 MR. KELLER: -- I admittedly haven't
24 analyzed. But I think it's a -- it's a very
25 different thing to say you're going to be

1 subject to the jurisdiction of our courts.

2 Pennsylvania has a republican form of
3 government that guarantees that the oldest
4 continually operating court system in the United
5 States is going to mete out impartial justice,
6 and saying, if you want to do business here,
7 it's 100 grand, but we don't impose the same
8 requirement on domestic corporations, I -- I
9 think that's different.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE SOTOMAYOR: I have just a
14 couple questions. The complaint notes that the
15 -- Petitioner lived in Pennsylvania from 2005
16 until his retirement and that he was diagnosed
17 with cancer in 2016.

18 Was he diagnosed in Pennsylvania?

19 MR. KELLER: No.

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

22 Number two, you've answered that we
23 shouldn't address the dormant Commerce Clause
24 because it wasn't addressed by the court below,
25 and I accept that.

1 But how about the unconstitutional
2 takings condition? The constitutional scholars --
3 scholars who have put in a memo here. Professor
4 Sachs goes on the dormant Commerce Clause in
5 support of that. The constitutional scholars
6 say that in -- that there is an unconstitutional
7 condition if there's no sovereign interest that
8 is served by a condition.

9 Do we have to deal with that here, and
10 why wouldn't we deal with that here?

11 MR. KELLER: Well --

12 JUSTICE SOTOMAYOR: And what's your
13 answer to that view?

14 MR. KELLER: -- though I think the
15 dormant Commerce Clause is separate and I
16 appreciate you accepting that that is for
17 remand, I do think you have to deal with --

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

20 MR. KELLER: Okay. I was getting too
21 ambitious.

22 (Laughter.)

23 MR. KELLER: You accepted my answer.
24 I do think you have to address, Justice
25 Sotomayor, unconstitutional conditions. That

1 issue has been properly joined by the parties.

2 I think you should -- again, I very
3 much appreciate the green briefs, but, for the
4 most part, the litigants to the case or
5 controversy should define the scope of the
6 unconstitutional conditions issue that you
7 address.

8 But I don't see how the sovereign
9 interest principle applies with respect to
10 consent to personal jurisdiction. Insurance of
11 Ireland, I think, makes this point very clear
12 that once you've consented the sovereign does
13 have an interest in adjudicating the dispute,
14 and I think it's notable that that opinion for
15 the Court was penned by Justice White, who is
16 the same Justice White --

17 JUSTICE SOTOMAYOR: I'm sorry, which
18 case are you referring to?

19 MR. KELLER: Insurance of Ireland.

20 JUSTICE SOTOMAYOR: Ah. Thank you.

21 MR. KELLER: The same Justice White,
22 of course, who penned Worldwide Volkswagen,
23 which has the common language about what the Due
24 Process Clause means as an instrument of
25 interstate federalism, he says, yeah, but that

1 doesn't apply when we're talking about consent
2 because, once you've consented, whether it's
3 waiver or, you know, other language --

4 JUSTICE SOTOMAYOR: You know, in equal
5 protection, a state can impose a condition if it
6 has a rational basis to do so.

7 MR. KELLER: Correct.

8 JUSTICE SOTOMAYOR: All right. Tell
9 me what the rational basis is for requiring
10 consent when there is no sovereign interest.

11 I accept that the sovereign interest
12 might get you past specific jurisdiction needs
13 or minimum contact needs, et cetera, because
14 that's pretty clear.

15 MR. KELLER: Yeah. This answer --

16 JUSTICE SOTOMAYOR: But what's the
17 rational basis for this?

18 MR. KELLER: Forgive me for
19 interrupting you. This answer is going to sound
20 old-fashioned, but sovereigns often thought that
21 they had a very compelling interest in opening
22 the doors to their courthouse for anyone,
23 resident or foreigner, and they would mete out
24 justice if they saw a wrong and attempt to right
25 it.

1 That's one of the great gifts of the
2 Anglo-American legal system, I think. It's one
3 of the great gifts of our independent judiciary.
4 Many state constitutions write that in as one of
5 the fundamental rights of persons, that the
6 courthouse doors are going to be open to anyone.

7 So the state's interest is we want to
8 give our residents a forum against these
9 dangerous railroads or these insurance companies
10 that do things nationwide, even if it has no
11 connection to our forum. And then, exactly as
12 you said, rational basis, this isn't strict
13 scrutiny, and we're going to stay true --

14 JUSTICE SOTOMAYOR: Except you just
15 gave it away. I -- certainly, the
16 constitutional scholars talk about the fact that
17 if a jurisdiction wants to give its residents a
18 forum, that makes eminent sense. But he's not a
19 resident of Pennsylvania, and this cause of
20 action had no contact with Pennsylvania. So --

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

22 JUSTICE SOTOMAYOR: -- that -- where's
23 the sovereign interest in opening up your for --
24 forum to an out-of-state plaintiff whose cause
25 of action has no connection to the forum?

1 MR. KELLER: Respectfully, I don't
2 think I've given it away. I think that I then
3 said the state has a sovereign interest in
4 treating all people equally and not
5 discriminating against out-of-state residents.
6 So we're not going to create special privileges
7 for our own residents and give them a better
8 access to our courts; we're going to give
9 everybody the same thing based on longstanding
10 Anglo-American principles of law.

11 JUSTICE SOTOMAYOR: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

23 And I would say that that approach is
24 very inconsistent with what you just said with
25 respect to federalism interests, where the

1 approach for, you know, how many years has it
2 been, 80 years, is Pennsylvania does not have a
3 state interest here. Virginia is the state that
4 has an interest in this litigation.

5 And also inconsistent with
6 International Shoe's approach to fairness, which
7 suggests, in line with Justice Alito's
8 questions, that it's not fair and reasonable to
9 haul any company into the court of any state on
10 any ground, even if it has nothing to do with
11 the company's business in that state.

12 So I guess this goes back to the Chief
13 Justice's question of you're taking us back to
14 the enactment of the Fourteenth Amendment, but,
15 for almost a century, we've lived under rules
16 that are entirely different from the ones that
17 you're suggesting we now adopt.

18 MR. KELLER: Yeah. So a couple of
19 responses, Justice Kagan. I'll confess at the
20 outset I'm a bottom-of-the-slippery-slope kind
21 of guy and my first argument is originalism.
22 But let me try and put your mind at ease. I am
23 not suggesting that we overrule Daimler and
24 Goodyear. They're -- only my friend is asking
25 to overturn precedent today. We are not.

1 And I don't think that it would
2 actually gut those opinions. It would
3 definitely change the jurisdictional landscape,
4 but I think big businesses, in particular, the
5 ones that are national in scope, they are
6 capable of making choices about what they're
7 going to do in the wake of rules that are
8 embraced by policymakers.

