WINDING AUTHORITY: CONSENT BY REGISTRATION AND THE LEGAL SINGULARITY

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More than forty years ago, the Pennsylvania legislature enacted a uniquely broad and explicit statute directed at out-of-state corporations: registration as a foreign corporation constitutes consent to general personal jurisdiction in the Commonwealth. Pennsylvania's consent-by-registration statute has faced Fourteenth Amendment due process challenges in state and federal courts alike, rising all the way to both the Supreme Court of Pennsylvania and the U.S. Supreme Court. This Article first tracks the myriad challenges to the Pennsylvania statute, culminating in the U.S. Supreme Court's opinion in Mallory v. Norfolk Southern Railway Co. *in 2023. The Article then argues that the statute's zigzagging path through the court system reveals cracks in the lower tiers of the judicial hierarchy. Rather than binding authority arising from stare decisis, the Pennsylvania law exemplifies a winding authority that invites every court to determine for itself whether the statute violates or comports with due process. Reflecting a legal singularity, the correct law lies in all directions. Each new judge shines a new light through the cracks.*

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I. INTRODUCTION

"There is a crack, a crack in everything.
That's how the light gets in."[1]

Leonard Cohen's *Anthem* is worlds away from the dry legal topic of personal jurisdiction. Or maybe not. At the core of our constitutional system lies a hierarchy of laws and courts. Personal jurisdiction puts pressure on the tiers, at times reaching a breaking point. That pressure is on full display in Pennsylvania, where registering as a foreign corporation comes with a cost.

Whether for profit or not for profit, an out-of-state corporation must pay a filing fee of $250 to do business in Pennsylvania.[2] An additional cost is nonmonetary. In many states, filing corporate forms subjects an out-of-state corporation to personal jurisdiction.[3] More than forty years ago, the Pennsylvania legislature enacted a broad and explicit provision to that effect: registration as a foreign corporation constitutes consent to general personal jurisdiction in the Commonwealth.[4] Such automatic consent by a foreign defendant, with its sweeping reach to all claims and undertone of coercion, likely sets off alarm bells for anyone who recalls reading *International Shoe Co. v. Washington*[5] in law school. Perhaps constitutional due process would like a word?

It has had one. Plenty, in fact. The Pennsylvania consent-by-registration statute has bounced through the court system like a pinball, with Fourteenth Amendment challenges lighting up decisions in state and federal courts alike, rising all the way to both the Supreme Court of Pennsylvania and the U.S. Supreme Court. This Article first tracks the myriad challenges to the Pennsylvania statute, culminating in the U.S. Supreme Court's opinion in *Mallory v. Norfolk Southern Railway Co.* in 2023.[6] The Article then argues that the statute's zigzagging path through the court system reveals cracks in the lower tiers of the judicial hierarchy. Rather than binding authority arising from stare decisis, the Pennsylvania law exemplifies a winding authority that invites every court to determine for itself whether the statute violates or comports with due process.

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1. LEONARD COHEN, *Anthem*, *on* THE FUTURE (Columbia 1992).
2. *See* 15 PA. CONS. STAT. §§ 102(a), 411(a), 412(a).
3. *See, e.g.*, Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc., 469 N.W.2d 88, 90 (Minn. 1991); Sharkey v. Washington Nat. Ins. Co., 373 N.W.2d 421, 425–26 (S.D. 1985); *see also* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1359 (2015).
4. 42 PA. CONS. STAT. § 5301(a)(2)(i).
5. 326 U.S. 310 (1945).
6. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023).

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II. CONSENT BY REGISTRATION

The winding path of Pennsylvania's consent-by-registration statute emerges on a timeline. The path begins at the Pennsylvania legislature, crosses the divide between the state and federal judiciaries to the U.S. Court of Appeals for the Third Circuit and the U.S. District Court for the Eastern District of Pennsylvania, returns across the divide to the Commonwealth courts and up to the Supreme Court of Pennsylvania, and finally rises to the U.S. Supreme Court. Let us examine each step.

A. Pennsylvania Legislature

A defendant's home state is the "paradigm forum" for general personal jurisdiction, where a court may hear all claims against the defendant.[7] For a corporate defendant from out of state, the jurisdictional reach varies. Several states look to an antecedent step, before a foreign corporation comes to town and woos local customers, linking general personal jurisdiction to an initial corporate filing.[8] Minnesota and South Dakota, for example, confer general jurisdiction based on the appointment of an in-state agent for service of process.[9] The Supreme Court of Georgia has

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7. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

8. *See* Monestier, *supra* note 3, at 1359 ("Many state and federal courts hold that registering to do business in a state and appointing an agent for service of process subjects a corporation to general jurisdiction . . . . [C]ourts generally hold that by registering under the relevant state statute and appointing an agent for service of process, a corporation has expressly consented to the jurisdiction of the state's courts—period.").

9. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) (concluding "that appointment of an agent for service of process under [Minnesota statute] gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state"); *Rykoff-Sexton, Inc.*, 469 N.W.2d at 90; *Sharkey*, 373 N.W.2d at 425–26 (concluding that, where out-of-state insurance company had appointed South Dakota Director of Insurance as its registered agent, "Company's contention that the South Dakota trial court lacked jurisdiction over it because of the fact that the policy was applied for and the death occurred in the state of Wyoming is totally without merit"); *see also, e.g.*, Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 469 (D.N.J. 2015) (finding general personal jurisdiction under New Jersey "designation of an in-state agent for service of process"); Chick v. C & F Enterprises, LLC, 938 A.2d 112, 114–15 (N.H. 2007) (finding general personal jurisdiction over out-of-state defendant that had designated New Hampshire agent for service of process pursuant to federal Motor Carrier Act). *Compare, e.g.*, Waite v. All Acquisition Corp., 901 F.3d 1307, 1321 (11th

interpreted that state's statutory "scheme for specific jurisdiction over corporations" to imply that "any corporation that is authorized to do business in Georgia is subject to the *general* jurisdiction of Georgia's courts."[10] Pennsylvania also links general jurisdiction to a corporate filing, but boasts a uniquely explicit statutory provision to that effect.[11] No interpretive boost needed.

Pennsylvania statutory law has long required any out-of-state corporation wishing to do business in the Commonwealth to register with the Department of State.[12] As enacted in 1978, Section 5301(a)(2)(i) of Pennsylvania's Judicial Code provides that such "qualification as a foreign corporation" allows "the tribunals of this Commonwealth to exercise general personal jurisdiction" over the foreign corporation, to the same

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Cir. 2018) (finding that Florida law neither "expressly or by local construction establishes that a foreign corporation's registration to do business and appointment of an agent for service of process in Florida amounts to its consent to general jurisdiction in the Florida courts") (internal quotations omitted), Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) (reviewing Texas law and stating that the assertion that "mere service on a corporate agent automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles"), and Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440, 447 (Ill. 2017).

10. Cooper Tire & Rubber Co. v. McCall, 863 S.E.2d 81, 88, 92 (Ga. 2021); *see also* The Rockefeller Univ. v. Ligand Pharms., 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) (stating that "[i]n maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction").

11. *See* Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 569 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023) (noting that "[u]nlike other states, whose statutes do not expressly condition the privilege to do business upon submission to general jurisdiction, foreign corporations are given reasonable notice" under the Pennsylvania statute); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 172 (2023) (Barrett, Roberts, Kagan & Kavanaugh, JJ., dissenting) (noting that "Pennsylvania is the *only* State with a statute treating registration as sufficient for general jurisdiction"); Urvan v. AMMO, Inc., No. 2023-0470 PRW, 2024 WL 863688, at *15 (Del. Ch. Feb. 27, 2024) (observing that "Pennsylvania's unique statutory scheme . . . is atypically precise in declaring that registering to do business constitutes consent to personal jurisdiction"); Replica Auto Body Panels & Auto Sales Inc. v. inTech Trailers Inc., 454 F. Supp. 3d 458, 462 (M.D. Pa. 2020) (stating that "Pennsylvania's statute is unusual, perhaps even unique, in its explicit" grant of general personal jurisdiction); Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 538–39 (E.D. Pa. 2019) (noting that Pennsylvania statute is "unique" for its explicit wording); *see also* Monestier, *supra* note 3, at 1366–68 (stating that "[o]nly one state, Pennsylvania, actually purports to directly address the jurisdictional consequences of registering to do business" and "[n]o other state directly spells out the jurisdictional consequences associated with registering to do business"); Sayer Paige, Note, *Rethinking Jurisdictional Maximalism in the Wake of* Mallory, 92 FORDHAM L. REV. 2725, 2727 (2024) (describing Pennsylvania's "jurisdiction-by-registration" statutory scheme).

12. 15 PA. CONS. STAT. § 411(a); *see id.* § 411(f) (also requiring that a foreign corporation maintain a "registered office" in Pennsylvania).

extent as over a domestic corporation.[13] Any foreign corporation that fails to register in Pennsylvania loses the right to file suit in the Commonwealth courts.[14] Once registered, the foreign corporation "enjoy[s] the same rights and privileges" and is "subject to the same liabilities, restrictions, duties and penalties" as a domestic corporation.[15]

The foreign qualification provision of Section 5301 is the first of three subsections conferring general personal jurisdiction; the statute also provides for express consent and substantial contacts with the forum.[16] All three subsections expose the out-of-state corporation to "any cause of action" filed in the Commonwealth courts.[17] Section 5301 is simple enough, even laudatory for its transparency and plain language.[18] But simplicity does not guarantee serenity. In enacting the Commonwealth's consent-by-registration statute, the Pennsylvania legislature stepped squarely into constitutional terrain.[19]

As the U.S. Supreme Court announced in 1877 in *Pennoyer v. Neff*—and as every first-year law student learns when facing a civil procedure professor primed to cold call—the Due Process Clause of the Constitution limits the power of the sovereign to exercise personal jurisdiction over a

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13. 42 PA. CONS. STAT. § 5301(a)(2)(i); *see id.* § 5301(a)(3)(i) (applying same standard to "[p]artnerships, limited partnerships, partnership associations, professional associations, unincorporated associations and similar entities"); *see also Sullivan*, 384 F. Supp. 3d at 536 ("Read together, [Sections 411 and 5301] provide that the state will only permit a foreign corporation to 'do business' in Pennsylvania if it registers and, thus, subjects itself to general personal jurisdiction."). *See generally* 42 PA. CONS. STAT. § 101.

14. *See* 15 PA. CONS. STAT. § 411(b) (providing that a foreign corporation that fails to register "may not maintain an action or proceeding in this Commonwealth"). An unregistered corporation may still defend an action in state court. *See id.* § 411(c).

15. *Id.* § 402(d).

16. 42 PA. CONS. STAT. § 5301(a)(2)(ii)–(iii).

17. *Id.* § 5301(b) ("When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section.").

18. *See* PLAIN WRITING ACT OF 2010, PL 111-274, 124 Stat. 2861 (requiring that "each agency shall use plain writing in every covered document of the agency that the agency issues or substantially revises"); *see also* Soha Turfler, *Language Ideology and the Plain-Language Movement: How Straight-Talkers Sell Linguistic Myths*, 12 LEGAL COMM. & RHETORIC: JALWD 195, 196 (2015) ("The Plain Language movement styles itself as an effort to demystify the legal process by requiring that lawyers write in a direct and straightforward manner, using, for example, such features as active voice, short sentences, and familiar words.").

19. *See* 42 PA. CONS. STAT. § 5308 ("The tribunals of this Commonwealth may exercise jurisdiction under this subchapter only where the contact with this Commonwealth is sufficient under the Constitution of the United States.").

nonresident defendant.[20] That limit is nontrivial. A court is "powerless to proceed" absent the "essential element" of personal jurisdiction.[21] Along with subject-matter jurisdiction, a court must have "authority over the parties . . . so that the court's decision will bind them."[22] The necessity of personal jurisdiction "recognizes and protects an individual liberty interest."[23] Due process is an ancient safeguard of liberty against the sovereign's coercive and arbitrary power, tracing its lineage to the Magna Carta.[24] As enshrined in the Fifth and Fourteenth Amendments, neither the federal government nor a state government may deprive a person of "life, liberty, or property, without due process of law."[25] This shield covers corporations, as well, in their capacity as juridical persons.[26]

Decided shortly after ratification of the Fourteenth Amendment, *Pennoyer v. Neff* drew a constitutional line atop a geographical line: "no

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20. Pennoyer v. Neff, 95 U.S. 714, 720, 733–74 (1877), *overruled in part*, Shaffer v. Heitner, 433 U.S. 186 (1977); *see* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–14 (1984).

21. Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937).

22. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999). *See generally Personal Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests.").

23. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (stating that "[t]he personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

24. *See* Davidson v. City of New Orleans, 96 U.S. 97, 101 (1877); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause."); Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 536 (E.D. Pa. 2019) ("The concept of due process is deeply rooted in our judicial system, having been imported from England as an essential bulwark against arbitrary deprivations by the crown.").

25. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

26. *See* Missouri Pac. Ry. Co. v. Mackey, 127 U.S. 205, 209 (1888) ("It is conceded that corporations are persons within the meaning of the [Fourteenth] amendment."); GSS Grp. Ltd v. Nat'l Port Auth., 680 F.3d 805, 813 (D.C. Cir. 2012) (recognizing "that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over them."); *Sullivan*, 384 F. Supp. 3d at 536 ("It has long been recognized that corporations have juridical personalities and are entitled to due process protections."); Sinclair v. City of Ecorse, 561 F. Supp. 2d 804, 809 (E.D. Mich. 2008), *aff'd in part*, 366 F. App'x 579 (6th Cir. 2010) ("Thus, only a 'person' is entitled to due process protection under Section One of the Fourteenth Amendment, and Wayne County, being neither an individual nor a corporation, is not a juridical person and is, therefore, not protected."); *see also* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2009–10 (2019) (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)) (discussing Mitt Romney's comment at the Iowa State Fair that "corporations are people, my friend").

State can exercise direct jurisdiction and authority over persons or property without its territory."[27] In 1945, the Supreme Court issued its canonical opinion in *International Shoe Co. v. Washington* and refined the constitutional limits on personal jurisdiction over a foreign corporation, softening the rigid territorial approach from *Pennoyer*.[28] There, the State of Washington sued the International Shoe Company, a Delaware corporation with its principal place of business in Missouri, for failing to contribute to a state unemployment compensation fund.[29] International Shoe challenged the tax on various bases, including that it was not a Washington corporation, that it was not doing business in Washington, that it had no agent for service of process in Washington, and that it was not furnishing employment as statutorily defined.[30] International Shoe did employ a dozen or so salespeople who lived in Washington, collected commissions in their home state, and occasionally rented local rooms to display samples ("each consisting of one shoe of a pair"), but who answered to supervisors in St. Louis, Missouri.[31]

Analyzing whether the Washington state courts could exercise personal jurisdiction over International Shoe, the Supreme Court rejected any "mechanical or quantitative . . . boundary line between those activities which justify the subjection of a corporation to suit, and those which do not."[32] Rather, the Due Process Clause looks at "the quality and nature of the activity in relation to the fair and orderly administration of the laws," which the Clause was designed to protect.[33] Borrowing terminology from Justice Oliver Wendell Holmes, Jr., the Court famously stated that a foreign corporation must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[34]

One could imagine a corporation engaged in "continuous . . . operations" that were "so substantial and of such a nature as to justify suit"

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27. Pennoyer v. Neff, 95 U.S. 714, 720, 722 (1877), *overruled in part*, Shaffer v. Heitner, 433 U.S. 186 (1977); *see id.* at 734–35 (describing limited instances of state's jurisdiction over nonresidents); U.S. CONST. amend. XIV; *cf.* Massie v. Watts, 10 U.S. 148, 158 (1810) (stating that "the principles of equity give a court jurisdiction wherever the person may be found").

28. Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945).

29. *Id.* at 311–12.

30. *Id.* at 312.

31. *Id.* at 313–14.

32. *Id.* at 319.

33. *Int'l Shoe Co.*, 326 U.S. at 319.

34. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see id.* at 324 (quoting Justice Holmes' opinion for the Court in McDonald v. Mabee, 243 U.S. 90, 91–92 (1917)).

based on "dealings entirely distinct from those activities."[35] The present suit was less ambitious. Turning to the facts at hand, the Supreme Court found that International Shoe had engaged in "systematic and continuous" activities in Washington and "[t]he obligation which is here sued upon arose out of those very activities."[36] Thus, International Shoe had "establish[ed] sufficient contacts or ties with the state of the forum to make it reasonable and just" to maintain the unemployment fund lawsuit.[37]

So began the modern doctrine of long-arm jurisdiction.[38] In 1984, the Supreme Court further refined the limits on personal jurisdiction in an opinion often mentioned in the same breath as *International Shoe*: *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[39] There, the survivors and representatives of four U.S. citizens killed in a helicopter crash in Peru sued the corporate owner of the helicopter, Helicol.[40] Helicol was a

35. *Id.* at 318.

36. *Id.* at 320.

37. *Id.* at 320–21 (also finding service of process to be sufficient and state's taxation for employment benefits to be constitutional).

38. *See, e.g.*, Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 445 (1952) ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stating that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State," but "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–75 (1985) (recognizing that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State" and noting that "[t]his 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts"); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (noting that *World-Wide Volkswagen Corp.* and *Burger King Corp.* focused on specific personal jurisdiction, and stating that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State") (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)); *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988) (noting that "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role").

39. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–14 (1984); *see also Perkins*, 342 U.S. at 414–15 (finding Ohio courts could exercise general personal jurisdiction over Philippine mining corporation that "has been carrying on in Ohio a continuous and systematic, but limited, part of its general business"); *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 929 (finding North Carolina courts could not exercise general personal jurisdiction over corporations from Luxembourg, Turkey, and France that had only "attenuated connections to the State" and were "in no sense at home in North Carolina").

40. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 409–10.

Colombian corporation with its principal place of business in the capital city of Bogotá.[41] Its contacts with Texas included the chief executive officer's attendance at a contract negotiation session in Houston, the purchase of helicopters and spare parts from Fort Worth, the training of pilots in Fort Worth, and the receipt of payments from a Houston bank into New York and Florida bank accounts.[42] Helicol was not authorized to do business in Texas, did not solicit business in Texas, did not sell products in Texas, did not sign contracts in Texas, and did not keep employees, offices, or records in Texas.[43] The four decedents were hired in Houston to work on a pipeline in Peru, but none lived in Texas.[44]

The decedents' representatives filed wrongful death claims in Texas state court, and Helicol moved to dismiss for lack of personal jurisdiction.[45] After losing that motion, losing a jury verdict in the amount of $1,141,200, winning an intermediate appeal based on the lack of personal jurisdiction, winning in the Supreme Court of Texas based on the same jurisdictional argument, and then losing upon rehearing in the Supreme Court of Texas, Helicol took its case to the U.S. Supreme Court.[46]

Expanding on *International Shoe*, the U.S. Supreme Court found that Helicol's contacts with Texas did not "constitute the kind of continuous and systematic general business contacts" necessary to satisfy due process.[47] Specific personal jurisdiction, where the controversy arises out of the defendant's activities in the State, rests on the "relationship among the defendant, the forum, and the litigation."[48] In *Helicopteros*, the Texas courts purported to exercise general personal jurisdiction over Helicol, where the controversy did not arise out of the company's activities in the State.[49] Applying the constitutional requirement of "sufficient contacts," the Court found Helicol's activities in Texas to be essentially one-offs, as the company's "purchases and related trips, standing alone, are not a

41. *Id.* at 409.
42. *Id.* at 410–11, 416.
43. *Id.* at 411.
44. *Id.* at 411–12.
45. *Id.* at 412.
46. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 412–13.
47. *Id.* at 416, 418–19.
48. *Id.* at 414 & n.8 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)); *see* Daimler AG v. Bauman, 571 U.S. 117, 138 (2014) (noting that "the words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate").
49. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414 & n.9; *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); *Daimler*, 571 U.S. at 121–22 (describing the "distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction").

sufficient basis for a State's assertion of jurisdiction."[50] Accordingly, eight years after the helicopter crash, the litigation finally ended as the U.S. Supreme Court reversed the rehearing decision of the Supreme Court of Texas.[51]

It is a safe bet that the notions of minimum contacts, sufficient contacts, continuous and systematic contacts, fair play, and substantial justice appear under the topic of "long-arm jurisdiction" in nearly every 1L study guide for civil procedure. Between the dates of the Supreme Court's decisions in *International Shoe* and *Helicopteros*, the Pennsylvania legislature placed the risky bet of adding corporate registration forms to that list.

B. U.S. Court of Appeals for the Third Circuit

Fast forward several years and head to the Northeast. Now, in Pennsylvania, a foreign corporation need not employ salespeople, pay commissions, nor ship half or full pairs of any merchandise. It may engage in a one-off activity distinct from CEO negotiations, company training, or payment receipts. Merely filing a form with the Pennsylvania Department of State triggers general personal jurisdiction, as a basis separate and distinct from the statutory basis parroting the language from *Helicopteros*: "[t]he carrying on of a continuous and systematic part of its general business within this Commonwealth."[52] Also now, the corporation's own salesperson dons the mantle of plaintiff.

In 1991, the U.S. Court of Appeals for the Third Circuit decided *Bane v. Netlink, Inc.* and focused on Pennsylvania's consent-by-registration statute.[53] There, plaintiff Thomas Bane had worked in sales for defendant Netlink, Inc. for three years, initially using his Pennsylvania home as an office.[54] One year into his employment, Netlink transferred Bane to an

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50. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414–17 ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation."); *see id.* at 418 ("[W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions. Nor can we conclude that the fact that Helicol sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas.").

51. *Id.* at 419.

52. 42 PA. CONS. STAT. § 5301(a)(2)(iii), (a)(3)(iii); *see Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416.

53. Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991).

54. *Id.* at 638.

office in Boston, Massachusetts.[55] Approximately eighteen months later, Netlink told Bane that he would be moving to a new office in Philadelphia, Pennsylvania.[56] Bane ended the lease on his Massachusetts house and signed a new lease for a Pennsylvania house; his wife also quit her job in Boston.[57] A few months later, Netlink terminated Bane's employment.[58]

Bane promptly sued Netlink in federal court for wrongful termination under the Age Discrimination in Employment Act ("ADEA"), among other claims.[59] At the time of his firing, Bane was fifty-six and the oldest salesperson at the company.[60] Netlink moved to dismiss for lack of personal jurisdiction on the basis that it was a Delaware corporation with its principal place of business in North Carolina; the company had also withdrawn its "authorization to conduct business in Pennsylvania."[61] The U.S. District Court for the Eastern District of Pennsylvania granted Netlink's motion.[62]

On appeal, the Third Circuit noted the absence of any provision for service of process in the ADEA and, thus, looked to whether Pennsylvania courts could exercise general personal jurisdiction over Netlink.[63] While the district court had weighed Netlink's slim contacts with Pennsylvania in the due process balance and found them wanting,[64] the circuit court zeroed in on Netlink's prior "authorization to conduct business."[65] *Helicopteros* was neither here nor there.[66] Pennsylvania's consent-by-

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55. *Id.*

56. *Id.*

57. *Id.*; *see* Bane v. Netlink, Inc., No. CIV. A. 89-6453, 1990 WL 33870, at *1 (E.D. Pa. Mar. 26, 1990), *rev'd*, 925 F.2d 637 (3d Cir. 1991).

58. *Bane*, 925 F.2d at 638.

59. *Id.*; *see* 29 U.S.C. §§ 621–34.

60. *Bane*, 925 F.2d at 638.

61. *Id.* at 638–39.

62. *Id.* at 639.

63. *Id.* ("Because the ADEA does not provide a means for service of process, a federal court may exercise personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state."); *see* Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 462 (D.N.J. 2015) ("A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state."); FED. R. CIV. P. 4(k)(1)(A) (stating service of process establishes jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located").

64. *See* Bane v. Netlink, Inc., No. CIV. A. 89-6453, 1990 WL 33870, at *2 (E.D. Pa. Mar. 26, 1990), *rev'd*, 925 F.2d 637 (3d Cir. 1991) ("Review of the affidavit shows contentions barren of any evidence to show a continuous and systematic course of business in Pennsylvania.").

65. *Bane*, 925 F.2d at 639–40.

66. *Id.* (citing *Helicopteros* for the distinction between specific and general jurisdiction and stating that, in following the *Helicopteros* analysis, the trial court failed to consider the Pennsylvania statute).

registration statute swept clear the mess of case-by-case predicate facts for due process:[67] "We need not decide whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact . . . because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts."[68] Full stop. Foreign registration and express consent may occupy different subsections, but the statute simply remixed consent as registration.[69]

On the facts of *Bane*, the defendant had registered and was authorized to do business as a foreign corporation in Pennsylvania from 1984 through 1988, during which time it had hired and fired the plaintiff.[70] No matter that Netlink withdrew its registration before the lawsuit. The company had already terminated Bane's employment and triggered the basis for liability.[71] By filing its registration form, Netlink had "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[72] Because Netlink could reasonably predict being haled into court in Pennsylvania,

67. *See* Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 547 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023) (recognizing that Pennsylvania's statutory scheme provides for "general personal jurisdiction over foreign corporations that register to do business in the Commonwealth, regardless of the lack of continuous and systematic affiliations within the state that render the corporation essentially at home here"); Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 537 (E.D. Pa. 2019) (noting that the "approach to the exercise of general personal jurisdiction" from *Helicopteros* and *Perkins* "remained problematic since the general jurisdiction analysis became exceedingly fact specific and idiosyncratically applied").

68. *Bane*, 925 F.2d at 640; *see* 42 PA. CONS. STAT. § 5301(b).

