IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 EAP 2021

ROBERT MALLORY, Appellant,

v.

NORFOLK SOUTHERN RAILWAY CO., Appellee.

Norfolk Southern Railway Company's Application to Set a Briefing Schedule on Remand from the U.S. Supreme Court or, Alternatively, to Exercise King's Bench or Extraordinary Jurisdiction

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Appeal from the Order Entered February 7, 2018
in the Court of Common Pleas of Philadelphia County,
Civil Division at No: 170901961

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INTRODUCTION

On remand from the U.S. Supreme Court, this Court should decide a question that Norfolk Southern preserved and the Supreme Court reserved: Whether, as applied here, Pennsylvania's assertion of general personal jurisdiction based solely on "qualification as a foreign corporation," 42 PA. C.S. § 5301(a)(2)(i), violates the U.S. Constitution's Commerce Clause. The answer is yes. This answer follows from reasoning this Court already adopted, which a majority of the Supreme Court accepted. And a prompt answer is urgently needed to provide guidance to courts and litigants before the Commonwealth is swamped in foreign litigation.

This Court unanimously held that due process bars states from asserting general personal jurisdiction based solely on a foreign corporation's registration to do business. *See Mallory v. Norfolk S. Ry.*, 266 A.3d 542, 551 (Pa. 2021) (*Mallory I*). A key reason for that holding was that "Pennsylvania has no legitimate interest in a controversy," like this one, "with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here." *Id.* at 567. The U.S. Supreme Court disagreed with this Court's due process holding by a 5–4 vote. *See Mallory v. Norfolk S. Ry.*, 143 S. Ct. 2028, 2030 (2023) (*Mallory II*). But five Justices agreed with—and no Justice questioned—this Court's conclusion that cases like this implicate no legitimate state interest. *See id.* at 2054 (Alito, J., concurring); *id.* at 2058 & n.1 (Barrett, J., dissenting). Justice Alito, who supplied the

controlling vote, explained that this problem is better addressed under the dormant Commerce Clause, using reasoning much like this Court already adopted. *See id.* at 2047, 2054 (Alito, J., concurring). And the Supreme Court made clear that Norfolk Southern had preserved the "alternative argument that Pennsylvania's statutory scheme as applied here violates [the] dormant Commerce Clause," which "remains for consideration on remand." *Id.* at 2033 n.3 (majority).

This Court should address that alternative argument now. As explained below, the Court has jurisdiction to do so under 42 PA. C.S. § 722(7), as this remains an appeal from a trial court ruling invalidating a state statute on constitutional grounds. If somehow the Court's exclusive jurisdiction under Section 722(7) has terminated, it should exercise its King's Bench or extraordinary jurisdiction to address the dormant Commerce Clause issue.

Exercising jurisdiction here is appropriate because the Commonwealth's courts and litigants urgently need guidance on this issue. After the Supreme Court's decision in *Mallory II*, every potential litigant that wants to sue a national or multinational corporation that does business in Pennsylvania (or is merely registered to do so) now has reason to think they can file suit here—even if their claim has no link to the Commonwealth. Countless out-of-state and international companies do business here, and Pennsylvania is now an attractive forum for any suits against all of them. Before the Commonwealth's trial courts are deluged with lawsuits in which

the people of Pennsylvania have no interest, this Court should resolve the Commerce Clause issue presented here. Doing so will provide much-needed guidance by erecting some basic guardrails around the Commonwealth's assertion of jurisdiction over suits with no connection to Pennsylvania.

On the merits, this Court's original reasoning—which the Supreme Court did not disturb—goes a long way toward resolving this Commerce Clause question. This Court rightly held that "Pennsylvania has no legitimate interest" in a wholly foreign case like this one. *Mallory I*, 266 A.3d at 567. Justice Alito and the four dissenting Justices agreed with that view, and the plurality did not question it. This point is essentially dispositive because the Commerce Clause invalidates state laws (or applications thereof) that significantly burden interstate commerce without "advanc[ing] a legitimate local public interest." *See Mallory II*, 143 S. Ct. at 2053 (Alito, J., concurring). And there is little question that seizing jurisdiction over all suits against registered foreign corporations burdens interstate (and international) commerce and deters cross-border economic activity. Thus, resolving this particular case merely requires recognizing that this Court's original reasoning applies equally under the dormant Commerce Clause. In any event, Pennsylvania's scheme also effectively discriminates against interstate commerce by stripping foreign corporations of a (constitutionally based) protection they enjoy as a result of being based elsewhere, and thus favoring in-state businesses. *See id.*

The Court should therefore retain or exercise jurisdiction and set a schedule for briefing and oral argument.