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

1 This may come as a surprise given my
2 profession. I am not anti-business. I value
3 the jobs and the tax base and the services that
4 they provide to local economies, and they have
5 every right to explain to policymakers why it
6 would be a terrible idea to embrace
7 Pennsylvania's rule. I'm not even sure I fully
8 agree with Pennsylvania's rule. But it is
9 completely constitutional and compatible with
10 Daimler and Goodyear. Nothing will be
11 overturned if Mr. Mallory prevails.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 Justice Kavanaugh?

15 JUSTICE KAVANAUGH: A couple
16 questions. Only Pennsylvania has a statute like
17 this, correct?

18 MR. KELLER: Pennsylvania modernized
19 its statute, I believe, in 1978, so it does look
20 unusual.

21 JUSTICE KAVANAUGH: As of today, it's
22 a yes, isn't it?

23 MR. KELLER: Correct.

24 JUSTICE KAVANAUGH: Okay. If you win,
25 every state could have a statute like this,

1 which would mean, I assume, that every business
2 would be at home in -- throughout the country?

3 MR. KELLER: I respectfully would just
4 quibble with the nomenclature. I wouldn't call
5 it "at home." I would say they would make a
6 choice whether to consent to do business in the
7 state and, therefore, be subject to general
8 jurisdiction. But "yes" is the thrust of the
9 answer to your question.

10 JUSTICE KAVANAUGH: Okay. And Justice
11 Alito's question raised the issue of whether you
12 can win on the unconstitutional conditions issue
13 if a state can't exclude out-of-state
14 competitors from its market. I just want to
15 make sure I understood your answer to that.

16 I thought you said to him, under the
17 precedent, a state can't exclude out-of-state
18 competitors from its market, but, under the
19 original public meaning, the state could do so?
20 Is that your answer?

21 MR. KELLER: That is. And to make
22 sure that I stated it correctly, I could win
23 under the -- the Due Process Clause, which is
24 the question presented here, excepting the
25 premise that they're not allowed to do this

1 under precedent and Pike's balancing doesn't go
2 my way and lots of other things. If I lose
3 under the dormant Commerce Clause in the
4 Pennsylvania courts, of course, I lose.

5 JUSTICE KAVANAUGH: Okay. And --

6 JUSTICE SOTOMAYOR: You'll be back up
7 here?

8 MR. KELLER: I -- I will be filing for
9 cert if we lose below. That is correct.

10 JUSTICE KAVANAUGH: And why sue in
11 Philadelphia?

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: So your argument
4 about the original meaning of the Fourteenth
5 Amendment depends on a lot of statutes that you
6 cite from the time. And let's just say that I
7 might not read all those statutes the same way
8 that you do, and one batch that I have some
9 trouble with are the ones that have to do with
10 service of process.

11 I don't think those necessarily
12 represent consent to general jurisdiction
13 because having an agent who can accept process
14 in a state could be, say, for a specific
15 jurisdiction, putting aside whether or not --
16 you know, and the government says not -- the
17 ideas of specific and general jurisdiction, you
18 know -- I mean, sorry, the government says that,
19 yes, those ideas of specific and general
20 jurisdiction, un -- unlike your position, did
21 obtain at the time.

22 Why do you think that we should accept
23 your argument that these service of process --
24 service of process statutes are like consent to
25 general jurisdiction?

1 MR. KELLER: Because service of
2 process statutes require the creation of an
3 agency relationship. And so I can't imagine a
4 world where the corporation is just deemed to
5 consent under those circumstances. If the board
6 is passing a resolution saying we deputize
7 Smith, we deputize Jones as the person who's
8 going to be in the jurisdiction who can accept
9 service of all valid process for all claims, all
10 writs, all causes of action, to me, that is a
11 very clear indication that the corporation is
12 consenting. They might not want to do it. They
13 might prefer to do business without those
14 strings attached, but they know what they are
15 getting into in that species of statute. And,
16 historically, that's how courts treated them.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: Yes. Going back to
21 Justice Sotomayor's question about the sovereign
22 interest, I sort of thought that the interest
23 was apparent in the condition that so many
24 people seem to have problems with, that is, that
25 a sovereign wants to open its doors, courthouse

1 doors, to its residents if they have disputes
2 with companies that are doing business in the
3 state, that the doing business in the state part
4 of it does the important work of making it
5 related to the state, as opposed to just having
6 a statute that opens the courthouse doors to sue
7 any corporation, period.

8 I would think that would be the
9 unfair, problematic, potentially
10 unconstitutional reaching out to grab
11 corporations, but, to the extent that the
12 corporation, as you say, is agreeing
13 voluntarily, knowingly, to do business in the
14 state, I would think the state would have a very
15 significant interest in making sure that its
16 residents have a forum to bring their lawsuits.

17 Am I thinking about this in the wrong
18 way?

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

23 So absolutely for the residents. And
24 that's why I think my friend doesn't challenge
25 the statutes that say, general jurisdiction for

1 residents are fine, even if the dispute has
2 nothing to do with the forum.

3 Obviously, that wouldn't work under
4 Goodyear or Daimler, right? I'm from Florida.
5 If I get hit by a train in California, I can't
6 just sue in Florida because I'm a resident of
7 Florida, unless the train company has consented
8 to that suit.

9 But Mr. Mallory is one step removed
10 from that. Again, in the spirit of candor, he's
11 not from Pennsylvania. But I do think
12 Pennsylvania has a strong interest in saying,
13 we're going to treat everybody equally. It
14 doesn't matter if you're a plaintiff from here
15 or a plaintiff from somewhere else. There's a
16 longstanding tradition of our courthouse doors
17 being open to all.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. KELLER: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Phillips.

23 ORAL ARGUMENT OF CARTER G. PHILLIPS

24 ON BEHALF OF THE RESPONDENT

25 MR. PHILLIPS: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 I think it's worth making sure we're
3 all on exactly the same page in terms of the
4 facts of this particular case. All we have here
5 is a lawsuit by a non-resident of Vir --
6 Pennsylvania against another corporation that --
7 against a corporation that is a non-resident of
8 Pennsylvania on a cause of action that arose
9 outside of the state of Pennsylvania.

10 And -- and, under the way this Court
11 looks -- and has interpreted general
12 jurisdiction in Daimler, that would say that it
13 would violate due process to hale my client
14 before the Pennsylvania courts.

15 The only basis on which the plaintiff
16 argues you should ignore the precedent in
17 Daimler is because there was a sheet of paper
18 filled out by which my client registered to do
19 business.

20 There's been a lot of talk about doing
21 business. And there is no question that Norfolk
22 Southern does a substantial amount of business
23 in the State of Pennsylvania. But that's not
24 what the statute requires.

25 All the statute requires is that you

1 fill out a registration in order to be able to
2 do business in the state. Once having done
3 that, you have then consented to general
4 jurisdiction in all cases.

5 So, if you go back to Justice Alito's
6 hypothetical of the single guy who's -- I mean,
7 I don't know -- actually, take the case that the
8 Court used in one of the earlier decisions about
9 duck decoys in Maine.