69. *See Bane*, 925 F.2d at 640; *see also* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 179 n.8 (2023) (Barrett, Roberts, Kagan & Kavanaugh, JJ., dissenting) (noting that, while "no 'magic words' are necessary to establish valid consent," "it is quite a stretch" to treat "actual 'consent' and registration . . . as one and the same").

70. *Bane*, 925 F.2d at 640–41.

71. *Id.*; *see* 42 PA. CONS. STAT. § 5301(b); Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1137 (Pa. Super. Ct. 2018) ("Although section 5301(b) contains a temporal provision allowing for jurisdiction over a foreign association that has withdrawn its registration in Pennsylvania, section 5301(a) does not preclude claims against foreign associations registered in Pennsylvania arising from events that occurred prior to registration.") (internal citation omitted).

72. *Bane*, 925 F.2d at 640 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)) (internal brackets omitted); *see* Dehne v. Hillman Inv. Co., 110 F.2d 456, 458 (3d Cir. 1940) (noting that a Delaware corporation had consented to be sued in Pennsylvania "by applying for a certificate of authority and designating the Secretary of the Commonwealth as its attorney for process").

the exercise of general personal jurisdiction did not offend due process.[73] Reversed and remanded.[74]

C. U.S. District Court for the Eastern District of Pennsylvania

Courts continued to smile on Pennsylvania's consent-by-registration statute. In the wake of the Third Circuit's approval in *Bane v. Netlink, Inc.*, Section 5301(a)(2)(i) enjoyed widespread favorable treatment in federal district courts beneath the Third Circuit and in the Superior Court of Pennsylvania, an intermediate appellate court in the Commonwealth.[75] Only a handful of judges declined to embrace the statute.[76] In particular, one Pennsylvania trial court highlighted the ill-fitting cut of "wrapping general jurisdiction in the cloak of consent."[77] That lone highlight presaged hazards ahead.

In 2014, the U.S. Supreme Court decided *Daimler AG v. Bauman*[78] and introduced "a sea change in the jurisprudence of exercising general personal jurisdiction over a foreign corporation."[79] In *Daimler*, twenty-two Argentinian residents sued the German car manufacturer

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73. *Bane*, 925 F.2d at 641.

74. *Id.* In 1991, after various discovery squabbles, the district court dismissed the case with prejudice. *See* Order Dismissing Action with Prejudice Pursuant to Local Rule 23(b), Bane v. Netlink, Inc., No. 2:89CV06453 (E.D. Pa. Nov. 13, 1991).

75. *See* Kraus v. Alcatel-Lucent, 441 F. Supp. 3d 68, 74 (E.D. Pa. 2020) ("Except for *Sullivan* and two Common Pleas court cases, all courts addressing this issue have held that consent-by-registration remains a constitutional basis for personal jurisdiction under current Third Circuit law. We agree with these courts.") (citing cases); Tupitza v. Texas Roadhouse Mgmt. Corp., No. 1:20-CV-2, 2020 WL 6268631, at *3 (W.D. Pa. Oct. 21, 2020) ("Within the Third Circuit, with the exception of one, every district court to consider the constitutionality of the consent-by-registration statute has held that it validly confers general personal jurisdiction upon defendants."); Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018) (applying § 5301 to Connecticut LLC); Simmers v. Am. Cyanamid Corp., 576 A.2d 376, 382 (Pa. Super. Ct. 1990) (applying § 5301 to successor of New York company); Bianco v. Concepts 100, Inc., 436 A.2d 206, 211 (Pa. Super. Ct. 1981) (applying § 5301 to New York company).

76. *See, e.g.*, Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283, at *6 (Pa. Com. Pl. May 30, 2018), *affirmed*, 266 A.3d 542 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023); Pennington v. United States Steel Corp., No. 160501092, 2019 WL 4131843, at *2 (Pa. Com. Pl. June 27, 2019) ("[T]his court now respectfully requests that the Superior Court determine the constitutionality of 42 Pa. C.S.A. § 5301(a)(2) and its effect on this court's personal jurisdiction over the present matter."); Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019); Metro Container Grp. v. AC&T Co., No. CV 18-3623, 2021 WL 5804374, at *6 (E.D. Pa. Dec. 7, 2021); Reynolds v. Turning Point Holding Co., LLC, No. 2:19-CV-01935-JDW, 2020 WL 953279, at *5 (E.D. Pa. Feb. 26, 2020).

77. *Mallory*, 2018 WL 3025283, at *6.

78. Daimler AG v. Bauman, 571 U.S. 117 (2014).

79. *Sullivan*, 384 F. Supp. 3d at 534.

DaimlerChrysler Aktiengesellschaft ("Daimler") in the U.S. District Court for the Northern District of California, alleging that Daimler's Argentinian subsidiary had collaborated in kidnapping, torturing, and killing employees during Argentina's ruthless Dirty War.[80] The complaint predicated general personal jurisdiction on the California contacts of Daimler's U.S. subsidiary, which was incorporated in Delaware with its principal place of business in New Jersey.[81] The trial court disagreed and dismissed the complaint.[82] Upon rehearing, the U.S. Court of Appeals for the Ninth Circuit reversed, relying on an agency theory and finding that "exercising personal jurisdiction over [Daimler] comports with fair play and substantial justice."[83]

The U.S. Supreme Court granted certiorari to decide "whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."[84] The question was not whether Daimler or its U.S. subsidiary had continuous and systematic contacts with California, but rather whether those affiliations were "*so* continuous and systematic as to render it essentially at home in the forum State."[85]

The Court found the affiliations too attenuated, as neither Daimler nor its subsidiary was incorporated or had its principal place of business in California.[86] The companies sold cars, and if "Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which [the subsidiary's] sales are sizable."[87] Even if the subsidiary were at home in California and its forum contacts imputable, still "Daimler's slim contacts with the State hardly render it at home there."[88] In the end, the Supreme Court held that the Due Process Clause bars such "sprawling," "grasping," and "exorbitant" exercises of personal

80. *Daimler*, 571 U.S. at 120–21.

81. *Id.* at 121.

82. *Id.* at 124.

83. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 929–30 (9th Cir. 2011), *rev'd sub nom.* Daimler AG v. Bauman, 571 U.S. 117 (2014); *see Daimler*, 571 U.S. at 134.

84. *Daimler*, 571 U.S. at 121.

85. *Id.* at 139 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (emphasis added and internal brackets and quotations omitted).

86. *Id.*; *see id.* at 137 (describing "place of incorporation and principal place of business" as paradigmatic bases for general personal jurisdiction over a corporation).

87. *Id.* at 139.

88. *Id.* at 136; *see Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

jurisdiction.[89] Erasing *Pennoyer*'s geographical line and tamping down the fact-specific focus from *Helicopteros*, *Daimler* drew a clear corporate line for general personal jurisdiction: absent "exceptional" circumstances, a corporation is "at home" in its place of incorporation and its principal place of business.[90] That's the rule for fair play and substantial justice.[91]

Daimler's U.S. subsidiary sold plenty of cars in states other than California, with other long-arm statutes.[92] But *Daimler AG v. Bauman* did not address the constitutionality of general personal jurisdiction by consent, statutory or otherwise. At least not directly. Back on the Atlantic coast, Pennsylvania's consent-by-registration statute remained on the books. In 2019, a new test case arose in the U.S. District Court for the Eastern District of Pennsylvania, with *Daimler* now in play.

Sullivan v. A.W. Chesterton, Inc. involved an asbestos personal injury action against forty-eight defendants.[93] Representing her deceased husband, John Sullivan, the plaintiff alleged that Sullivan had suffered exposure to asbestos for more than a decade while serving in the U.S. Navy.[94] The plaintiff further alleged that a predecessor to defendant Huntington Ingalls, Inc. built the Navy ship on which Sullivan served and which contained asbestos.[95] Huntington Ingalls was incorporated and had its principal place of business in Virginia, and Sullivan's exposure on the ship occurred outside Pennsylvania.[96] Significantly, however, both Huntington Ingalls and its predecessor had previously registered to do business in Pennsylvania.[97]

Huntington Ingalls moved to dismiss for lack of personal jurisdiction.[98] Considering the relevant laws at hand—from the Pennsylvania legislature, the U.S. Court of Appeals for the Third Circuit, and the U.S. Supreme Court—the district court sought to untangle two

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89. *Daimler*, 571 U.S. at 121–22, 136, 138–39.

90. *Id.* at 137, 139 & n.19 (noting that "in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State") (citation omitted); *see* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021) (stating that "[a] state court may exercise general jurisdiction only when a defendant is essentially at home in the State") (internal quotations omitted).

91. *Id.* at 142.

92. *See, e.g.*, Fla. Stat. § 48.193 (2024) (Florida's long-arm statute providing for both specific and general personal jurisdiction).

93. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019).

94. *Id.* at 534–35.

95. *Id.* at 535.

96. *Id.* (also noting that the plaintiff was a citizen of Virginia).

97. *Id.*

98. *Id.*

issues: (1) whether *Daimler AG v. Bauman* rendered Pennsylvania's consent-by-registration statute unconstitutional, and (2) if so, whether *Bane v. Netlink, Inc.* controlled the present case.[99]

For issue (1), the district court looked directly to the Fourteenth Amendment, as, by its terms, Pennsylvania's long-arm statute was coextensive with federal due process.[100] Yet, the facts of *Sullivan* closed all doors for general personal jurisdiction that the Supreme Court had opened in *Daimler*: Huntington Ingalls was not incorporated in Pennsylvania, Huntington Ingalls did not have its principal place of business in Pennsylvania, and there were no exceptional circumstances.[101] Closing the door for specific personal jurisdiction, as well, the facts made clear that the asbestos exposure had occurred outside Pennsylvania.[102] Accordingly, the plaintiff's only hope for personal jurisdiction rested with Pennsylvania's consent-by-registration statute.[103]

Starting from the "axiomatic" principle that consent is valid only if both knowing and voluntary, the district court recognized that a foreign corporation such as Huntington Ingalls faced a Hobson's choice.[104] In the seventeenth century, Thomas Hobson had owned a livery stable in Cambridge, England, offering transport to London.[105] To allow his best horses a rest, Hobson offered customers the horse nearest to the stable door or no horse at all.[106] Ride this steed or find your own way through the fog. The Pennsylvania statute fit the same customer service mold: take it or leave it. From that mold emerged an unconstitutional condition: either surrender the due process shield of general jurisdiction only where the corporation is "at home" or lose the benefits of doing business in

99. *Sullivan*, 384 F. Supp. 3d at 536.

100. *Id.* at 537; *see* 42 PA. CONS. STAT. § 5322(b) ("[T]he jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."); *see also* Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) (looking to federal due process to analyze California's long-arm statute).

101. *Daimler*, 571 U.S. at 137, 139 & n.19 (2014); *see Sullivan*, 384 F. Supp. 3d at 538.

102. *Sullivan*, 384 F. Supp. 3d at 538.

103. *Id.*

104. *Id.* at 538, 541.

105. *See Hobson's choice*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice [https://perma.cc/EC5E-5QYT] (last visited Nov. 5, 2024); *Where Does the Term 'Hobson's Choice' Come From?*, HISTORIC ENGLAND, https://historicengland.org.uk/listing/what-is-designation/heritage-highlights/hobsons-choice/ [https://perma.cc/B6XR-V7JR] (last visited Nov. 5, 2024).

106. *Where Does the Term 'Hobson's Choice' Come From?*, HISTORIC ENGLAND, https://historicengland.org.uk/listing/what-is-designation/heritage-highlights/hobsons-choice/ [https://perma.cc/B6XR-V7JR] (last visited Nov. 5, 2024).

Pennsylvania.[107] The statute provides clear notice without genuine choice, as "the mandatory nature of the statutory consent . . . is, in fact, functionally involuntary."[108] Thus, because the Pennsylvania statute "conditions the benefit of doing business in the state with the surrender of constitutional due process protections" as announced in *Daimler*, the statute could not stand.[109]

For issue (2), the district court struck a note of modesty, recognizing its occupancy on the bottom tier of the federal court hierarchy and, thus, its obligation to follow both the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court.[110] After crafting the first portion of its opinion in obedience to the Supreme Court, the district court turned its attention to the Third Circuit. The district court interpreted *Bane*, decided prior to *Daimler*, as resting on a dethroned constitutional regime.[111] Mere "continuous and substantial" forum contacts and "purposeful availment" were now antiquated notions, no longer sufficient for due process.[112] The Supreme Court had substituted a new, binding standard.[113] While *Bane* would ordinarily control as law of the circuit, an intervening decision from the court of last resort overrides all.[114]

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107. *Sullivan*, 384 F. Supp. 3d at 541–42; *see* Daimler AG v. Bauman, 571 U.S. 117, 137, 139 & n.19 (2014); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021).

108. *Sullivan*, 384 F. Supp. 3d at 542 (noting that the statutory consent at issue "is not true consent at all"); *see* Monestier, *supra* note 3, at 1413 (arguing that "the consent that underpins registration-based general jurisdiction is coercive").