BACKGROUND

Robert Mallory sued Norfolk Southern Railway under the Federal Employers' Liability Act in the Philadelphia Court of Common Pleas in September 2017. At the time, he lived in Virginia, and Norfolk Southern was incorporated and headquartered there. *Mallory I*, 266 A.3d at 551. Mallory's complaint "asserted that while employed by [Norfolk Southern] in Ohio and Virginia from 1988 through 2005, he was exposed to harmful carcinogens." *Id.* Mallory "did not allege that he suffered any harmful occupational exposures in Pennsylvania." *Id.*

Mallory's sole basis for asserting personal jurisdiction over Norfolk Southern was the company's registration to do business in the Commonwealth under 15 PA. C.S. § 411(a) and 42 PA. C.S. § 5301(a)(2)(i). *Id.* at 551. Norfolk Southern sought dismissal for lack of personal jurisdiction on both due process and dormant Commerce Clause grounds, and the trial court accepted the due process objection. *See id.* at 552, 559–60, nn.9, 11.

After the appeal was transferred from the Superior Court, this Court unanimously affirmed. The Court held that due process barred states from asserting general jurisdiction over every foreign corporation that files a mandatory registration to do business. Registration-jurisdiction, the Court concluded, contradicted *Goodyear*

Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which had together abrogated *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). *See* 266 A.3d at 566–67. Moreover, this Court held, Pennsylvania's registration-jurisdiction scheme "is contrary to the concept of federalism," because it "infringes upon our sister state[s'] ability to try cases against their corporate citizens." *Id.* at 566–67. "Pennsylvania has no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here." *Id.* at 567. Upholding Pennsylvania's scheme would thus "limit[ ] . . . the sovereignty of all its sister states" by seizing the ability to try cases in which they have a greater interest. *See id.*; *accord Mallory II*, 143 S. Ct. at 2058 (Barrett, J., dissenting).

Having so held, this Court did not need to address Norfolk Southern's "additional grounds to affirm . . . based on . . . the Dormant Commerce Clause because states may not impose burdens on interstate commerce that exceed any local state interest." *See* 266 A.3d at 559–60, nn.9, 11.

By a 5–4 vote, the U.S. Supreme Court vacated this Court's decision and remanded the case for further proceedings. Most of Justice Gorsuch's lead opinion was joined by only three other Justices, making those portions a plurality opinion, not a majority. *See* 143 S. Ct. at 2030 (joined by Thomas, Sotomayor, and Jackson,

JJ.). Justice Alito, who supplied the controlling fifth vote, joined only parts I and III-B of Justice Gorsuch's opinion, so only those parts are the opinion of the Court. *See id.*

Those parts of the opinion are narrow. They conclude only that *Pennsylvania Fire* still "controls" the due-process question because its holding "that suits premised on [corporate registration] do not deny a defendant due process of law" had not been overruled by *Daimler* or *Goodyear* (or their predecessors). *See id.* at 2037. The majority opinion also notes that the Supreme Court did not address or resolve "Norfolk Southern's alternative argument that Pennsylvania's statutory scheme as applied here violates [the] dormant Commerce Clause . . . . Accordingly, any argument along those lines remains for consideration on remand." *Id.* at 2033 n.3.

In the plurality section of his opinion (not joined by Justice Alito), Justice Gorsuch noted the federalism concerns this Court had identified. *Id.* at 2043. He did not dispute those concerns, but deemed them irrelevant to the due-process analysis because, under the Due Process Clause, "personal jurisdiction is a *personal* defense that may be waived or forfeited." *Id.*; *see also id.* at 2045–46 (Jackson, J., concurring).