10 If somebody wants to sue -- wants to
11 ship duck decoys from Maine into Pennsylvania,
12 hasn't even done it yet but, nevertheless,
13 decides out of -- out -- you know, out of an
14 abundance of caution I'm going to register to do
15 business in the state of Pennsylvania, what
16 you're saying is, under those circumstances, you
17 have consented to being sued on actions that
18 have nothing to do with Pennsylvania and,
19 indeed, in circumstances where you have not even
20 done any business in the State of Pennsylvania.

21 And my friend's argument on the other
22 side of that is to say: Yes, but Pennsylvania
23 has this enormous interest in allowing everyone
24 to access its courts and that that -- you know,
25 which is fine, except, first of all, in defense

1 of this litigation, the state of Pennsylvania
2 didn't defend this statute.

3 And, second of all, no other state has
4 adopted a statute like this one for the -- at --
5 and at any time within the modern memory of
6 people. And so, therefore, this state this --
7 this statutory scheme stands alone.

8 So, to answer Justice Kavanaugh's
9 question, is it alone? Yes.

10 And if this Court affirms the decision
11 of the Pennsylvania Supreme Court, the only
12 effect of that will be to end a statute that the
13 state of Pennsylvania doesn't care about and
14 that no other state has come here to defend
15 under these circumstances.

16 JUSTICE ALITO: Well, Mr. -- Mr.
17 Phillips -- is his time -- I'm sorry, have you
18 passed your time or not?

19 MR. PHILLIPS: It started flickering.
20 (Laughter.)

21 JUSTICE ALITO: Can't the same thing
22 that you just said be said about tag
23 jurisdiction? What -- what sense does it make?
24 Somebody's on a -- you know, somebody's on a
25 train between Washington and Boston and switches

1 trains in New York and somebody tags in there.

2 MR. PHILLIPS: Right. The answer to
3 that is, I don't know how much sense it makes,
4 they come from two very fundamental --
5 fundamentally different traditions. Tag
6 jurisdiction has been recognized for time
7 immemorial, continues to be recognized both at
8 the -- at the framing of the Constitution,
9 framing of the Fourteenth Amendment, and up to
10 this day it continues to be.

11 So it's not only the history,
12 tradition, and the practice that tells you that
13 tag jurisdiction is permissible. By contrast,
14 corporations, while there were these statutes,
15 first of all, if you read the Chamber of
16 Commerce brief, it'll tell you there's no
17 statute and no case prior to the Fourteenth
18 Amendment that would -- that would cover what
19 Pennsylvania does here.

20 But, even if you take the handful or
21 the smattering of statutes that come out after
22 that, that doesn't come anywhere close to the
23 kind of tradition and practice that this Court
24 relied -- or at least that Justice Scalia's
25 plurality opinion relied upon in deciding that

1 that was appropriate. And part of that is
2 because, as somebody asked, corporations
3 otherwise exist everywhere that they do
4 business.

5 And that is a fundamentally unfair
6 approach, that there is this notion of
7 interstate federalism and that these were
8 sovereigns and that we have a right to be -- to
9 be sued and to have the exercise of coercive
10 power in those states that have a legitimate
11 interest in the -- in the resolution of the
12 litigation --

13 JUSTICE JACKSON: But why isn't --

14 MR. PHILLIPS: -- on behalf of the
15 corporation.

16 JUSTICE JACKSON: -- that right
17 connected to your consent in some way? You seem
18 -- your -- your narrative doesn't seem to take
19 into account what I thought was common ground
20 about the nature of this right that personal
21 jurisdiction is an individual right, it comes
22 from the Due Process Clause and not Article III,
23 and that personal rights such as this one can be
24 waived.

25 MR. PHILLIPS: Right.

1 JUSTICE JACKSON: I mean, all the --
2 the -- the kind of background principles that
3 you just articulate exist absent consent. It
4 seems to me that you're suggesting that
5 consenting to have a -- a state court exercise
6 personal jurisdiction can't happen consistent
7 with the Constitution.

8 MR. PHILLIPS: Well, it can clearly
9 happen. Obviously, if -- if -- we could have
10 consented to this lawsuit.

11 JUSTICE JACKSON: So why -- why isn't
12 it happening in a situation in which you
13 knowingly file the registration and it's clear
14 from the law that when you file -- choose, when
15 you choose to file the registration, you're
16 thereby consenting?

17 MR. PHILLIPS: Well, I mean, this
18 Court -- I mean, that's not the normal way the
19 Court thinks about consent or waiver of
20 fundamental constitutional rights. Typically,
21 that's a more transactional inquiry.

22 And if you -- and if you look at the
23 Irish case that -- and Justice White's analysis
24 of consent, it's -- this is not the kind of
25 consent that's ever been used.

1 And, indeed, if you look at the
2 Pennsylvania statute, the Pennsylvania statute
3 says that you can be sued in Pennsylvania for
4 consent to the extent of your consent.
5 Plaintiff didn't invoke that provision. He
6 didn't say there was consent as that's
7 understood.

8 JUSTICE JACKSON: No, I understand,
9 but why does it matter? I don't -- I guess I
10 don't see the difference between Pennsylvania
11 having a law that says, if you would like to do
12 intrastate business, you have to register and,
13 per the registration, you are consenting.

14 I don't see the difference between
15 that and Pennsylvania negotiating with each
16 individual business but standing to its term,
17 this is a term in the agreement, you're --
18 you're going to do business and this is what we
19 require. In fact, I think it seems fairer to
20 have it be the law applying to everybody rather
21 than a transactional thing business by business.

22 MR. PHILLIPS: So I don't think -- I
23 mean, I understand that point. And my -- my --
24 my response remains the same, which is that's
25 not the way the Court normally thinks about

1 waiving constitutional rights. It's not the way
2 anybody thinks about consent to personal
3 jurisdiction.

4 But the -- the flip side of that is --
5 and that's -- that's the unconstitutional
6 conditions problem -- is that, okay, if you
7 think this is consent, then the question is: Is
8 that an unconstitutional condition? And since
9 we have a right not to be sued in Pennsylvania
10 on actions that have nothing to do with
11 Pennsylvania, insisting that we have to waive
12 that right --

13 JUSTICE JACKSON: Right, but we don't
14 ask that unconstitutional conditions question in
15 all of the other situations in which people
16 waive their rights, very, very significant
17 rights, in their interactions with the
18 government.

19 I'm thinking about all of the criminal
20 law rights that came up in the context of the
21 briefing here --

22 MR. PHILLIPS: Sure.

23 JUSTICE JACKSON: -- where a state
24 will condition your, you know, getting a lesser
25 recommendation at -- at sentencing, for example,

1 with you giving up your right to a trial, giving
2 up your right to appeal. I mean, those are
3 really significant things.

4 And the Court apparently doesn't ask
5 the question, is an unconstitutional condition
6 happening in that circumstance. So why would it
7 do that here?