109. *Sullivan*, 384 F. Supp. 3d at 534, 540–43 (stating that "a mandatory statutory regime purporting to confer consent to general jurisdiction in exchange for the ability to legally do business in a state is contrary to the rule in *Daimler* and, therefore, can no longer stand" and finding that the Pennsylvania statute "violates the unconstitutional conditions doctrine").

110. *Id.* at 544; *see* Ramos v. Louisiana, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring).

111. *Sullivan*, 384 F. Supp. 3d at 543; *see* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 697–98 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (stating that if a constitutional "standard is replaced, decisions reached under the old standard are not binding," as "[i]t would be anomalous if the results reached under a constitutional standard remained binding after the standard or test was repudiated").

112. *Sullivan*, 384 F. Supp. 3d at 543.

113. *Casey*, 947 F.2d at 692.

114. *Sullivan*, 384 F. Supp. 3d at 544; *see Ramos*, 590 U.S. at 124 n.5 (Kavanaugh, J., concurring); Whitaker v. Herr Foods, Inc., 198 F. Supp. 3d 476, 489–90 (E.D. Pa. 2016) ("Once a panel of the Third Circuit makes its prediction as to state law, a subsequent panel of the Third Circuit cannot overrule it. The prior prediction remains controlling upon a subsequent panel unless a U.S. Supreme Court decision requires modification or the Third Circuit sitting en banc overrules the prior decision.") (internal citation omitted); *In re* Taras, 136 B.R. 941, 948 (Bankr. E.D. Pa. 1992) (noting that "[p]rinciples of *stare decisis*

Thus, because the rule from the Supreme Court in *Daimler*—that courts may exercise "general personal jurisdiction only where the foreign corporation is at home"—negates the rule from the Third Circuit in *Bane*—that courts may exercise "general personal jurisdiction over a foreign corporation by statutory consent"—the district court could rightfully ignore the circuit court.[115] Motion to dismiss granted.[116] Huntington Ingalls was free to go.

D. Supreme Court of Pennsylvania

As different judges pulled in different directions and the federal court hierarchy wobbled, Pennsylvania's consent-by-registration statute still remained on the books. Fortunately, an authoritative, clarion voice soon joined the conversation. Hearing one Pennsylvania trial court's rare concern that "the cloak of consent" could not wrap general personal jurisdiction,[117] the highest court in the Commonwealth looked squarely at Section 5301(a)(2)(i).

In 2021, the Supreme Court of Pennsylvania decided *Mallory v. Norfolk Southern Railway Co.* and struck down the consent-by-registration statute as unconstitutional.[118] There, plaintiff Robert Mallory sued his former employer, Norfolk Southern, for violating the Federal Employers' Liability Act.[119] Mallory had worked as a freight-car mechanic for Norfolk Southern for more than two decades, first in Ohio and later in Virginia.[120] His job responsibilities included spraying asbestos on boxcar pipes, managing chemicals in a paint shop, and demolishing train car

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command this court to follow the law of the circuit, as set forth by the Third Circuit, unless and until the Supreme Court directs to the contrary").

115. *Sullivan*, 384 F. Supp. 3d at 545; *see* Metro Container Grp. v. AC&T Co., No. CV 18-3623, 2021 WL 5804374, at *6 (E.D. Pa. Dec. 7, 2021) (declining to find that a foreign corporation's "registration to do business in Pennsylvania subjects it to general personal jurisdiction"); *see also* Reynolds v. Turning Point Holding Co., LLC, No. 2:19-CV-01935-JDW, 2020 WL 953279, at *5 (E.D. Pa. Feb. 26, 2020).

116. In 2023, after years of litigation between the plaintiff and dozens of other defendants, the parties reached a settlement and the district court dismissed the case with prejudice. *See* Order Dismissing Action with Prejudice Pursuant to Local Rule 41.1(b), Sullivan v. A.W. Chesterton, Inc., 2:18CV03622 (E.D. Pa. Mar. 8, 2023).

117. Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283, at *6 (Pa. Com. Pl. May 30, 2018), *affirmed*, 266 A.3d 542 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

118. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 547 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

119. *Id.* at 551; *see Mallory*, 2018 WL 3025283, at *1.

120. *Mallory*, 266 A.3d at 551; *see* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 126 (2023).

interiors, all of which exposed him to dangerous carcinogens.[121] He was later diagnosed with colon cancer.[122] After a brief residence in Pennsylvania, Mallory moved back to Virginia and filed suit against Norfolk Southern in Pennsylvania state court.[123]

At the time of filing, the defendant's legal link to Pennsylvania was a slip of paper. Norfolk Southern was incorporated and had its principal place of business in Virginia.[124] In 1998, it registered to do business in Pennsylvania and, over the years, continued to update its corporate information with the Department of State.[125] Accordingly, the plaintiff invoked Pennsylvania's consent-by-registration statute as the basis for general personal jurisdiction.[126]

The trial court dismissed Mallory's complaint with prejudice for lack of personal jurisdiction.[127] But the court quickly realized its outlier status in condemning Section 5301(a)(2)(i) as unconstitutional. As the case rose on appeal, the trial court issued a supplemental opinion necessitated by its "duty of candor":[128] the Superior Court of Pennsylvania should be "aware of the existence" of a recent panel opinion reaching the opposite conclusion on Section 5301.[129] As it turned out, that note of honesty was better addressed to the Supreme Court of Pennsylvania. Because *Mallory* involved an appeal "from a final order declaring . . . Pennsylvania's general jurisdiction statute . . . unconstitutional under the Fourteenth Amendment," Pennsylvania's Judicial Code mandated that the highest state court decide the appeal.[130] It did so.

On direct appeal, the Supreme Court of Pennsylvania recognized that the U.S. Supreme Court had not addressed the precise issue at hand post-*International Shoe*: "the interplay between consent to jurisdiction by

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121. *Mallory*, 600 U.S. at 126.

122. *Id.*; *see Mallory*, 266 A.3d at 551.

123. *Mallory*, 600 U.S. at 126.

124. *Mallory*, 266 A.3d at 547, 551.

125. *Mallory*, 600 U.S. at 134–35.

126. Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283, at *1 (Pa. Com. Pl. May 30, 2018), *affirmed*, 266 A.3d 542 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

127. Mallory v. Norfolk S. Ry. Co., No. 1709001961, 2018 WL 3202860, at *1 (Pa. Com. Pl. Feb. 6, 2018), *affirmed*, 266 A.3d 542 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

128. Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 11269775, at *1 (Pa. Com. Pl. Sep. 5, 2018).

129. *Id.* (citing Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1137 (Pa. Super. Ct. 2018)).

130. Mallory v. Norfolk S. Ry. Co., 241 A.3d 480, at *1 (Pa. Super. Ct. 2020) (citing 42 PA. CONS. STAT. § 722) (citing the consent subsection of Pennsylvania's statute, § 5301(a)(2)(ii), although the trial court and the supreme court analyzed the foreign qualification subsection, § 5301(a)(2)(i)).

registration and the due process limits on general jurisdiction."[131] Any court peering into such a void must "work with the authoritative sources that remain available to us."[132] So, led by the Chief Justice as author, the Pennsylvania court interpreted the U.S. Supreme Court's directives on offer at the time, looking only from *International Shoe* forward and "declin[ing] to follow *Pennoyer*-era High Court decisions."[133] After all, the High Court itself in *Daimler AG v. Bauman* had cautioned that "unadorned citations" to cases "decided in the era dominated by *Pennoyer*'s territorial thinking should not attract heavy reliance today."[134]

Instead, the Supreme Court of Pennsylvania relied on Norfolk Southern's home state.[135] The court found that "our statutory scheme fails to comport with the guarantees of the Fourteenth Amendment; thus, it clearly, palpably, and plainly violates the Constitution."[136] Following *Daimler*, as well as the "astute" and "cogent" trial court below, the court struck down the consent-by-registration statute as an overbroad grant of jurisdictional authority.[137] The Commonwealth legislature "may not require what the Constitution prohibits."[138] Because Norfolk Southern was not "at home" in Pennsylvania, it was not subject to general personal jurisdiction in Pennsylvania.[139]

Analyzing the notion of consent, in particular, the Supreme Court of Pennsylvania acknowledged that the requirement of personal jurisdiction, as a liberty right flowing from the Due Process Clause, may be waived by consent.[140] But as the U.S. Supreme Court instructed in *Brady v. United States*—a case familiar to law students facing a criminal procedure professor with roster in hand—such waiver must be voluntary, knowing, and intelligent.[141] The consent embedded in Section 5301(a)(2)(i) was not

131. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 564 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

132. United States v. Heron, 564 F.3d 879, 885 (7th Cir. 2009) (describing the lack of a rule of law coming from a splintered bench).

133. *Mallory*, 266 A.3d at 565–67; *see also id.* at 554–55 (observing that Pennsylvania "trial court opined that the High Court implicitly overruled" pre-*International Shoe* cases).

134. Daimler AG v. Bauman, 571 U.S. 117, 138 n.18 (2014).

135. *See Mallory*, 266 A.3d at 567–68.

136. *Id.* at 565.

137. *Id.* at 565–66, 570.

138. *Id.* at 566.

139. *Id.* at 567–68 (also accepting the trial court's federalism analysis, as the predicate facts "illustrate[] the textbook example of infringement upon the sovereignty of sister states").

140. *Id.* at 548; *see* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

141. *Mallory*, 266 A.3d at 548–49; Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Miranda v. Arizona, 384 U.S. 436, 444 (1966); Fuentes v. Shevin, 407 U.S. 67, 94 & n.31 (1972) (recognizing that "in the civil no less than the criminal area, courts

voluntary, but rather "compelled submission to general jurisdiction by legislative command."[142] Not fair play and substantial justice. Not consistent with due process. And, frankly, not good for business.[143] Dismissal affirmed.[144]

E. U.S. Supreme Court

Let's recap. The Pennsylvania legislature enacted Section 5301(a)(2)(i) to provide for general personal jurisdiction via foreign corporate registration, attracting constitutional challenges in federal and state courts.[145] A panel sitting on the U.S. Court of Appeals for the Third Circuit found that the law comports with due process, reflecting the widespread view.[146] A judge sitting directly below on the U.S. District Court for the Eastern District of Pennsylvania found that the law violates due process.[147] A judge sitting on the Pennsylvania trial court also found that the law violates due process, and the Supreme Court of Pennsylvania agreed.[148] Opinions up and down the hierarchy reached disparate results on whether the statute was constitutional. The path is getting bumpy, and only one bench remains. Enter the U.S. Supreme Court.

In 2023, the U.S. Supreme Court granted certiorari in *Mallory v. Norfolk Southern Railway Co.* and vacated the decision of the Supreme Court of Pennsylvania.[149] Does "the Due Process Clause of the Fourteenth Amendment prohibit[] a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there"?[150] Observing a split in authority between Pennsylvania and Georgia on the question,[151] the U.S. Supreme Court provided a final answer: No.[152]

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indulge every reasonable presumption against waiver") (internal quotation omitted); D.H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 185–86 (1972).

142. *Mallory*, 266 A.3d at 569–70.

143. *See id*. at 571 (sharing a Delaware court's sentiment that, if the cost of offering goods and services in the state "is that those foreign corporations will be subject to general jurisdiction in Delaware, they rightly may choose not to do so") (quoting Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016)). *See generally* Paige, *supra* note 11, at 2755–63.

144. *See Mallory*, 266 A.3d at 547, 571.

145. 42 PA. CONS. STAT. § 5301(a)(2)(i).

146. Bane v. Netlink, Inc., 925 F.2d 637, 641 (3d Cir. 1991).

147. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 543 (E.D. Pa. 2019).

148. *Mallory*, 266 A.3d at 564.

149. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 125–26, 146 (2023) (also remanding).

150. *Id.* at 127.

151. *Id.*

152. *Id*. at 126, 146.

Writing for the majority, Justice Neil M. Gorsuch approached this "very old question indeed" by dusting off precedent from a prior century, decades before the International Shoe Company failed to pay its Washington taxes.[153] In 1917, Justice Holmes wrote for a unanimous bench in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.* and assessed a state court's power over a defendant similarly situated to Norfolk Southern.[154] There, the Court ruled that Missouri courts had general personal jurisdiction over an out-of-state (Pennsylvania) insurance company sued by an out-of-state (Arizona) plaintiff on an out-of-state (Colorado) contract because the insurance company had "obtained a license to do business in Missouri," and that licensing law required appointing a Missouri agent for service of process.[155] So, too, here: Pennsylvania courts have general personal jurisdiction over an out-of-state railway company sued by an out-of-state plaintiff on an out-of-state carcinogen exposure because the railway company had registered to do business in Pennsylvania, and that statutory law combines registration and general personal jurisdiction into a package deal.[156]

The Supreme Court of Pennsylvania may have viewed *Pennsylvania Fire* as a faded relic of the pre-*International Shoe* era, lacking "significant precedential weight in federal jurisprudence on the issue."[157] On appeal, the U.S. Supreme Court was less inclined to overlook its own prior ruling, however old and unfashionable—and not at all inclined to overlook the Pennsylvania court's impertinence.[158] The High Court will overrule when

153. *See id.* at 134–36, 146.

154. Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co., 243 U.S. 93, 94–96 (1917).

155. *Id.*; *see Mallory*, 600 U.S. at 133.

156. *See Mallory*, 600 U.S. at 135–36 ("It is enough to acknowledge that the state law and facts before us fall squarely within *Pennsylvania Fire*'s rule."); *see also* Union Home Mortg. Corp. v. Everett Fin., Inc., No. 1:23 CV 00996, 2023 WL 6465171, at *3 n.6 (N.D. Ohio Oct. 4, 2023) (stating "the key operative fact of the *Mallory* decision was that the Pennsylvania statute at issue acted as an *explicit* consent to general jurisdiction as part of the 'registration to do business' process").

157. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 567 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

158. *Mallory*, 600 U.S. at 136 (quoting Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989), to admonish lower courts to "leav[e] to this Court the prerogative of overruling its own decisions").

it says it overrules.[159] For now, *Pennsylvania Fire* controls on mirrored facts.[160] The "sea change" of *Daimler* did not douse the flames.[161]

Continuing his opinion in *Mallory* for a plurality of the Court, Justice Gorsuch revisited the import of *International Shoe*.[162] There, the Court had expanded state court jurisdiction, and Norfolk Southern could not now transform *International Shoe* into precisely the sort of "mechanical or quantitative" formula that the opinion expressly eschewed.[163] The opinion had merely paved an "*additional* road to jurisdiction over out-of-state corporations," specifically "an out-of-state corporation that *has not* consented to in-state suits."[164] Like Pennsylvania Fire Insurance Co., Norfolk Southern Railway Co. "*has* consented."[165] (Emphases noted.) The plurality found "no fair play or substantial justice" in overreading *International Shoe* at the expense of the "longstanding precedent" of *Pennsylvania Fire*, as the two "sit comfortably side by side."[166] Back in the day, the Court in *International Shoe* had ignored that precedent completely.[167]

Going forward, Justice Gorsuch's "flexible" vision of *International Shoe* may or may not hold, despite the eye-catching italics.[168] Without

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159. *See* Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents."); Ramos v. Louisiana, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring); United States v. Thomas, 242 F.3d 1028, 1035 (11th Cir. 2001) (rejecting defendant's "urging that we should get ahead of the Supreme Court and beat it to the punch by overruling *Almendarez–Torres* ourselves" due to "the very basic fact that we cannot overrule Supreme Court decisions"); United States v. Dupree, 57 F.4th 1269, 1286 (11th Cir. 2023) (Grant, J., concurring) (noting that revising the contours of Supreme Court precedent would cause disruption, "[a]nd that sort of disruption should be weighed by the Supreme Court as part of its horizontal stare decisis analysis, not invited by our own rejection of vertical stare decisis").

160. *Mallory*, 600 U.S. at 134; *id.* at 146 n.11 ("Nor will this Court now overrule *Pennsylvania Fire*."). Upon remand, *Mallory* returned to the Pennsylvania state court system.

161. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019).

162. *Mallory*, 600 U.S. at 136–46 (plurality opinion).

163. *Id.* at 139; Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

164. *Mallory*, 600 U.S. at 138 (emphasis in original); *see Int'l Shoe Co.*, 326 U.S. at 319.

165. *Mallory*, 600 U.S. at 138 (emphasis in original).

166. *Id.* at 137, 139, 146.

167. As presented in the Supreme Court Reporter, the Court's opinion in *International Shoe* includes the Supreme Court Reporter information for *Pennsylvania Fire*. *See Int'l Shoe Co.*, 66 S. Ct. at 160. However, that information apparently refers to the preceding opinion in *McDonald v. Mabee*. *See id.*

168. *See Mallory*, 600 U.S. at 139.

majority support, the plurality opinion lacks binding force.[169] Still, his vision may signal the future of long-arm doctrine, a future where states find clever and manipulative ways to attach general jurisdiction to foreigners.[170]

It is telling that the one Justice who peeled off from the paragraphs constituting Justice Gorsuch's plurality opinion to concur in the judgment was Justice Samuel A. Alito, Jr. Before President George W. Bush nominated Justice Alito to the U.S. Supreme Court, President George H.W. Bush had nominated him to the U.S. Court of Appeals for the Third Circuit.[171] While sitting on the Third Circuit bench, Justice Alito served on the unanimous panel that decided *Bane v. Netlink, Inc.*[172] The *Bane* opinion made short work of the facts: Pennsylvania's statute for "registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts."[173] Thirty-two years later, Justice Alito's concurrence in *Mallory* made no mention of *Bane*, offering a more nuanced, forward-facing perspective in its stead.

On Justice Alito's contemporary view, *Mallory* "is not the end of the story for registration-based jurisdiction."[174] Specifically, consent-by-registration statutes may violate the dormant Commerce Clause as discriminating against out-of-state corporations and burdening interstate commerce.[175] But such federalism concerns would have to wait for another

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169. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 737 (1983) (stating that while a plurality opinion is "not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue"); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (noting that Court is not bound by reasoning of plurality opinion); Commonwealth v. McClelland, 233 A.3d 717, 729 (Pa. 2020) ("Plurality opinions, by definition, establish no binding precedent for future cases.") (internal quotations omitted); *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotations omitted).

170. *See Personal Jurisdiction—General Jurisdiction—Consent-by-Registration Statutes*—International Shoe *and Its Progeny*—Mallory v. Norfolk Southern Railway Co., 137 HARV. L. REV. 360, 369 (2023) (identifying "*Mallory*'s most salient contribution" as "its clarification of how a slim majority of the Court understands *International Shoe*: as providing grist for the 'construction' of a supplemental doctrinal edifice rather than 'tearing open a gulf' between traditional notions of jurisdiction and a new regime").

171. *See Justice Samuel A. Alito*, THE WHITE HOUSE: JUDICIAL NOMINATIONS, https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/alito.html [https://perma.cc/AA8Z-4D4U].

172. Bane v. Netlink, Inc., 925 F.2d 637, 638 (3d Cir. 1991).

173. *Id.* at 640.

174. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 154 (2023) (Alito, J., concurring in part and concurring in the judgment).

175. *See id.* at 157–63; U.S. CONST. art. I, § 8, cl. 3.

day and another petitioner, as "no Commerce Clause challenge is before us."[176] Litigants in a mass tort action promptly took the bait, seeking "urgent" clarification from the Pennsylvania appellate court as to whether the registration statute violates Commerce Clause doctrine.[177] Time will tell. Today, *Pennsylvania Fire* remains good law and controls "due to the clear overlap with the facts of this case."[178]

The five majority Justices in *Mallory* all agreed that the Supreme Court of Pennsylvania stepped out of line when declining to follow *Pennsylvania Fire*. From Justice Gorsuch, writing the Opinion of the Court for himself and Justices Alito, Ketanji Brown Jackson, Sonia Sotomayor, and Clarence Thomas: "The Pennsylvania Supreme Court clearly erred" in its impression that "intervening decisions from this Court had 'implicitly overruled' *Pennsylvania Fire*."[179] From Justice Alito's concurrence: "Norfolk Southern has not persuaded me that *Pennsylvania Fire* has been overruled."[180] From Justice Jackson's concurrence: "I agree with the Court that this case is straightforward under our precedents. . . . [W]hat makes it so is not just our ruling in *Pennsylvania Fire* . . . ."[181]

In stark contrast, the four dissenting Justices took a dimmer view of opinions "decided before this Court's transformative decision on personal jurisdiction in *International Shoe*."[182] Justice Amy Coney Barrett, writing for herself, Chief Justice John G. Roberts, Jr., and Justices Elena Kagan and Brett M. Kavanaugh, reiterated a point that apparently should have been obvious: "[W]e have already stated that prior decisions that are

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176. *Mallory*, 600 U.S. at 163 (Alito, J., concurring in part and concurring in the judgment).

177. *See* Supplement to Syngenta Crop Protection, LLC's Petition for Permission to Appeal at 3, Syngenta Crop Protection, LLC v. Nemeth, No. 160 EDM 2023 (Pa. Super. Ct. Apr. 26, 2024) (original permission to appeal filed on November 21, 2023, five months after *Mallory*); Aleeza Furman, *'Urgent Need for Clarity': Mass Tort Defendant Presses Superior Court to Examine Pa.'s Registration Statute*, THE LEGAL INTELLIGENCER (Apr. 30, 2024), https://www.law.com/radar/card/urgent-need-for-clarity-mass-tort-defendant-presses-superior-court-to-examine-pas-registration-statute-402-153571/ [https://perma.cc/W5F6-U4HY]. The appellate court declined to hear the appeal. *See* Order Denying Petition for Permission to Appeal, Syngenta Crop Protection, LLC v. Nemeth, No. 160 EDM 2023 (Pa. Super. Ct. Aug. 8, 2024) (per curiam); Aleeza Furman, *Pa. Appeals Court Shuts Down Bid for Clarity Amid 'Mallory' Uncertainty*, THE LEGAL INTELLIGENCER (Aug. 8, 2024), https://www.law.com/thelegalintelligencer/2024/08/08/pa-appeals-court-shuts-down-bid-for-clarity-amid-mallory-uncertainty/ [https://perma.cc/A9F4-9HPG].

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

179. *Id.* at 136 (majority opinion).

180. *Id.* at 152 (Alito, J., concurring in part and concurring in the judgment).

181. *Id.* at 147 (Jackson, J., concurring).

182. *Id.* at 177–78 (Barrett, Roberts, Kagan & Kavanaugh, JJ., dissenting).

inconsistent with this standard are overruled. *Pennsylvania Fire* fits that bill."[183] Echoing the Supreme Court of Pennsylvania and the U.S. District Court for the Eastern District of Pennsylvania, the dissenters interpreted *Daimler* to set the new jurisdictional standard and undermine consent-by-registration statutes.[184]

Despite the sharp divide on the bench in *Mallory*, all nine Justices' attention to the binding force of a 1917 opinion reveals a deeper meaning to the ruling. On the surface, the *Mallory* decision holds Norfolk Southern to account in Pennsylvania courts by performing the quintessential lawyerly task—which every law student, facing every professor, is trained to perform—of mapping current case facts onto prior case facts. Beneath the surface, the decision is a lesson in hierarchy. By providing a yes/no answer, *Mallory* at long last put a stop to the zigzagging travels of Section 5301. All the disparate opinions from lower courts are now, finally, correct or incorrect.

The Supreme Court's vehement rejection of an implicit overruling of *Pennsylvania Fire* allowed the majority and plurality paragraphs to sidestep questions of involuntary choice and coercion and unconstitutional conditions.[185] Thomas Hobson was nowhere to be found.[186] The Court in *Pennsylvania Fire* had treated the filing of a foreign license as "the defendant's voluntary act," carrying "the risk of the interpretation that may be put upon it by the courts."[187] Case closed.

Indeed, the majority opinion in *Mallory* was so concise, so laser focused on applying *Pennsylvania Fire* to parallel facts that one wonders if an underlying motivation was putting the Supreme Court of Pennsylvania and like-minded lower benches in their place. For its part, the dissenting opinion in *Mallory* was equally ardent that *Pennsylvania*

183. *Id.* (internal brackets and quotation marks omitted).

184. *See Mallory*, 600 U.S. at 163.

185. *Compare id.* at 164 (dissent stating that "States may now manufacture 'consent' to personal jurisdiction" and that a court's exercise of jurisdiction over a defendant who "*contests* the court's authority" is an exercise of "coercive power over the defendant"); *id.* at 170 (dissent stating that the Court has rejected efforts to require defendants to relinquish waivable rights "as a condition of doing business"); *id.* at 179 (dissent stating that "nothing about that [statutory] registration is 'voluntary'").

186. *Compare id.* at 167 (dissent stating that the Court casts Pennsylvania's statute "as setting the terms of a bargain").

187. Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co., 243 U.S. 93, 96 (1917); *see also* Gold Issue Min. & Mill. Co. v. Pa. Fire Ins. Co. of Phila., 267 Mo. 524, 184 S.W. 999, 1012 (1916), *aff'd*, 243 U.S. 93 (1917), *and overruled by* State *ex rel.* Am. Cent. Life Ins. Co. v. Landwehr, 300 S.W. 294 (Mo. 1927), *and abrogated by* State *ex rel.* Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017) (stating that "there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business").

Fire "is no longer good law."[188] But that dissenting view lost the vote, five to four. *Pennsylvania Fire* stands and decides *Mallory*, and the lower courts have no business de facto overruling the U.S. Supreme Court. Lesson learned.