Justice Alito concurred in part and in the judgment. *See id.* at 2047. He agreed that due process was not violated on these facts, but he seriously questioned whether "the Constitution permits a State to impose such a submission-to-jurisdiction

requirement." *Id.* "A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles" that are "most appropriate[ly]" protected by the dormant Commerce Clause. *Id.* Indeed, a "long" line of Supreme Court cases considered—and sometimes rejected—"assertions of jurisdiction over out-of-state companies in light of interstate commerce concerns." *Id.* at 2052 (citing, *e.g.*, *Davis v. Farmers' Co-operative Equity Co.*, 262 U.S. 312, 315–17 (1923)). Similar reasoning applies here, Justice Alito explained, because Pennsylvania's registration-jurisdiction regime discriminates against or significantly burdens interstate commerce without advancing "any *legitimate local* interest." *See id.* at 2054. Like the majority, he noted that Norfolk Southern had preserved a Commerce Clause challenge in this Court, suggesting that the company may "renew the challenge on remand." *Id.* at 2047.

Justice Barrett, writing for the Chief Justice and Justices Kagan and Kavanaugh, dissented. She would have held that Pennsylvania's regime violates due process because (as this Court had concluded) the Commonwealth "has no legitimate interest" here, and "there is nothing reasonable about a State extracting consent [to jurisdiction] in cases where it has 'no connection whatsoever.'" *Id.* at 2058 & n.1 (quoting *Mallory I*, 266 A.3d at 566). "Permitting Pennsylvania to impose a blanket claim of authority over controversies with no connection to the Commonwealth

intrudes on the prerogatives of other States—domestic and foreign—to adjudicate the rights of their citizens and enforce their own laws." *Id.* at 2058 (citations omitted).

The Supreme Court's mandate should issue by July 29, 2023, remanding the case to this Court. *See* U.S. Sup. Ct. R. 45.2; *Mallory II*, 143 S. Ct. at 2045.

ARGUMENT

I. The Court already has jurisdiction over this appeal from a judgment holding a state statute invalid.

As this Court noted in *Mallory I*, it has jurisdiction over this appeal under 42 PA. C.S. § 722(7), which gives the Court "exclusive jurisdiction over appeals from final common pleas court orders that declare a Pennsylvania statute invalid as repugnant to the Constitution." 266 A.3d at 555. This is still such an appeal. With issuance of the Supreme Court's mandate, this Court's *Mallory I* decision will be "vacated" and the matter "remanded" to this Court, *Mallory II*, 143 S. Ct. at 2045, returning the case to the same point when this Court's exclusive jurisdiction attached—an appeal from a final order of a court of common pleas holding a state statute unconstitutional. What remains is for this Court to address Norfolk Southern's alternative ground for affirmance of the trial court's ruling. After all, "an appellate court may *affirm* for any reason appearing as of record," *Alderwoods (Pa.), Inc. v. Duquesne Light Co.*, 106 A.3d 27, 41 n.15 (Pa. 2014), including to serve "the

systemic interest in avoiding costly and unnecessary proceedings before the judiciary," *Commonwealth v. Hamlett*, 234 A.3d 486, 492 (Pa. 2020).

Had this Court reversed the trial court's due process ruling, it would then have addressed Norfolk Southern's alternative Commerce Clause ground for affirmance, which was preserved and briefed by both parties. The Court has done precisely this in many prior cases. For example, in *Commonwealth v. Turner*, another Section 722(7) appeal, the Court reversed a trial court ruling that a provision of the Post-Conviction Relief Act was unconstitutional as applied to the appellee, but then addressed the appellee's alternative grounds for affirmance. 80 A.3d 754, 769–71 (Pa. 2013). Similarly, in *Commonwealth v. Means*, after reversing the trial court's ruling that portions of the death penalty statute were unconstitutional, the Court addressed "two additional arguments as alternative grounds to support the decision of the lower court," which the appellee had raised below. 773 A.2d 143, 157 n.8 (Pa. 2001) (plurality). There are other examples too. *See Commonwealth v. Herman*, 161 A.3d 194, 208–09 (Pa. 2017) (affirming dismissal of criminal charges on alternative, non-constitutional grounds in Section 722(7) appeal from dismissal on constitutional grounds); *Commonwealth v. Allsup*, 392 A.2d 1309, 1311 (Pa. 1978) (same, pursuant to predecessor law to Section 722(7)); *cf. Commonwealth v. Ludwig*, 874 A.2d 623, 631–34 (Pa. 2005) (affirming dismissal of criminal charges on alternative, non-

constitutional grounds relied on by trial court in Section 722(7) appeal after reversing trial court's ruling that statute at issue was unconstitutional).