8 MR. PHILLIPS: Because, under those
9 circumstances, and generally, you know, those
10 are the kinds of waivers you have to do in open
11 court that are knowing and voluntary and that
12 that's a choice that the litigant makes under
13 those circumstances.

14 JUSTICE JACKSON: So you're saying you
15 had no choice, it wasn't knowing and voluntary?
16 Is that --

17 MR. PHILLIPS: If we were going to do
18 business. Well, you know, I don't -- I don't
19 want to play the railroad card, but the reality
20 is, is that my -- you know, my client was doing
21 business in Pennsylvania long before the statute
22 was enacted and will -- and -- and will be
23 forced to continue to do business long after.
24 So the --

25 JUSTICE GORSUCH: Let me ask it this

1 way if I might. I'm sorry to interrupt.

2 But, if -- if we're worried about
3 fairness of consent and -- and knowledge,
4 there's no doubt the railroad understood by
5 filing that piece of paper that it was subject
6 to this law.

7 MR. PHILLIPS: Right.

8 JUSTICE GORSUCH: Okay. Right?

9 MR. PHILLIPS: Right. Although I --

10 JUSTICE GORSUCH: And -- and don't you
11 think --

12 MR. PHILLIPS: -- might have thought
13 that the statute could be construed more
14 broadly.

15 JUSTICE GORSUCH: Sure, you have the
16 right to bring the suit, of course.

17 MR. PHILLIPS: And we would have that.

18 JUSTICE GORSUCH: Yeah, this argument,
19 I understand that. But you understood the law.
20 And isn't that a -- a far way down the railroad
21 compared to the individual in Justice Alito's
22 hypothetical who's traveling on a train who has
23 no idea about tag jurisdiction?

24 So why is it unconstitutional
25 conditions when we're talking about corporations

1 but not persons?

2 MR. PHILLIPS: So it's -- it's -- it's
3 important to recognize, right, the complaint in
4 this case doesn't allege that we are a large,
5 knowledgeable corporation. It says, simply
6 because we filed a form --

7 JUSTICE GORSUCH: Fair enough. I -- I
8 take your point.

9 MR. PHILLIPS: -- that that's
10 sufficient to say --

11 JUSTICE GORSUCH: I take that point.

12 MR. PHILLIPS: -- that all of those
13 other things don't count.

14 JUSTICE GORSUCH: But -- but, if we're
15 going to treat corporations and persons alike
16 for purposes of fairness, abstract notions of
17 fairness, why is it any less fair to treat
18 corporations as subject to consenting here if we
19 treat individuals as subject to jurisdiction on
20 a tag basis?

21 MR. PHILLIPS: Be -- because --
22 because you're -- you're comparing apples and
23 oranges.

24 JUSTICE GORSUCH: I mean, it does seem
25 a little bit like due process Lochnerism for

1 corporations here, doesn't it?

2 MR. PHILLIPS: I would never say that,
3 Your Honor.

4 JUSTICE GORSUCH: Oh, I know you
5 wouldn't.

6 (Laughter.)

7 MR. PHILLIPS: But what it looks like
8 is that these -- that there is a -- is a
9 fundamentally different historic tradition
10 dealing with individuals than there is with
11 corporations. That may be --

12 JUSTICE GORSUCH: That's the best
13 we've got?

14 MR. PHILLIPS: -- good or bad, but it
15 is --

16 JUSTICE GORSUCH: Okay. So --

17 MR. PHILLIPS: -- a fact.

18 JUSTICE GORSUCH: -- so, on that, if
19 -- if corporations are really special, how about
20 the foreign squared circumstance, okay? What if
21 we had a Pennsylvania resident, okay, suing
22 about out-of-state events against your -- your
23 company, your -- your client? What then? Would
24 that be permissible consent in those
25 circumstances?

1 MR. PHILLIPS: I mean, this Court has
2 pretty consistently said that the inquiry under
3 the Due Process Clause with corporations is to
4 look at the relationship among the -- the
5 defendant, the state, and the litigation --

6 JUSTICE GORSUCH: I've just given you
7 this --

8 MR. PHILLIPS: -- and that the
9 plaintiff's residence doesn't play a role in
10 that analysis. So the answer, I think, would be
11 the -- would be the same. But, obviously --

12 JUSTICE GORSUCH: The same being no --

13 MR. PHILLIPS: -- that's not this
14 case.

15 JUSTICE GORSUCH: -- that that consent
16 would be insufficient --

17 MR. PHILLIPS: Right. That --

18 JUSTICE GORSUCH: -- too despite the
19 historical tradition there?

20 MR. PHILLIPS: Well, I don't -- I
21 don't know -- I mean, the -- the -- we have to
22 look at that historical tradition in the same
23 way we looked at the historical --

24 JUSTICE GORSUCH: That's why I'm
25 asking you.

1 MR. PHILLIPS: I mean, I haven't
2 analyzed the plaintiff's cases as carefully, you
3 know, when -- where the plaintiff was a resident
4 as I have all of the other cases, some of which
5 were --

6 JUSTICE GORSUCH: So it's at least
7 possible that consent there would be permissible
8 in your view?

9 MR. PHILLIPS: I -- I doubt it because
10 I don't -- those statutes didn't -- you know,
11 there's no tradition that lived on. I mean,
12 those cases are -- those -- those cases --

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

15 MR. PHILLIPS: -- those statutes have
16 all -- I'm sorry.

17 JUSTICE GORSUCH: There are a number
18 of states who have those statutes today and who
19 continue to enforce them.

20 MR. PHILLIPS: I'm not so sure that
21 there's --

22 JUSTICE GORSUCH: There's a circuit
23 split about that.

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

25 JUSTICE GORSUCH: State --

1 MR. PHILLIPS: -- how much evidence
2 there is about the extent to which those are
3 continuing to be enforced, whether they've been
4 challenged. My guess is that a lot of
5 defendants decide not to fight on those grounds.
6 But that has a different historical --

7 JUSTICE GORSUCH: But you're leaving
8 --

9 MR. PHILLIPS: -- pedigree.

10 JUSTICE GORSUCH: I -- I guess what
11 I'm asking isn't -- isn't -- maybe I should
12 abstract from my question. It is possible that
13 consent jurisdiction would be permissible in
14 some circumstances, even under your theory?

15 MR. PHILLIPS: Yes, it is possible.

16 JUSTICE GORSUCH: So, if -- if that's
17 true, if that's true, this doesn't implicate
18 Daimler or those cases at all, where we're
19 dealing with no consent, no question of consent
20 jurisdiction. Consent jurisdiction could exist
21 alongside International Shoe here, just as tag
22 jurisdiction exists alongside personal
23 jurisdiction in individual cases?

24 MR. PHILLIPS: Right. But the -- but
25 the truth -- the same is true for specific cases

1 like -- where the -- where the specific
2 defendant has -- has, in fact, consented, you
3 know, comes in and defends, enters into an
4 agreement with the party to defend under those
5 circumstances.