III. THE LEGAL SINGULARITY

Pennsylvania's consent-by-registration statute is now fortified with the High Court's imprimatur. Unless and until a new collection of Justices decides differently on analogous facts, the statute stands as constitutional under the Due Process Clause.[189] In the end, the Third Circuit got it right, and the Eastern District of Pennsylvania and the Supreme Court of Pennsylvania got it wrong.

But let us rewind the clock. What of the time before the U.S. Supreme Court's ruling in *Mallory v. Norfolk Southern Railway Co.* in 2023? After all, Section 5301(a)(2)(i) has provided for general personal jurisdiction by registration since 1978, a full forty-five years before the *Mallory* decision issued from the court of last resort. During those intervening years, was the law constitutional? Did the Pennsylvania statute violate or comport with due process? Which lower court was correct or incorrect at the moment of its decision, before the U.S. Supreme Court pulled rank? Spoiler alert: *every* court was correct.

As Section 5301(a)(2)(i) wound its way through the judicial hierarchy, the binding force of tiers beneath the Supreme Court broke down. Consider the scientific analogy of a singularity, a "region of infinite density" where the laws of physics break down.[190] A singularity lies at the center of all black holes, those "mysterious cosmic objects" with a gravitational pull so intense that not even light can escape.[191] On the exterior of a black hole lies the event horizon, the boundary marking the

188. *Mallory*, 600 U.S. at 178 (Barrett, Roberts, Kagan & Kavanaugh, JJ., dissenting).

189. *Cf.* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 364 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The Court reverses course today for one reason and one reason only: because the composition of this Court has changed.").

190. Ethan Siegel, *We Can't Avoid a Singularity Inside Every Black Hole*, BIG THINK (May 16, 2023), https://bigthink.com/starts-with-a-bang/singularity-inside-black-hole/ [https://perma.cc/6MTR-Q6ZP]; *see* Erik Curiel, *Singularities and Black Holes*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/archives/sum2023/entries/spacetime-singularities/ [https://perma.cc/ATF7-6CAU]; PAUL M. SUTTER, HOW TO DIE IN SPACE: A JOURNEY THROUGH DANGEROUS ASTROPHYSICAL PHENOMENA 214–17, 243 (2020).

191. *Black Hole Basics*, NASA, https://science.nasa.gov/universe/black-holes/ [https://perma.cc/Q5VX-D7JQ]; *see* Siegel, *supra* note 190.

point of no return.[192] Inside, a singularity is "the true heart of the black hole,"[193] where "time stops and space ceases to make sense."[194] If we cross the event horizon and enter a black hole, then we will always face the singularity no matter which direction we turn.[195] Mysterious, indeed.

The landscape of constitutional jurisprudence contains that same head-spinning property of a singularity, at least until the U.S. Supreme Court weighs in to bring order to the chaos.[196] No matter which direction we turn, no matter which court we examine, no matter which tier on the hierarchy, we will always face the correct law.

A. Stare Decisis on the Judicial Hierarchy

We should be able to distinguish correct decisions from incorrect, who got it right from who got it wrong. Law schools teach stare decisis for good reason. This ancient doctrine is "a foundation stone of the rule of law,"[197] ensuring uniformity and stability in our legal system and grounding societal norms "in the law rather than in the proclivities of individuals."[198]

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192. SUTTER, *supra* note 190, at 307; *What Are Black Holes?*, NASA (Sept. 8, 2020) ("Matter and radiation fall in, but they can't get out."), https://www.nasa.gov/universe/what-are-black-holes/# [https://perma.cc/A9T8-KPJ8].

193. SUTTER, *supra* note 190, at 214 ("The true center. The true death. The singularity.").

194. Ahmed Almheiri, *How the Inside of a Black Hole Is Secretly on the Outside*, SCIENTIFIC AM. (Sept. 1, 2022), https://www.scientificamerican.com/article/how-the-inside-of-a-black-hole-is-secretly-on-the-outside/ [https://perma.cc/JN37-GT49].

195. SUTTER, *supra* note 190, at 215; Ethan Siegel, *What's It Like When You Fall Into A Black Hole?*, FORBES (June 1, 2019), https://www.forbes.com/sites/startswithabang/2019/06/01/ask-ethan-whats-it-like-when-you-fall-into-a-black-hole/ [https://perma.cc/6XH9-G7ZE] ("From inside a black hole's event horizon, if you move in any direction, you'll eventually encounter the singularity itself. Therefore, surprisingly, the singularity appears in all directions!"); Paul Sutter, *Take a Fun Trip into a Black Hole: What's It Like Inside?*, SPACE.COM (Nov. 18, 2019), https://www.space.com/into-a-black-hole-whats-inside.html [https://perma.cc/6XEP-JNPL] ("Turn left, turn up, turn around, it doesn't matter—the singularity always remains in front of you.").

196. *See* Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (stating that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

197. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014).

198. Vasquez v. Hillery, 474 U.S. 254, 265 (1986); *see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 387–88 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 430 (1924) ("This ancient custom of following precedents . . . helps us to hold fast to our basic principles, to establish knowable rules of conduct, to administer even-handed justice, and to remain a uniformly consistent development of our legal system.").

A Latin phrase meaning "to stand by things decided," stare decisis traces its ancestry to English common law.[199] In his classic eighteenth-century treatise, *Commentaries on the Laws of England*, William Blackstone recognized "an established rule to abide by former precedents, where the same points come again in litigation," all the better "to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."[200] Moving into the New World, stare decisis traces its framework to the U.S. Constitution. Article III constructs a hierarchy of courts, vesting the "judicial Power" in "one supreme Court" and any "inferior Courts" that Congress may establish.[201] Stare decisis determines when a court must follow prior decisions from itself or another court on the hierarchy.[202]

The doctrine takes two forms: vertical and horizontal.[203] Vertical stare decisis imposes an absolute dictate.[204] An inferior court is obligated to follow "a prior factually indistinguishable decision of a controlling court,"[205] whether federal or state.[206] Vertical stare decisis expresses

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199. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

200. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.

201. U.S. CONST. art. III, § 1; *see* McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) ("The United States federal legal system is structured as a common law system.").

202. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

203. *See* Ramos v. Louisiana, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring) (stating that "horizontal *stare decisis*" reflects "the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent," while "vertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court'"); Dodge v. Cnty. of Orange, 282 F. Supp. 2d 41, 79 (S.D.N.Y. 2003) (distinguishing "between horizontal *stare decisis* (whereby a court binds itself) and vertical *stare decisis* (whereby a higher court's decision binds lower courts)").

204. *Ramos*, 590 U.S. at 124 n.5 (Kavanaugh, J., concurring).

205. Brewster v. Comm'r, 607 F.2d 1369, 1373 (D.C. Cir. 1979); *see* Henderson v. Collins, 262 F.3d 615, 623 (6th Cir. 2001) ("Where, as here, we are unable to perceive material distinctions between a decision of [the Supreme] Court and the case before us, we are obligated to defer to its lead regardless of our own inclinations."); Scott v. United States, 890 F.3d 1239, 1257 (11th Cir. 2018) ("[W]e must follow the reasoning behind a prior holding if we cannot distinguish the facts or law of the case under consideration.").

206. *See* Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam); United States v. Maloid, 71 F.4th 795, 808 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024) (recognizing that "rigid adherence to vertical stare decisis is paramount"); McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) ("A circuit court's decision binds the district courts sitting within its jurisdiction while a decision by the Supreme Court binds all circuit and district courts."); *In re* Avery, 286 A.3d 1217, 1232 n.1 (Pa. 2022) ("In cases of horizontal *stare decisis*, moreover, this Court remains free to refine its own precedents as new fact patterns reveal complexities the earlier decision did not anticipate when it formulated the holding in question."); Presbytery of Seattle v. Schulz, 449 P.3d 1077, 1084 (Wash. App. 2019) (stating that "vertical stare decisis requires that courts follow decisions handed down by higher courts in the same jurisdiction," and thus "trial and appellate courts in Washington

power, rank over quality. One state court put the point bluntly: "Adherence is mandatory, regardless of the merits of the higher court's decision."[207] Lower and middle managers listen to the top brass, always.[208] Reflecting our system of dual sovereignty,[209] federal courts must follow the highest state court on issues of state law,[210] and state courts must follow the U.S. Supreme Court on issues of federal law.[211]

By contrast, horizontal stare decisis "is not an inexorable command."[212] A court may ignore itself. Wisdom and respect often counsel following along, as a consistent body of case law enhances the integrity of the American experiment.[213] Still, an "unworkable or . . . badly reasoned" opinion may warrant a do-over.[214] No precedent is etched in stone. The U.S. Supreme Court overrules its own decisions as occasion and "special justification" demand, with new Justices training a fresh lens

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must follow decisions handed down by our Supreme Court and the United States Supreme Court") (internal quotations omitted).

207. *Presbytery of Seattle*, 449 P.3d at 1084.

208. *See* United States v. Guillen, 995 F.3d 1095, 1114 (10th Cir. 2021) ("Vertical stare decisis is absolute and requires us, as middle-management circuit judges, to follow applicable Supreme Court precedent in every case."); Whitaker v. Herr Foods, Inc., 198 F. Supp. 3d 476, 490 (E.D. Pa. 2016) ("Surely, a district court does not have the power to review a prior decision by a Third Circuit panel when a subsequent panel has no such power.").

209. *See* Gregory v. Ashcroft, 501 U.S. 452, 457–58 (1991) (recognizing that "States thus retain substantial sovereign authority" under the "federalist structure of joint sovereigns").

210. *See* World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 586 F.3d 950, 957 (11th Cir. 2009) (stating that "we are bound by the decisions of the state supreme court" on state law issues); King v. Ord. of United Com. Travelers of Am., 333 U.S. 153, 158 (1948) (clarifying that federal courts are bound by a state's intermediate appellate courts absent "persuasive evidence that the highest state court would rule otherwise"); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940).

211. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (stating that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); Doe v. Pryor, 344 F.3d 1282, 1286 (11th Cir. 2003) (recognizing that "[t]he only federal court whose decisions bind state courts is the United States Supreme Court").

212. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

213. *See* Vasquez v. Hillery, 474 U.S. 254, 265 (1986); *see also* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 103 (1945) (acknowledging "the attractive vision of a uniform body of federal law").

214. *Payne*, 501 U.S. at 827; *see* Ramos v. Louisiana, 590 U.S. 83, 123–24 (2020) (Kavanaugh, J., concurring) ("But even when judges agree that a prior decision is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling.").

on often sensitive and partisan debates.[215] One tier down, overruling is possible but rare by design. All thirteen U.S. Circuit Courts of Appeals follow the law of the circuit.[216] While specifics vary, in general a panel of circuit judges cannot disturb the published decision of a prior panel.[217] Only the circuit court sitting en banc, the U.S. Supreme Court, or a statutory enactment can overrule the prior panel's decision.[218] At the trial

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215. Gamble v. United States, 587 U.S. 678, 691 (2019); Dickerson v. United States, 530 U.S. 428, 443 (2000); *see, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that *Roe* and *Case*y must be overruled."); Loper Bright Enterprises v. Raimondo, No. 22-1219, 2024 WL 3208360, at *40 (U.S. June 28, 2024) (Kagan, J., dissenting) (dubbing the majority opinion "Hubris Squared" for overruling longstanding *Chevron* doctrine and accusing the majority of making "a laughingstock" of stare decisis).

216. *See generally* BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 491–94 (2016); Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39, 89 (2015) (arguing that a "mischief" lies in the law of the circuit and describing the Third Circuit's "stubborn refusal, ostensibly required by horizontal stare decisis, to recognize that it may have gotten it wrong" in predicting state law).

217. *See, e.g.*, United States v. Guerrero, 19 F.4th 547, 550 (1st Cir. 2021) (recognizing "'law of the circuit' rule, which ordinarily forces us—and the district courts under us—to follow the holdings of earlier panel decisions regardless of how anyone might feel about them"); Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021) (applying horizontal commands from circuit precedents "as a mechanical mandate"); United States v. Guzman, 419 F.3d 27, 31 (1st Cir. 2005) ("In a multi-panel circuit, however, newly constituted panels ordinarily are constrained by prior panel decisions directly (or even closely) on point."); United States v. Alaw, 327 F.3d 1217, 1220 (D.C. Cir. 2003); United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (noting that "a panel cannot overrule a prior one's holding even though convinced it is wrong"); Whitaker v. Herr Foods, Inc., 198 F. Supp. 3d 476, 489 (E.D. Pa. 2016).