The post-remand posture here is not materially different. While this Court affirmed the trial court's due process ruling, the Supreme Court's decision in *Mallory II* and vacatur of *Mallory I* places this appeal in the same posture as if this Court had reversed the trial court's due process ruling. This Court should thus follow its consistent practice of addressing alternative, preserved arguments for affirmance in these circumstances and set a schedule for full briefing and argument on the dormant Commerce Clause issue. *See also Pap's A.M. v. City of Erie*, 812 A.2d 591, 597–99 (Pa. 2002) (addressing constitutional challenge to local ordinance after reversal and remand by Supreme Court of earlier ruling on different constitutional challenge).

II. Alternatively, the Court should exercise King's Bench or extraordinary jurisdiction to decide the dormant Commerce Clause issue.

As just explained, the Court should exercise its exclusive jurisdiction under Section 722(7) to address the alternative, preserved ground for affirmance of the trial court's ruling, as it has done many times before. But if Section 722(7) does not support continued jurisdiction over this appeal, the Court should invoke King's Bench or extraordinary jurisdiction to decide this issue.

A. King's Bench or extraordinary jurisdiction applies here.

The Court's "King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to

avoid the deleterious effects arising from delays incident to the ordinary process of law." *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015); *see also* PA. CONST. art. V, sched. § 1; 42 PA. C.S. § 502. "[T]he availability of the power is essential to a well-functioning judicial system." *Williams*, 129 A.3d at 1206. The Court's extraordinary jurisdiction is similar and authorizes the Court to "assume plenary jurisdiction" "in any matter pending before any court . . . of this Commonwealth involving an issue of immediate public importance." 42 PA. C.S. § 726.

While this Court remanded this matter to the trial court after issuing its decision in *Mallory I*, the Supreme Court's vacatur of *Mallory I* effectively nullified that remand. Thus, while jurisdiction would be appropriate under either this Court's King's Bench or extraordinary jurisdiction, King's Bench jurisdiction is more appropriately applied here. *See In re Dauphin County Fourth Investigating Grand Jury*, 943 A.2d 929, 933 n.3 (Pa. 2007) ("King's Bench jurisdiction allows the Court to exercise power of general superintendency over inferior tribunals even when no matter is pending before a lower court" (citation omitted)).

The remaining issue before the Court goes to whether the federal Constitution precludes the courts of the Commonwealth from exercising a portion of the jurisdiction conferred on them by statute. This issue implicates a core aspect of the Unified Judicial System, over which this Court's "supervisory power . . . is beyond question." *In re Bruno*, 101 A.3d 635, 678 (Pa. 2014). Whether the courts can exercise

this purported jurisdiction and, if so, the ramifications of opening the Commonwealth's courts to a tsunami of litigation—including in cases and with parties having no connection to Pennsylvania—are precisely the types of supervisory issues this Court has addressed under its King's Bench powers. The Court's "comprehensive jurisdiction" includes the authority to determine "the type of causes committed generally or otherwise to an inferior jurisdiction." *Id.* at 670.

The Court often has noted that its "principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth." *Id.* at 675. These core principles would be threatened by a judicial system overburdened by litigation in which the Commonwealth has no interest. And "the King's Bench power obviously admits the use of the Court's supervisory authority to inquire into issues affecting the lower courts." *Id.* at 679. Indeed, the Court previously has exercised its extraordinary jurisdiction to address matters affecting the efficient operation of the judicial system and the potential for disruption and injustice from overburdened courts. *See Pennsylvania State Ass'n of County Comm'rs v. Commonwealth*, 681 A.2d 699, 701 (Pa. 1996); *see also Bruno*, 101 A.3d at 671 ("King's Bench allows the Supreme Court to exercise authority commensurate with its ultimate responsibility for the proper administration and supervision of the judicial system." (citation omitted)).