6 Of course, consent can, in fact, live
7 in the -- in the International Shoe world, but
8 that's not the circumstance we're talking about
9 here. I think the first line of defense ought
10 to be this is not consent in the sense that
11 anybody thinks about consent.

12 And to get to the point where you thay
13 -- say that this is consent in the way that you
14 normally think about it, you'd have to look at
15 the history and the tradition. And if you look
16 at that history and it -- you know, you have a
17 smattering of state laws that tell you
18 something. I think Justice Barrett was right.
19 I don't -- you know, service of process I would
20 -- I would argue doesn't get you home because
21 it's pretty clear under those circumstances that
22 they're -- want to make sure that if they have
23 one of their residents injured in their state --
24 or anybody injured in their state, that they can
25 respond to that and, again, open the courts.

1 JUSTICE SOTOMAYOR: I -- I'm sorry,
2 counselor. I -- I -- I think I'm now finally
3 understanding. You don't accept the SG's
4 position that -- that takes -- well, I think you
5 admitted that historical case law permits
6 consent-by-registration to cases arising from
7 doing business in the state, correct?

8 MR. PHILLIPS: No, not from doing
9 business.

10 JUSTICE SOTOMAYOR: If the case arises
11 from something that happened in the state.

12 MR. PHILLIPS: If there's an injury,
13 I'd -- but you don't need consent --

14 JUSTICE SOTOMAYOR: Exactly.

15 MR. PHILLIPS: -- in that situation.

16 JUSTICE SOTOMAYOR: But -- so those
17 statutes you're saying are -- are unnecessary,
18 having consent statutes that require you to have
19 --

20 MR. PHILLIPS: That's right. Justice
21 Sotomayor --

22 JUSTICE SOTOMAYOR: You're saying --

23 MR. PHILLIPS: Right. I think those
24 --

25 JUSTICE SOTOMAYOR: So what's the --

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

3 JUSTICE SOTOMAYOR: So what you're --
4 basically, the position you're taking is, even
5 when the state has a separate sovereign interest
6 the way the government has argued, like giving
7 its residents a forum, you're basically saying
8 due process would not permit that express
9 consent?

10 MR. PHILLIPS: Well, I actually would
11 --

12 JUSTICE SOTOMAYOR: And --

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

16 JUSTICE SOTOMAYOR: All right. Can I
17 ask you -- you know in Daimler that I disagree
18 with the Court's jurisprudence in the
19 non-consent there.

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

22 (Laughter.)

23 JUSTICE SOTOMAYOR: It's very
24 doubtful.

25 (Laughter.)

1 JUSTICE SOTOMAYOR: And I'll tell you
2 why, because your case shows it to me. We have
3 one of the amicus that tells us that you had
4 more miles of railroad track and more employees
5 in Pennsylvania than any other state, even
6 Virginia. So except for the fiction of you
7 having your incorporation in Virginia and you
8 choosing artificially to say, this is my
9 principal place of business, in fact, you are
10 doing the most business of anywhere else in
11 Pennsylvania.

12 So what logic does it make to me to
13 say that you cannot consent, because you were
14 already doing business in Pennsylvania, you had
15 three railroad yards, you've had miles and miles
16 of trains and miles and miles and employees, how
17 can I say you were coerced --

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: -- into signing a
20 general jurisdiction waiver? I can see where we
21 might have a doctrine that says, in an
22 individual application, there's coercion, but I
23 can't see how we could say there's coercion for
24 a company in your situation.

25 MR. PHILLIPS: Well, I don't think

1 there's any question about the coercion. I
2 mean, we are required to register in order to do
3 business there. We were already doing business
4 there.

5 JUSTICE SOTOMAYOR: Well, you've
6 already said the --

7 MR. PHILLIPS: And as a condition of
8 -- I'm sorry.

9 JUSTICE SOTOMAYOR: -- you've already
10 said, the state can waive -- can coerce you into
11 signing a waiver for an accident that happens in
12 Pennsylvania because they -- they don't need the
13 waiver.

14 MR. PHILLIPS: They don't need the
15 waiver.

16 JUSTICE SOTOMAYOR: All right.

17 MR. PHILLIPS: They don't need
18 consent.

19 JUSTICE SOTOMAYOR: So you're
20 basically saying, there's no -- there's no
21 sovereign right to ask for any consent ever?

22 MR. PHILLIPS: Ex ante, yes, I think
23 that's exactly the position I would take. I
24 would say, after the --

25 JUSTICE GORSUCH: Well, I --

1 MR. PHILLIPS: -- after the event and
2 the litigation that might arise, it would be
3 perfectly okay.

4 Can I -- can I make one other point in
5 response to --

6 JUSTICE GORSUCH: Please.

7 MR. PHILLIPS: -- Justice Sotomayor,
8 though, Justice Gorsuch?

9 JUSTICE GORSUCH: Yeah. Please.

10 MR. PHILLIPS: Just, you know, I
11 recognize that -- that as a -- as a matter of
12 judicial notice, you can say that Norfolk
13 Southern has these contacts with the -- with the
14 state of Pennsylvania, but realize that none of
15 that is in the complaint in this case. There is
16 no allegation of anything other than that we do
17 business in an interstate commerce.

18 And, therefore, the only basis on
19 which jurisdiction is -- is -- is invoked in
20 this particular case is the fact of having
21 filled out a registration form.

22 So I would argue that even if the
23 Court -- even if you individually want to think
24 about a case somewhere down the line where
25 that's the issue, I would say, in this

1 particular case, those facts are irrelevant to
2 the proper outcome of this because that's not
3 the theory on which the plaintiff brought the
4 case. Candidly, it can't be the theory on which
5 -- on which the Petitioner is going to try to --
6 try to set aside what the Supreme Court of
7 Pennsylvania did in this case. I apologize.
8 Thank you for allowing me to --

9 JUSTICE BARRETT: No, go ahead.

10 JUSTICE GORSUCH: No, please.

11 JUSTICE BARRETT: If you have -- if
12 you have a --

13 JUSTICE GORSUCH: No, no.

14 JUSTICE BARRETT: Okay. Mr. Phillips,
15 would it make a difference to you if the
16 registration form had been explicit about the
17 consent? So, you know, you pointed out, listen,
18 all we did was fill out a registration form.
19 Justice Kagan pointed out earlier to your friend
20 on the other side that it might be a different
21 case if there was a form that had some explicit
22 consent. Would it matter to you?

23 MR. PHILLIPS: No, it wouldn't matter
24 to me. Maybe it -- it -- I mean, it would -- it
25 would make it more arguable as to whether the

1 consent existed. It would still put you
2 squarely in the position where it's consent
3 that's -- that's extorted by the state in order
4 to -- in order to provide -- in order to -- to
5 litigate issues where the sovereign has no
6 interest because there's no contact otherwise
7 with the state.

8 JUSTICE BARRETT: But what if the
9 state gives a benefit and says, corporations
10 that consent to general jurisdiction, we're
11 going to waive the registration fee -- let's say
12 it's a thousand dollars -- you don't have to pay
13 the fee as long as you consent?