218. *See, e.g.*, *Guerrero*, 19 F.4th at 552 (recognizing exception to the law of the circuit where "an intervening higher authority—a directly-on-point Supreme Court opinion, an en banc opinion of this court, or a statutory enactment—overrules the earlier panel decision"); Yue Li v. Bureau of Citizenship & Immigr. Servs., No. 04-6122-AG, 2006 WL 1049063, at *1 (2d Cir. Apr. 13, 2006); Gulf Power Co. v. Fed. Commc'ns Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000); *In re* Zermeno-Gomez, 868 F.3d 1048, 1052 (9th Cir. 2017) (stating that "a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so") (internal quotations omitted); Lehman v. Lycoming Cnty. Children's Servs. Agency, 648 F.2d 135, 144 (3d Cir. 1981), *aff'd*, 458 U.S. 502 (1982); *see also* United States v. Lewko, 269 F.3d 64, 66 (1st Cir. 2001) (describing subsequent events that may disturb a prior panel decision, specifically "a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling," and including "non-controlling but persuasive case law" in "extremely rare circumstances"); Robinson v. Jiffy Exec. Limousine Co., 4 F.3d 237, 240 (3d Cir. 1993) (allowing an exception such that "when we are applying state law and there is persuasive evidence that it has undergone a change, we are not bound by our previous

level, a district court judge "ought to give great weight to his own prior decisions" but is not tethered to them.[219] At the risk of issuing "superfluous" opinions, however, the district judge better heed the higher-ups.[220]

Wherever a court sits on the hierarchy, the Constitution comes first. Article VI declares the founding charter to be the "supreme Law of the Land."[221] The Supremacy Clause entails that "federal law trumps or preempts state law whenever the two are in conflict"[222] and that the Constitution preempts all.[223] Courts are the guardians.[224] Conjuring images from Greek mythology, Blackstone described judges as "living oracles" and "depositaries of the laws."[225] With his own rhetorical flourish, Chief Justice John Marshall in *Marbury v. Madison* identified the power of judicial review as "the very essence of judicial duty."[226] Courts determine whether statutes are constitutional, as "[i]t is emphatically the province and duty of the judicial department to say what the law is."[227] Indeed, a court's fundamental power of jurisdiction "is power to declare the law."[228]

At the apex of the judicial hierarchy, then, sits a Supreme Court guarding a Supreme Law. Beneath that shiny surface, the path of Pennsylvania's statute reveals cracks. When a constitutional question

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panel decision if it reflected our reliance on state law prior to its modification"). *See generally* GARNER, *supra* note 216, at 492.

219. *See* McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) (recognizing the "general rule . . . that a district judge's decision neither binds another district judge nor binds him").

220. *Whitaker*, 198 F. Supp. 3d at 490 n.9 (stating that "even if the district court could evade the Third Circuit's earlier prediction, the district court would likely be reversed on appeal, because the panel hearing the appeal would be itself bound by the earlier prediction," and, "[t]hus, the district court decision would be procedurally superfluous").

221. U.S. CONST. art. VI, cl. 2; *see* Hasanaj v. Detroit Pub. Schs. Cmty. Dist., 35 F.4th 437, 448 (6th Cir. 2022) (referencing "the basic hierarchy of substantive law (e.g., Constitution, statutes, regulations, common law)").

222. Zimmerman v. Norfolk S. Corp., 706 F.3d 170, 176 (3d Cir. 2013).

223. U.S. CONST. art. VI, cl. 2.

224. SUPREME COURT: ABOUT THE COURT, https://www.supremecourt.gov/about/about.aspx [https://perma.cc/93LD-DNVF] (describing the Supreme Court "as guardian and interpreter of the Constitution").

225. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.

226. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

227. *Id.* at 177; *see* Bartlett v. Bowen, 816 F.2d 695, 710 (D.C. Cir. 1987) (noting that judicial review from *Marbury v. Madison* is not "discretionary on Congress' part"), *opinion reinstated on reconsideration sub nom.* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240 (D.C. Cir. 1987); United States v. Windsor, 570 U.S. 744, 774 (2013) (striking down the Defense of Marriage Act); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (striking down President Biden's loan forgiveness program).

228. *Ex parte* McCardle, 74 U.S. 506, 514 (1868); *see In re* Royal, 197 B.R. 341, 345 (Bankr. N.D. Ala. 1996) ("'Jurisdiction' literally means 'to speak the law.'").

meets an evolving Supreme Court jurisprudence, vertical stare decisis loses its ironclad grip on the lower tiers. And a legal singularity appears.

B. Cracking the Tiers

Section 5301 is a state statute. Ordinarily, on a question of state law, stare decisis would command all courts to look to the highest state court.[229] The *Erie* principles are fundamental, a mainstay of civil procedure syllabi and final exams.[230] But Pennsylvania's consent-by-registration statute implicates due process. So all eyes are on the Constitution.[231]

In enacting Section 5301, the Pennsylvania legislature set a high bar for due process challenges. Even as courts exercise their power of judicial review bestowed by Chief Justice Marshall, statutes enjoy the presumption of constitutionality.[232] The judiciary may serve as legal depositary, but it remains co-equal with the other two branches of government. "Due respect" requires that courts "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[233] Pennsylvania specifies that courts will not strike down a statute absent a showing that the law "clearly, palpably and plainly violates the constitution."[234] Hence the Supreme Court of Pennsylvania's careful

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229. *See* Fid. Union Tr. Co. v. Field, 311 U.S. 169, 178 (1940) (recognizing that "[t]he highest state court is the final authority on state law" and advising federal courts to follow lower state courts "in the absence of more convincing evidence of what the state law is"); Harvey's Wagon Wheel, Inc. v. Van Blitter, 959 F.2d 153, 154 (9th Cir. 1992).

230. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (directing federal courts sitting in diversity to apply state substantive law); *see* Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1478 (9th Cir. 1995) (applying *Erie* "equally in the context of pendent jurisdiction"); Bravo v. United States, 577 F.3d 1324, 1325 (11th Cir. 2009).

231. *See* Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) (noting that "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons," but because "California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution" the Court must inquire whether the statute "comports with the limits imposed by federal due process"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985) (analyzing whether Florida long-arm statute comports with federal due process).

232. *See, e.g.*, Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133 (9th Cir. 2021) (recognizing "the general presumption of constitutionality of statutes"); United States v. Comstock, 627 F.3d 513, 518 (4th Cir. 2010) ("In considering any constitutional attack on a federal statute, a court presumes that Congress has complied with the Constitution."); Gillmor v. Thomas, 490 F.3d 791, 798 (10th Cir. 2007); Bell Tel. Co. of Pa. v. Driscoll, 21 A.2d 912, 914 (Pa. 1941) ("While we approach the subject with the presumption that the section is valid and constitutional, there are, nevertheless, constitutional limitations upon the power of the legislature to delegate its authority.").

233. United States v. Morrison, 529 U.S. 598, 607 (2000).

234. Commonwealth v. Eid, 249 A.3d 1030, 1041 (Pa. 2021) (quoting Commonwealth v. Mikulan, 470 A.2d 1339, 1340 (Pa. 1983)).

wording that Section 5301(a)(2)(i) "clearly, palpably, and plainly violates" due process.[235] From enactment, then, before any meddling defendants raised jurisdictional objections, Pennsylvania's consent-by-registration statute comported with the Fourteenth Amendment. Thus, the legislature was correct.

The U.S. Court of Appeals for the Third Circuit then polished the statute's sheen of constitutionality. While the defendant in *Bane v. Netlink, Inc.* stressed its geographical and corporate distance from the Commonwealth,[236] the court rightfully looked to state statutory law and federal precedent.[237] Without an opinion from the U.S. Supreme Court or a prior Third Circuit panel striking down Section 5301(a)(2)(i) under the Due Process Clause, the Third Circuit in *Bane* leaned into its respect and deference toward the legislature and applied the statute as is.[238] Thus, the circuit court was correct.

The U.S. District Court for the Eastern District of Pennsylvania disagreed.[239] Vertical stare decisis typically would tie the district court's hands. As future Third Circuit panels are bound to the law of the circuit by horizontal stare decisis, district courts are bound even more tightly.[240] Still, even tight ties can slip off. The lower-tier mandates of vertical stare decisis yield to Article III and Article VI. *Bane* provided "a prior factually indistinguishable decision" issued by the Third Circuit as "a controlling court."[241] By contrast, *Daimler AG v. Bauman* provided a factually distinguishable decision issued by the U.S. Supreme Court as an even higher controlling court. *Bane* ruled directly on the Pennsylvania statute; *Daimler* did not. The analysis is far from perfunctory.[242] Precedent is not robotic, even with a new-age assist from artificial intelligence.[243]

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235. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 565 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

236. Bane v. Netlink, Inc., 925 F.2d 637, 638–39 (3d Cir. 1991).

237. *See id.* at 639–40.

238. *Id.* at 640.

239. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 543 (E.D. Pa. 2019).

240. *See* Whitaker v. Herr Foods, Inc., 198 F. Supp. 3d 476, 490 n.9 (E.D. Pa. 2016).

241. Brewster v. Comm'r, 607 F.2d 1369, 1373 (D.C. Cir. 1979).

242. *See In re* J.P. Linahan, Inc., 138 F.2d 650, 652–53 (2d Cir. 1943); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 620–21 (1954) (stating that a "judge has so much discretion in determining what is applicable to his case and how it is to be applied that he can, if he wishes to support a conclusion he has reached in the case, find that which supports it applicable and that which does not inapplicable").

243. Artificial intelligence has made a shaky debut on the legal stage. *See* Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023) (admonishing attorneys who "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued

The language of the Constitution is open, written to enshrine lofty sentiments of liberty,[244] freedom,[245] and equality[246] and to apply to innumerable factual scenarios for posterity.[247] Chief Justice Marshall described our founding charter as "intended to endure for ages to come" and "be adapted to the various *crises* of human affairs."[248] This open, enduring, adaptable texture has defenders and critics.[249] It also has interpreters: judges. Vertical stare decisis requires that courts obey their superiors.[250] True—including occasions for trial courts to skip straight to the top. The Constitution's unique combination of supreme status and open texture creates an intellectual safe space, where even the lowest courts may think freely to find harmony or disharmony among disparate decisions. Specifically, the U.S. Supreme Court may indirectly overrule a circuit court by displacing the constitutional or federal framework of its

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to stand by the fake opinions after judicial orders called their existence into question"); Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring) ("Those, like me, who believe that 'ordinary meaning' is *the* foundational rule for the evaluation of legal texts should consider—*consider*—whether and how AI-powered large language models like OpenAI's ChatGPT, Google's Gemini, and Anthropic's Claude might—*might*—inform the interpretive analysis."); Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* 5 (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/Q5Y4-LEYD] (warning that "any use of AI requires caution and humility").

244. U.S. CONST. pmbl.

245. U.S. CONST. amend. I.

246. U.S. CONST. amend. XIV, § 1.

247. *See* Legal Tender Cases, 79 U.S. 457, 527 (1870) ("It is not given to man, when framing a constitution, to foresee all the cases to which the conferred powers will properly extend."); RONALD A. CASS, THE RULE OF LAW IN AMERICA 72–73 (2001) (stating that "[l]egislators and constitution framers cannot foresee all relevant circumstances, nor can they specify with clarity all applications of the principles they adopt").

248. M'Culloch v. State, 17 U.S. 316, 415, 4 L. Ed. 579 (1819).

249. *See* Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 14 (2001) ("There is no doubt that this open-textured language is what has allowed the Constitution to survive for over 200 years and to govern a world radically different from the one that existed when it was drafted."); Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 23–24 (1999) (stating that "the very qualities that permitted the U.S. Constitution to grow and survive," including "the open textured language, . . . have been impossible to control"); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985) ("While some of the provisions in the Constitution have relatively unambiguous, specific, and noncontroversial meanings, the language of a great many is so vague, ambiguous, and open-textured that they might be understood to mean almost anything.").

250. *See supra* Part III.A.

reasoning.[251] The High Court can do what it wants, including imposing "a new standard."[252] An indirect overruling does not disturb the circuit opinion de jure; its name endures on the intermediate tier. But its binding force drains de facto for any subsequent panel or trial court that sees the conflict.[253] Once overruled, directly or indirectly, the law of the circuit falls.[254]

Because *Daimler* did not directly overrule *Bane,* good-faith arguments could be made for or against an indirect overruling. *Daimler*'s introduction of "at home" general personal jurisdiction may or may not speak to consent-by-registration statutes. The issue never arose.[255] Many lower

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251. *See* United States v. Guzman, 419 F.3d 27, 31 (1st Cir. 2005) (describing exception to law of the circuit where "authority that postdates the original decision, although not directly controlling, may nevertheless offer a compelling reason for believing that the former panel, in light of new developments, would change its collective mind"); Planned Parenthood of Se. Pennsylvania v. Casey, 947 F.2d 682, 698 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (concluding "that a change in the legal test or standard governing a particular area is a change binding on lower courts that makes results reached under a repudiated legal standard no longer binding"); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1115 (3d Cir. 1993) (overruling prior panel regarding ERISA and the Arbitration Act and stating that, while "mindful that the doctrine of *stare decisis* counsels reluctance when we are confronted with a situation calling for the internment of a precedent, . . . we have not hesitated to act when we discover that our decisions have fallen out of step with current Supreme Court jurisprudence").

252. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 697–98 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); *see* Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993) (finding that "the Supreme Court exercised its discretion to invalidate the *rule*" from two prior opinions concerning baseball's reserve clause under the Sherman Act).