B. Courts and litigants urgently need guidance on the legal issue the Supreme Court remanded.

Under the principles above, exercising jurisdiction here is warranted. *Mallory II* leaves open whether constitutional provisions *other than* the Due Process Clause allow registration-jurisdiction in all, some, or no cases. *See* 143 S. Ct. at 2033 n.3; *id.* at 2049–55 (Alito, J., concurring). That question is uniquely important to Pennsylvania, as only the Commonwealth has a long-arm statute that explicitly asserts general jurisdiction based solely on corporate registration. *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent,* 36 CARDOZO L. REV. 1343, 1366 (2015). And *Mallory II* has significantly raised the profile of this issue—if the Commonwealth's unique law flew somewhat under the radar before, it is now front-page news. *See, e.g.*, Abbie VanSickle & Adam Liptak, *Supreme Court Allows Unusual Pennsylvania Law on Corporate Suits*, N.Y. TIMES (June 27, 2023), https://shorturl.at/nqvJZ.

As a result, potential litigants across the country and the world now have reason to think that, if they want to sue a national or multinational corporation that does business in Pennsylvania—or is just registered to do business here—they can file in the Court of Common Pleas. A deluge of litigation will likely result. In general, U.S. courts are "extremely attractive to foreign plaintiffs," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981), and both foreign and domestic plaintiffs reportedly consider Philadelphia a favorable forum, *see, e.g.*, David Murrell, *Why a Group of*

British Plaintiffs From a London Apartment Fire Are Suing in Philly Court, PHILADELPHIA MAGAZINE (Aug. 7, 2019), https://shorturl.at/xzGO3. While some of these suits may have a link to the Commonwealth, many will not. In response, defendants will urge a variety of defenses to personal jurisdiction, including the Commerce Clause. *See, e.g.*, Sean Marotta, *After Mallory, businesses shouldn't panic, but they should be ready to keep fighting*, WESTLAW TODAY (June 30, 2023). Pennsylvania's busy trial judges will thus be plunged into an unsettled area of law, with no clear guidance from higher courts. Some judges will probably dismiss some of these suits, while others will not; the plaintiffs in the dismissed suits may then appeal the dismissal while simultaneously filing the same suit in another forum as a protective measure. And *forum non conveniens* motion practice will proliferate.

Deciding the dormant Commerce Clause question is therefore urgent. Before Pennsylvania's courts are inundated with foreign litigation—much of which the Commonwealth will have no interest in—this Court should provide guidance to courts and litigants by addressing the Commerce Clause issue here. This issue was preserved during the initial appeal and remanded by the Supreme Court for this Court's consideration. And while deciding whether *this* suit violates the Commerce Clause will not resolve every possible question *Mallory II* raised, it will at least make clear the outer bounds of registration-jurisdiction in Pennsylvania. In particular, if this Court holds (as it should) that the Commerce Clause bars suits by foreign

plaintiffs against foreign defendants based on foreign causes of action, *see infra* § II.C, the Commonwealth's courts will not be burdened by suits in which Pennsylvania's people have no stake; litigants seeking to pursue such suits will know to go elsewhere; and companies operating in Pennsylvania will have some certainty about the extent of their increased exposure under *Mallory II*.

Nor is factual development required to resolve this question. As explained next, where a suit has *no* connection to the forum state, there is no legitimate local interest in hearing it, so the specifics of the burden on interstate commerce are largely irrelevant—any material burden suffices to establish a Commerce Clause violation.

C. Asserting jurisdiction over a foreign plaintiff's foreign cause of action against a foreign defendant violates the Commerce Clause.

The Commerce Clause bars states from asserting jurisdiction over cases like this one, where neither the parties nor the cause of action have any connection to the forum. Allowing these suits burdens interstate (and international) commerce—a burden that cannot be justified because no legitimate interest exists in seizing jurisdiction over this kind of case. This Court's original opinion explained as much, and a majority of the U.S. Supreme Court agreed with that reasoning. And as applied here, registration-jurisdiction also discriminates against interstate commerce.