14 MR. PHILLIPS: At the end of the day
15 -- I mean, I don't know at what point you can
16 say that it sort of washes out. But, at the end
17 of the day, you're not allowed -- you know, the
18 -- the unconstitutional conditions principle
19 says, you cannot insist that we give up our
20 right not to have to be haled into court by the
21 coercive powers of the state of Pennsylvania,
22 Commonwealth of Pennsylvania.

23 JUSTICE JACKSON: But why is that
24 insisting, Mr. Phillips? I don't understand. I
25 mean, it sounds like an exchange. It sounds

1 like the state is saying, if you would like to
2 do business in the state, you don't have to do
3 business in the state, you can, as your friend
4 on the other side said, make a choice. You
5 don't have to come here.

6 So it's not coercive. It's just a
7 term in the agreement that we're making with the
8 businesses that come to our state. And I
9 understand it's not negotiated individually,
10 but, surely --

11 MR. PHILLIPS: Sure.

12 JUSTICE JACKSON: -- surely, a
13 business who doesn't want to be held to that
14 standard could go to the legislature and ask for
15 an exemption. I mean, there's an option -- you
16 have options to try to get around it if you
17 would like to, but you don't have to do business
18 in the state. So why is it coercive?

19 MR. PHILLIPS: So, again, I -- I'm a
20 little reluctant to play the railroad card here,
21 but it's not as though we actually have a choice
22 whether or not we're going to do business in the
23 state of Pennsylvania.

24 The federal government will require us
25 to continue to do business in the State of

1 Pennsylvania. And the State of Pennsylvania
2 will, although it doesn't defend this statutory
3 scheme here today, the State of Pennsylvania
4 under the plaintiff's theory is that that
5 requires us to give up our rights under Daimler.

6 JUSTICE JACKSON: But, here -- here,
7 it's only intrastate, though, right? I mean,
8 you just -- you just articulated an interstate
9 circumstance, where the federal government is
10 going to make you continue to go interstate, but
11 I thought the condition here only related to
12 intrastate business.

13 MR. PHILLIPS: Well --

14 JUSTICE JACKSON: Am I wrong about
15 that?

16 MR. PHILLIPS: -- I -- I just -- well,
17 it doesn't require you to do business at all.
18 It only requires -- it only says if you
19 register --

20 JUSTICE JACKSON: No, I'm sorry.

21 MR. PHILLIPS: -- to do business.

22 JUSTICE JACKSON: The waiver -- the
23 waiver extends only -- the condition only
24 relates to -- to companies that want to do
25 intrastate business. That's what I thought.

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

5 We -- we -- I mean, the idea that we
6 voluntarily accepted this when we -- when we
7 checked that box is simply -- is not the way I
8 think of -- of waiver and consent under any
9 circumstance. But, if it is -- if you think of
10 it that way, it's still an unconstitutional
11 condition then.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas?

14 JUSTICE THOMAS: Mr. Phillips, I am
15 still -- I'm just not very good at metaphysics,
16 and --

17 MR. PHILLIPS: I'm not very good at
18 physics either.

19 JUSTICE THOMAS: Yeah. Well, no, I
20 was good at physics. It's just metaphysics that
21 were a problem.

22 (Laughter.)

23 MR. PHILLIPS: Then you're way ahead
24 of me.

25 JUSTICE THOMAS: But the -- the -- we

1 -- you said that you, if you had consented, that
2 you could consent to jurisdiction.

3 MR. PHILLIPS: Yes, if there is such a
4 thing.

5 JUSTICE THOMAS: So there's -- but you
6 can't -- so you're going -- we're going back and
7 forth between waiver and consent ex ante. You
8 said that's what you're opposed to.

9 And, at some point, some of the
10 argument it sounds as though, well, this wasn't
11 a voluntary waiver.

12 MR. PHILLIPS: Right.

13 JUSTICE THOMAS: And then, at other
14 times, it sounds, well, we can agree to this and
15 it's not so much a waiver, but it seems to
16 satisfy due process requirements.

17 What I'd like you to do for me is to
18 tell me what the antecedent rights are that the
19 railroad has that it could possibly be waiving
20 and whether or not you are waiving those rights
21 or you are consenting not to assert those
22 rights. It may not be a difference.

23 MR. PHILLIPS: Right.

24 JUSTICE THOMAS: But I think if we
25 could at least be -- you started by saying let's

1 be on common ground. That would help me at
2 least understand where we are a little better.

3 MR. PHILLIPS: So, Justice Thomas, the
4 way I would articulate it is it is our right not
5 to be coerced to appear before a court, except
6 by lawful judicial power. And this Court has
7 made clear that lawful judicial power in dealing
8 with a corporation is to be -- is to be haled
9 into a court where it is at home.

10 And whatever else Pennsylvania may be,
11 Justice Sotomayor's views notwithstanding, we
12 are not at home in Pennsylvania. And that's the
13 right we've been asked to give up, is -- is the
14 right not to be sued anywhere except where we
15 are at home.

16 JUSTICE THOMAS: So are we -- are --
17 is this really about whether or not you are
18 voluntarily consenting or you voluntary --
19 involuntarily consented? Because you've said
20 you could sign an agreement today or you could
21 write a waive -- a consent form or sign a
22 consent form today and you could bypass the
23 jurisdictional problems.

24 MR. PHILLIPS: Right.

25 JUSTICE THOMAS: So you -- what the

1 other side is saying, Petitioner is saying is
2 you signed that form ex ante and that gets you
3 there.

4 MR. PHILLIPS: Right. And --

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

8 MR. PHILLIPS: Right. My -- I mean,
9 my -- my first line of response would be, that's
10 not consent as this Court has traditionally
11 thought about consent in this context. If you
12 -- if you look at the -- the Ireland case, where
13 the Court goes through all of the versions of
14 consent to personal jurisdiction, this one
15 doesn't come up.

16 But, second, if I'm wrong about that,
17 if you want to extend consent beyond those that
18 were articulated by the Court already, I would
19 say that's an unconstitutional condition.

20 JUSTICE THOMAS: What would it look
21 like? What would -- if -- if you had signed
22 this -- and then I'll be done -- what would that
23 adequate consent look like?

24 MR. PHILLIPS: Well, what I think of
25 as adequate consent is if we had defended this

1 litigation on the merits in the Commonwealth of
2 Pennsylvania.

3 JUSTICE THOMAS: No, I -- I mean, the
4 -- the -- the form, when we're talking about a
5 form to do business in Pennsylvania. If there
6 was such a way -- if there was a way to consent
7 that is agreeable to you, let's say you're a
8 generous railroad company and you want to be
9 fair to -- to -- to -- to these litigants, even
10 more than fair, how would that form look?
11 Because what I'm hearing you say is this is
12 inadequate.

13 MR. PHILLIPS: Well, clearly, if all
14 you have to do is check a box that says I
15 register to do business --

16 JUSTICE THOMAS: No, we've got that.
17 We've passed that.

18 MR. PHILLIPS: -- you know, and that's
19 why I would say -- say that's not adequate
20 consent. What would be adequate consent? The
21 flip side of it is, if -- if being sued, I say,
22 good, fine. I'm a generous railroad. I'm happy
23 to be sued in a Commonwealth that you're
24 comfortable with. I can -- I can consent under
25 those circumstances.

1 Wherein between those two is -- is
2 hard for me to say. Anything ex ante I -- I
3 have problems with, Your Honor.

4 JUSTICE THOMAS: Yeah.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: Well, I think the
7 question is what you would say if Pennsylvania
8 or another state required you as a condition of
9 doing business in the state to sign something
10 that says, I will not contest personal
11 jurisdiction in this state under any
12 circumstances.

13 MR. PHILLIPS: Right. And I would say
14 in that, that that -- that was extorted out of
15 me as a condition of being able to do business,
16 that they had no right to under those
17 circumstances, and, therefore, it's still
18 unconstitutional.

19 But I agree. I mean, I -- I -- you
20 know, it's harder to say that that's not
21 consent, but it doesn't make it constitutionally
22 permissible.

23 JUSTICE ALITO: So your argument --
24 you really have to argue that this is a right
25 that you can't be forced to waive. Lots of

1 rights are waivable.

2 MR. PHILLIPS: Right. But you should
3 be --

4 JUSTICE ALITO: And this one you have
5 to argue --

6 MR. PHILLIPS: -- but most rights are
7 not -- are not waivable by coercion. You know,
8 you can't put a gun to the person's head and
9 say, you know, Fourth Amendment -- give up your
10 Fourth Amendment rights or I blow your head off.
11 Right?

12 JUSTICE ALITO: A big part of -- one
13 other question -- a big part of Mr. Keller's
14 argument is Pennsylvania Fire, and we haven't
15 discussed that at all.

16 MR. PHILLIPS: Right.

17 JUSTICE ALITO: Can we rule in your
18 favor without overruling Pennsylvania Fire?
19 When I -- I read your brief and the Solicitor
20 General's brief, I count up, I don't know, five
21 or six different --

22 MR. PHILLIPS: Distinctions?

23 JUSTICE ALITO: -- potential ways of
24 getting around Pennsylvania Fire. What's the
25 best one?

1 MR. PHILLIPS: Well, I -- I -- I mean,
2 you -- you can say that there was a -- a -- a
3 clearer document in that case, á la what Justice
4 Thomas said, and that that's the basis for
5 saying that there was consent there and there's
6 not consent here. That's -- that's a legitimate
7 ground.

8 If you get past that, I think it's
9 easier to say, frankly, that the Court already
10 overruled Pennsylvania Fire when it said in
11 Daimler that if you -- if you look at the cases
12 between Pennoyer and International Shoe that are
13 based on the Pennoyer territoriality concept,
14 those cases are no longer valid, this one would
15 fall squarely in that camp.

16 JUSTICE SOTOMAYOR: How? Given how --

17 CHIEF JUSTICE ROBERTS: I'm sorry,
18 we'll -- I'm sorry --

19 JUSTICE SOTOMAYOR: I'm sorry.

20 CHIEF JUSTICE ROBERTS: -- we'll be
21 --

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

24 MR. PHILLIPS: I -- I didn't hear the
25 question anyway. I apologize.

1 CHIEF JUSTICE ROBERTS: Well, Justice
2 Alito, are you --

3 JUSTICE ALITO: No, I'm done. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Okay. Justice
6 Sotomayor?

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

9 My question was, how? Daimler
10 International -- Daimler was a non-consent case.
11 All of the cases that you rely upon for specific
12 jurisdiction and general jurisdiction are all
13 non-consent statute cases. So how can we say
14 that overrules Pennsylvania?

15 MR. PHILLIPS: Well, what the Court --
16 I mean, what the Court said in Daimler, and as
17 repeated in other cases, is that all of the --
18 all of the precedents between Pennoyer and
19 International Shoe, all of them, that ultimately
20 rely on some basic concept of territoriality --

21 JUSTICE SOTOMAYOR: But not one -- but
22 not one of them has dealt with consent. That
23 was always put in a separate category.
24 International Shoe was basically about when
25 there was no consent.

1 MR. PHILLIPS: Well, right. But I
2 think the -- the flip side of the question then
3 goes to, what -- what is consent within the
4 meaning of that? And I would argue that this is
5 not consent under that.

6 JUSTICE SOTOMAYOR: Mr. Phillips, one
7 last question.

8 MR. PHILLIPS: And, clearly, I didn't
9 mean to overrule the idea that a defendant can
10 come into court and say, fine, I'm happy to --
11 I'm happy to defend this case in this court,
12 clearly not.

13 JUSTICE SOTOMAYOR: One last question.

14 MR. PHILLIPS: I apologize.

15 JUSTICE SOTOMAYOR: I know that
16 there's some of my colleagues who believe that
17 every state will pass a law like Pennsylvania,
18 but every state had that opportunity at the
19 ratification and very few did. Others had more
20 limitations.

21 I suspect today that very crowded
22 courts are not going to want for cubed cases to
23 come to them and will continue having their laws
24 as they are. And we have other doctrines like
25 forum non conveniens and choice of law that will

1 guard -- will present guardrails.

2 I know, in your brief, you say they're
3 not adequate constitutional guardrails, but, if
4 we say consent is consent, then -- and we don't
5 find an unconstitutional conditions case, those
6 doctrines will provide some guardrails, won't
7 they?

8 MR. PHILLIPS: Well, they -- to -- to
9 some extent. And -- and I don't -- I don't
10 doubt you're right that it's improbable that all
11 50 states would necessarily adopt this view.

12 But, as -- as the business interests
13 have said to this Court, the more concerning
14 portion of this would be those few states that
15 say we're going to open our doors to the -- to
16 the huddled masses to come in yearning for a
17 place to litigate in a -- in a popular forum
18 from the plaintiffs' perspective. And that, it
19 seems to me, goes right to the core of the right
20 not to be haled into a court coerced against
21 your will under these circumstances.

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?

25 JUSTICE GORSUCH: I just want to make

1 sure I understand where we're at. Consent lives
2 on after International Shoe, right?

3 MR. PHILLIPS: Yes.

4 JUSTICE GORSUCH: Okay.

5 MR. PHILLIPS: Some version of
6 consent.

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

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

17 MR. PHILLIPS: Yes, Your Honor. And
18 -- and -- and -- and my answer to that would be,
19 if Justice Holmes were here today, he would
20 recognize that --

21 JUSTICE GORSUCH: He would get it
22 right this time?

23 MR. PHILLIPS: Exactly.

24 (Laughter.)

25 MR. PHILLIPS: The -- the benefit of a

1 little better advocacy.

2 JUSTICE GORSUCH: I appreciate your
3 candor.

4 (Laughter.)