The Commerce Clause's "dormant" or "negative" aspect is a corollary to its express grant of power to Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. The dormant Commerce

Clause "vindicates a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation." *Mallory II*, 143 S. Ct. at 2051 (Alito, J., concurring). To that end, this doctrine "forbid[s] the enforcement of certain state economic regulations even when Congress has failed to legislate on the subject." *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1152 (2023) (cleaned up).

Under this framework, "a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate commerce or when it imposes 'undue burdens' on interstate commerce." *Mallory II*, 143 S. Ct. at 2053 (Alito, J., concurring) (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018)). A law that "discriminate[s] against interstate commerce either on its face or in practical effect" is "subject to a virtually *per se* rule of invalidity." *Id.* (cleaned up). "Laws that even-handedly regulate to advance a legitimate local public interest," by contrast, are subject to "*Pike* balancing," under which they "will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Id.* (cleaned up) (quoting *Wayfair*, 138 S. Ct. at 2091); *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In applying these doctrines, the Supreme Court has been especially cognizant of

burdens on the "instrumentalities of interstate transportation—trucks, trains, and the like." *Pork Producers*, 143 S. Ct. at 1158 n.2.

These principles bar a state from asserting jurisdiction over cases with no relation to the forum just because the defendant registers to do business there. *First*, Pennsylvania's law "imposes a significant burden on interstate commerce by requiring a foreign corporation to defend itself with reference to all transactions, including those with no forum connection." *Mallory II*, 143 S. Ct. at 2053 (Alito, J., concurring) (cleaned up) (quoting *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988)). Such a law imposes "operational burdens" and "injects intolerable unpredictability into doing business across state borders." *Id.* Indeed, some companies "may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation," and others "may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction." *Id.*

Nor are these burdens limited to inter*state* commerce. They implicate international commerce too, because Pennsylvania's registration-jurisdiction regime also reaches companies based abroad. *See* 15 PA. C.S. § 102 (defining "foreign" entities that must register). So, as the United States explained in urging affirmance of this Court's ruling, "the theory of jurisdiction asserted here would allow state courts to hear cases against foreign defendants based on foreign conduct, and thus could affect

the United States' diplomatic relations and foreign trade." *See* Brief for the United States as *Amicus Curiae*, *Mallory II*, 2022 WL 4080618, at *4 (U.S. *Amicus* Br.).

And against these burdens, there are no legitimate benefits to weigh. Echoing this Court's conclusion that "Pennsylvania has no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here," *Mallory I*, 266 A.3d at 567, Justice Alito was "hard-pressed to identify any *legitimate local* interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State," *Mallory II*, 143 S. Ct. at 2054. The four dissenting Justices agreed: Pennsylvania's "blanket claim of authority over controversies with no connection to the Commonwealth" is unsupported by any "legitimate interest" and "intrudes on the prerogatives of other States." *Id.* at 2058 & n.1 (Barrett, J., dissenting) (quoting *Mallory I*, 266 A.3d at 567). The United States and several fellow states concurred as well: Pennsylvania's scheme "subverts interstate federalism" and "poses risks to international comity" while serving "no legitimate countervailing interest." U.S. *Amicus* Br., 2022 WL 4080618, at *4; *see also* Br. for Virginia et al. as *Amici Curiae*, *Mallory II*, 2022 WL 4110480, at *23–31. And the Supreme Court plurality, while disagreeing with this Court's due-process holding, did not question that Pennsylvania lacks any valid interest here.

That suffices to invalidate Pennsylvania's registration-jurisdiction scheme as applied in this case. "With no legitimate local interest served, there is nothing to be weighed to sustain the law." *Mallory II*, 143 S. Ct. at 2054 (Alito, J., concurring) (cleaned up). "And even if some legitimate local interest could be identified," it is far from clear that "any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes." *Id.*