5 JUSTICE KAVANAUGH: Just to follow up
6 on Justice Gorsuch's question, when he says,
7 consent lives on, you mean, if you're sued in
8 Philadelphia and you show up and say I have a
9 right not to be sued here, but, nonetheless, I'm
10 going to let it go --

11 MR. PHILLIPS: Right. That --

12 JUSTICE KAVANAUGH: -- and that's what
13 you mean by consent --

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

15 JUSTICE KAVANAUGH: -- lives on?

16 MR. PHILLIPS: Yes, that's consent
17 that lives on.

18 JUSTICE KAVANAUGH: And your point
19 about consent and waiver more generally is that,
20 you know, it's involuntary, it's coerced, that
21 the terms "consent" and "waiver" are not
22 appropriate terms --

23 MR. PHILLIPS: Right. Those --

24 JUSTICE KAVANAUGH: -- for what's
25 going on?

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

3 JUSTICE KAVANAUGH: Yeah. But that
4 depends on -- I think, on a premise that we were
5 talking about or I was talking about with your
6 friend on the other side, which is that you have
7 a right to do business in Pennsylvania.

8 MR. PHILLIPS: Yes.

9 JUSTICE KAVANAUGH: And our precedents
10 certainly grant you that right.

11 MR. PHILLIPS: Yes.

12 JUSTICE KAVANAUGH: Your friend on the
13 other side said, actually, as a matter of
14 original public meaning, a state could exclude
15 out-of -- out-of-state competitors from its
16 market. That's not my reading of the
17 Constitution or the history.

18 MR. PHILLIPS: Well, and --

19 JUSTICE KAVANAUGH: But I -- but I
20 want to give you a chance to --

21 MR. PHILLIPS: Right. Well --

22 JUSTICE KAVANAUGH: -- explain why
23 that's -- I mean, I thought the Constitution in
24 part was created to create a common economic
25 market and that was a key part of the whole

1 enterprise.

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

3 JUSTICE KAVANAUGH: But -- but he says

4 no --

5 MR. PHILLIPS: Right.

6 JUSTICE KAVANAUGH: -- that's wrong.

7 MR. PHILLIPS: I --

8 JUSTICE KAVANAUGH: And I want your

9 response.

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

17 JUSTICE KAVANAUGH: But I think he's
18 saying, well, you've said that, but that's not
19 correct.

20 MR. PHILLIPS: Well, but -- but -- but
21 the Court went through that entire history and
22 said that that -- that conclusion was completely
23 consistent with that entire history and that, in
24 fact, the framers would be horrified to find out
25 that the states could balkanize the economy the

1 way that my -- my friend would suggest in this
2 case.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

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

12 But are you really saying that you
13 cannot consent in advance or waive your rights
14 in advance in any way?

15 MR. PHILLIPS: I -- I think, if you
16 enter into a contract -- a true contract, I
17 mean, there -- that's the other -- another
18 example that the Court adopted where there's a
19 contract between two private parties and you
20 say, you can choose the forum in which you're
21 going to have this brought, and even though that
22 wouldn't be a forum that I would otherwise have
23 been permitted to be sued, that's a -- that's a
24 permissible exercise of that. But that's not
25 what we're talking about here. I would go back

1 --

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

7 MR. PHILLIPS: Right.

8 JUSTICE BARRETT: -- in a private
9 contract?

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

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

18 MR. PHILLIPS: Right. It -- it still
19 seems to me you're asking us to give up a
20 fundamental constitutional right under these
21 circumstances. I mean, that's a tougher case,
22 to be sure, and it's not this case. I would say
23 that's not -- that's still not consent. Even
24 though -- even though you try to dress it up in
25 a more attractive fashion, that's not the way

1 this Court has thought about consent up to this
2 point.

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: I -- I had exactly
13 the same question as Justice Barrett, and let me
14 just ask another variation of it.

15 MR. PHILLIPS: Mm-hmm.

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

1 jurisdiction of the courts.

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

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

12 I would say it's -- I don't know how
13 you would enforce that.

14 JUSTICE JACKSON: No, no, no. I'm
15 asking --

16 MR. PHILLIPS: I don't know who would
17 enforce it.

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

23 MR. PHILLIPS: No.

24 JUSTICE JACKSON: -- or whether it's
25 the conditional nature of the state asking you

1 to waive it in the context of your interaction
2 that's the problem.

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

15 JUSTICE JACKSON: So it's the
16 conditions that's the -- that's the problem?

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

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

11 MR. PHILLIPS: Right.

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

14 MR. PHILLIPS: Of course.

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

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

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

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

14 On the other hand, I would be --

15 JUSTICE KAGAN: I think it's --

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

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

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

23 CHIEF JUSTICE ROBERTS: Mr. Gannon.

24

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 I -- 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. The -- and the other --
3 other 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 re --
7 recognized the importance of interstate
8 federalism, even since Insurance Corporation of
9 Ireland's, not just Goodyear and Daimler, but
10 all of this goes back, if you go back to the
11 first important case that we cite, Lafayette
12 Insurance Company, which is about the question
13 of how to deal with an out-of-state corporation,
14 that case is talking about whether it is
15 inconsistent with "rules of public law which
16 secure the jurisdiction and authority of each
17 State from 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 -- there -- there
2 -- it -- it might be okay, depending upon what
3 is the nature of the gratuity. It's not
4 something that you otherwise have a right to. I
5 take the point of 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 -- I think potentially
3 yes. If the plaintiff were a resident, there
4 probably still needs to be, under -- under the
5 Court's recent cases, there probably still needs
6 to be more of a state interest than just the --
7 the residence of the plaintiff because,
8 otherwise, it's an easy circumvention of
9 Goodyear, where the victims to the bus accident
10 in France were actually North Carolina citizens,
11 and other courts -- other cases where the Court
12 has emphasized the ties between the defendant
13 and 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 -- 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
4 the 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 -- that question probably gets
16 more into the question of what the right answer
17 is under dormant Commerce Clause, which nobody's
18 --

19 JUSTICE SOTOMAYOR: Exactly.

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

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

1 to unfettered access to a market. There's all
2 sorts of fettering that we permit.

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

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

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

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

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

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

1 withhold all of your Medicaid funding, you know,
2 which is sort of like another way to hold the
3 person over the barrel.

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

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

17 JUSTICE JACKSON: Which is just --

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

20 Justice Alito, anything further?

21 Justice Sotomayor?

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

25 MR. GANNON: That's --

1 JUSTICE SOTOMAYOR: More business than
2 it does in its state of registration or where it
3 incorporated, correct?

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

8 JUSTICE SOTOMAYOR: No, but that --

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

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

14 MR. GANNON: Well --

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

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

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

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

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

14 JUSTICE SOTOMAYOR: All right. Thank
15 you, counsel.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

1 suit?

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

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

24 But even apart from that, we think
25 that the Congress and the executive branch in

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

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

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

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 Thank you, counsel.

25 Mr. Keller, rebuttal?

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 six -- 1868 and then just after
5 the 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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