Precedent bolsters this conclusion. *Bendix* held that an Ohio law forcing foreign corporations to choose between submitting to general jurisdiction or facing indefinite tolling of limitations periods violated the Commerce Clause because "the burden imposed on interstate commerce . . . exceed[ed] any local interest." 486 U.S. at 891. And older Supreme Court cases applied the Commerce Clause to reject state assertions of jurisdiction over out-of-state companies—usually railroads—in suits with no link to the forum. For example, a Minnesota law that "compel[ed] every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state" was invalid as applied in a case "in no way connected with Minnesota." *See Davis*, 262 U.S. at 315–17 (Brandeis, J., for the Court). More recently, the Delaware Supreme Court declined to construe Delaware law as asserting registration-jurisdiction in part because "[p]redicating jurisdiction solely on" registration "may be an impermissible burden on interstate commerce": "If the cost

of doing [business in the state] is that those foreign corporations will be subject to general jurisdiction in Delaware, they rightly may choose not to do so," and "exacting such a disproportionate toll on commerce is itself constitutionally problematic." *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 & n.108 (Del. 2016); *see also In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 2866166, at *5–6 (D. Kan. May 17, 2016) (similar, because "a state has no legitimate interest in hosting litigation between two out-of-state parties that does not arise from either parties' activities in the state").[1]

This does not mean registration-jurisdiction necessarily violates the Commerce Clause in all cases. Generally, a plaintiff's "[r]esidence . . . though not controlling, is a fact of high significance." *Int'l Milling Co. v. Columbia Co.*, 292 U.S. 511, 520 (1934). Some courts have thus distinguished suits with no forum link—like this one—from cases with in-state plaintiffs or injuries, since a state "has an interest in providing a forum for its residents and those injured here." *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 579 (N.M. App. 2018) (collecting authorities), *rev'd*

[1] Scholars agree as well. *See, e.g.*, John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 143 (2016) ("where the plaintiff is a non-resident injured out of state, the state has no legitimate interest in protecting him, so jurisdiction-via-registration would violate the Dormant Commerce Clause"); T. Griffin Vincent, *Toward A Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 485 (1989) ("The absence of any cognizable state interest . . . justifies a court's denial of jurisdiction on the grounds of any potential adverse effect on interstate commerce.").

on other grounds, 503 P.3d 332 (N.M. 2021); *Hegna v. Smitty's Supply, Inc.*, No. 16-3613, 2017 WL 2563231, *4–5 (E.D. Pa. June 13, 2017) (same, under PA. C.S. § 5301). But even accepting that reasoning, no such interest exists here.

Second, the Commerce Clause bars this suit for an independent reason: "Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies" and thus against interstate commerce. *See Mallory II*, 143 S. Ct. at 2053 & n.7 (Alito, J., concurring). The scheme applies solely to foreign entities. And while it may appear non-discriminatory because it treats foreign corporations the same way as domestic ones, "laws can violate the Dormant Commerce Clause even where in-state and out-of-state businesses are treated the same"—for example, if they take "an advantage that out-of-staters possess[ ] . . . and nullif[y] its benefit within the state." Preis, *supra*, at 139–40. That is the case here: "[O]ut-of-state companies . . . have an advantage over in-state companies—the ability," ordinarily protected by the Constitution, "to avoid suits in the state that are unrelated to [their] activities there"—but "subjecting registrants to personal jurisdiction strips this advantage and thus potentially protects locals from competition." *See id.*; *cf. Bendix*, 486 U.S. at 891 (Ohio's jurisdiction-or-tolling law "might have been held to be a discrimination that invalidates [it] without extended inquiry").

III. The Court could benefit from full briefing and oral argument.

The Court could benefit from another round of briefing and oral argument. Since the parties first briefed the issue in this Court, the U.S. Supreme Court decided *Pork Producers*, which sheds additional light on the dormant Commerce Clause analysis, including the proper approach to *Pike* balancing. Thus, a full presentation by the parties (and any *amici*) focused on the Commerce Clause issue could aid the Court's decision-making process.

CONCLUSION

For these reasons, after the U.S. Supreme Court issues its mandate, this Court should (i) retain jurisdiction over this appeal or, alternatively, exercise King's Bench or extraordinary jurisdiction, and (ii) either hold that the assertion of personal jurisdiction over Norfolk Southern in this case violates the dormant Commerce Clause or issue a briefing schedule so the parties can further address the merits of that issue.

Respectfully submitted,

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July 28, 2023

CERTIFICATE OF COMPLIANCE

Rule 127 Compliance. I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Service. I certify that, on July 28, 2023, this Application was served on the following through the Court's PACFile System:

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