253. *See Piazza*, 831 F. Supp. at 437–38; United States v. Guerrero, 19 F.4th 547, 555 (1st Cir. 2021) (agreeing with the government that Supreme Court precedent indirectly overruled prior First Circuit panel opinion); Cox v. Horn, 757 F.3d 113, 124 (3d Cir. 2014) (reading "remarkable" jurisprudential change from Supreme Court narrowly to deny habeas relief); United States v. White, 670 F.3d 498, 516–17 (4th Cir. 2012) ("We do not lightly presume that the law of the circuit has been overturned. Such a presumption would be particularly inappropriate where, as here, the Supreme Court opinion and our precedent can be read harmoniously.") (internal citations omitted).

254. *See Guerrero*, 19 F.4th. at 553–55 (describing rare "directly-overrules exception" to law of the circuit and "even rarer" indirectly-overrules exception).

255. *See* Replica Auto Body Panels & Auto Sales Inc. v. inTech Trailers Inc., 454 F. Supp. 3d 458, 463–64 (M.D. Pa. 2020) (expressing inclination to follow *Sullivan* "[w]ere I deciding this issue on a blank slate," but noting that "*Bane* remains controlling law in this Circuit" and "[w]hile *Daimler* provides strong reasons to believe that general jurisdiction by consent may be abrogated in the future, it neither addresses this question directly nor compels this outcome logically"); Aetna Inc. v. Kurtzman Carson Consultants, LLC, No. CV 18-470, 2019 WL 1440046, at *5 (E.D. Pa. Mar. 29, 2019) ("Because *Daimler* did not address the due process limits on consent as a basis for general jurisdiction, district courts

courts read the decisions harmoniously,[256] while a few did not.[257] The district judge who decided *Sullivan v. A.W. Chesterton, Inc.* fell squarely into the latter camp, applying *Daimler* as negating *Bane* and following the Supreme Court as eclipsing the Third Circuit.[258] In hindsight, the *Sullivan* judge now views *Daimler* as offering "no particular guidance . . . to future litigants other than be careful when you argue by implication that a new legal standard has been adopted."[259] Indeed, *Mallory v. Norfolk Southern Railway Co.* issued a terse warning not to misread tension between Supreme Court opinions.[260] An indirect overruling is an exceedingly rare

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in Pennsylvania have uniformly rejected the argument that *Daimler* overturned the longstanding rule that a corporation that applies for and receives a certificate of authority to do business in Pennsylvania consents to the general jurisdiction of state and federal courts in Pennsylvania.") (internal quotations omitted).

256. *See Replica Auto Body Panels & Auto Sales Inc.*, 454 F. Supp. 3d at 463–64; Jordan v. Del. & Hudson Ry. Co., No. 3:20-CV-1879, 2021 WL 5816285, at *4 (M.D. Pa. June 24, 2021) (noting that "the majority of courts in this circuit, while expressing uncertainty about the continuing validity of *Bane*, have ultimately followed the Third Circuit's ruling and have held that § 5301 is constitutional and comports with due process requirements"); Diab v. Brit. Airways, PLC, No. CV 20-3744, 2020 WL 6870607, at *5 (E.D. Pa. Nov. 23, 2020) (stating that "[a] number of courts . . . have determined that *Bane*'s existence answers the constitutional question and *Daimler* hardly killed the Third Circuit's ruling in *Bane*" and that "[t]his Court will join the numerous courts that continue to follow *Bane* despite the decision in *Daimler*"); *see also* Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1138–39 (Pa. Super. Ct. 2018) (concluding "that *Daimler* does not eliminate consent as a method of obtaining personal jurisdiction" and noting that "federal courts in Pennsylvania have analyzed [Section] 5301, in light of *Daimler*, and determined that it has no effect on jurisdiction by consent"); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 153 (2023) (Alito, J., concurring in part and concurring in the judgment) ("*Pennsylvania Fire*'s holding, insofar as it is predicated on the out-of-state company's consent, is not 'inconsistent' with *International Shoe* or its progeny.").

257. *See* Metro Container Grp. v. AC&T Co., No. CV 18-3623, 2021 WL 5804374, at *6 (E.D. Pa. Dec. 7, 2021) (agreeing with *Sullivan* that "the constitutional regime under which *Bane* was decided has been superseded by a newer standard") (internal quotations omitted); Ruffing v. Wipro Ltd., 529 F. Supp. 3d 359, 367 (E.D. Pa. 2021) (stating that "[t]his court finds persuasive Judge Robreno's decision in" *Sullivan*); Reynolds v. Turning Point Holding Co., LLC, No. 2:19-CV-01935-JDW, 2020 WL 953279, at *5 (E.D. Pa. Feb. 26, 2020) (stating that "this Court agrees with and adopts as its own Judge Robreno's analysis in" *Sullivan*); *see also* Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283, at *6 (Pa. Com. Pl. May 30, 2018), *affirmed*, 266 A.3d 542 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023) (questioning validity of Pennsylvania statute after *Daimler* and other Supreme Court decisions); McCaffrey v. Windsor at Windermere Ltd. P'ship, No. CV 17-460, 2017 WL 1862326, at *4 (E.D. Pa. May 8, 2017) (following *Daimler*).

258. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 544–55 (E.D. Pa. 2019).

259. E-mail from Judge Eduardo C. Robreno to author (July 11, 2024) (on file with author).

260. *See Mallory*, 600 U.S. at 136.

exception to the law of the circuit, inspiring the First Circuit's metaphor of hen's teeth scarcity.[261] But the exception does exist.[262]

Far from superfluous, the district court's decision in *Sullivan* may have been affirmed or reversed had the case risen on appeal. Reasonable minds differ, as demonstrated with gusto by the five majority and four dissenting Justices in *Mallory* on the precise question of whether the U.S. Supreme Court's modern long-arm view sounds the death knell for Pennsylvania's statute.[263] The district court in *Sullivan* leaned into its respect and deference toward the Supreme Law of the Land and found a due process violation.[264] Thus, the district court was correct.

Finally, the Supreme Court of Pennsylvania took its own fresh look, reviewing the state trial court's decision de novo.[265] Facing a constitutional question, the court turned to the one bench that matters: the U.S. Supreme Court. Unbound by state courts or inferior federal courts, the Supreme Court of Pennsylvania looked to *Daimler* and companion opinions for guidance.[266] Writing for the bench, the Chief Justice leaned into his interpretation of post-*International Shoe* cases and found a due process violation.[267] Thus, the highest state court was correct.[268]

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261. United States v. Guzman, 419 F.3d 27, 31 (1st Cir. 2005).

262. *See Guzman*, 419 F.3d at 31; United States v. Guerrero, 19 F.4th 547, 553–54 (1st Cir. 2021).

263. *Compare Mallory*, 600 U.S. at 136 (relying on a pre-*International Shoe* case to approve Pennsylvania's statute), *with id.* at 163–66 (Barrett, Roberts, Kagan & Kavanaugh, JJ., dissenting) (relying on *Daimler* and other post-*International Shoe* cases to disapprove Pennsylvania's statute).

264. Sullivan v. A.W. Chesterton, Inc. (*In re* Asbestos Prods. Liab. Litig. (No. VI)), 384 F. Supp. 3d 532, 543 (E.D. Pa. 2019).

265. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 560 (Pa. 2021), *vacated and remanded*, 600 U.S. 122 (2023).

266. *Id.* at 564–66.

267. *Id.* at 565.

268. Analogous to the indirectly-overrules exception to the law of the circuit in federal courts, state courts remain bound by the U.S. Supreme Court on constitutional and federal questions regardless of pronouncements from the highest state court. *See, e.g.*, Commonwealth v. Ferguson, 475 A.2d 810, 812–13 (Pa. Super. 1984) (rejecting prior Pennsylvania Supreme Court decision as "no longer . . . an accurate statement of federal constitutional law" in light of subsequent U.S. Supreme Court decision on Sixth Amendment issue, and finding alternative support in Pennsylvania Constitution); Commonwealth v. Jackson, 323 A.2d 799, 806 (Pa. Super. 1974) (Spaeth, J., concurring) (allowing that U.S. Supreme Court decision indirectly overruled Pennsylvania Supreme Court decision "because when the United States Supreme Court states a rule based upon the Constitution of the United States, the statement is binding on us under the Supremacy Clause"); *see also* Mott v. Pa. R.R. Co., 30 Pa. 9, 31–32 (Pa. 1858) (stating that "decisions of the Supreme Court of the United States, on the construction of the constitution or laws of the United States, are binding on the state courts").

At this point, Section 5301 could easily have swerved away from Washington, D.C. The fact that the U.S. Supreme Court heard the case of *Mallory v. Norfolk Southern Railway Co.* is extraordinary. The Court receives more than 5,000 petitions for a writ of certiorari each Term, and its acceptance rate with full review hovers around one to two percent.[269] Among the thousands of petitioners, those who identify a split of authority can at least hope for an audience with the Justices.[270] Only a lucky few secure the necessary four votes for certiorari.[271] If the U.S. Supreme Court had rejected the petition in *Mallory*, despite the split of authority between Pennsylvania and Georgia, then all lower courts would have remained correct.[272] As it turned out, all were correct until 2023 when the U.S. Supreme Court issued its ruling in *Mallory*. For decades, the statute both violated and respected the Fourteenth Amendment. It depends on which direction we face.

The hierarchy is ceasing to make sense, with lower tiers suffering the fate of spacetime in a black hole. An opinion from the U.S. Supreme Court not only sorts prior opinions, but offers intellectual raw material going forward. Although new constitutional standards require careful handling, they empower courts on all tiers to think for themselves. Like *Pennoyer*, *International Shoe*, *Helicopteros*, and *Daimler* before it, *Mallory* introduced a new sight line for personal jurisdiction. Specifically, Justice Alito's concurrence pegged the dormant Commerce Clause as the next chapter in "the story for registration-based jurisdiction."[273] Federalism concerns within consent-by-registration statutes "fall more naturally

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269. *See* PUB. INFO. OFF. SUPREME CT. OF THE U.S., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/28AF-GMFX] (stating that the Court receives between 5,000 and 6,000 petitions each Term and "grants and hears oral argument in about 60–70 cases"); U.S. CTS, SUPREME COURT PROCEDURES, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/F2WM-F32G] (stating that "the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year").

270. U.S. CTS, SUPREME COURT PROCEDURES, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/6XFR-TSJ9] (noting that the Court is not obligated to grant certiorari "and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value").

271. *See generally* 16B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. (3d ed. 2024) (describing the "Rule of Four" for certiorari jurisdiction).

272. *See* Mallory v. Norfolk S. Ry. Co., 142 S. Ct. 2646 (2022) (granting petition for writ of certiorari).

273. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 154 (2023) (Alito, J., concurring in part and concurring in the judgment).

within the scope of the Commerce Clause."[274] Lower courts will grapple with that analysis, and, eventually, perhaps, the Supreme Court will grant certiorari and speak another final word on whether consent-by-registration statutes are constitutional.[275]

As steeped in inconsistency, the path of Section 5301(a)(2)(i) exposes a deep truth emanating from the Supremacy Clause. Because the Constitution overrides all and admits diverse interpretations, it's every court for itself. Stare decisis aims to rein in the "proclivities of individuals" in favor of "the law."[276] Constitutional questions are a triumph of courtroom-specific preferences. As interpretations of due process and other guarantees evolve with each passing Term, individual proclivities *become* the law.

In every court, every judge reads the same constitutional language and the same U.S. Supreme Court decisions and applies those esteemed sources as he or she sees fit. There's the law. And there. And over there. The "scale of justice" tips with every new judge's value choices.[277] Binding law becomes parochial, shrinking to the present parties and tempting crafty plaintiffs toward the "universally condemned" strategy of judge shopping.[278] In practice, of course, many lower courts choose to follow higher courts even when the law and their "understandable inclinations" point elsewhere.[279] Institutional inertia and fear of reversal are powerful magnets. In truth, opportunity knocks for individual decision-making. As the U.S. Supreme Court observed shortly after the Pennsylvania legislature enacted Section 5301(a)(2)(i), "anarchy" may prevail on the inferior benches unless the Supreme Court steps in and vertical stare decisis snaps all lower courts to attention.[280] Pennsylvania's

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274. *Id.* at 157.

275. *See, e.g.*, Sloan v. Burist, No. 2:22-CV-76, 2023 WL 7309476, at *5–6 (S.D. Ga. Nov. 6, 2023).

276. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

277. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69; *see* Chemerinsky, *supra* note 249, at 14 (arguing that the open-textured language of the Constitution "requires that courts may use value choices in interpreting it and in deciding its meaning").

278. Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975).

279. *See* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1115 (3d Cir. 1993) ("commend[ing] the district court judge for faithfully adhering to this circuit's precedent," but finding that intervening Supreme Court precedent indirectly overruled Third Circuit law); Pritzker v. Merrill Lynch Pierce Fenner & Smith, Inc., No. CIV. A. 92-5800, 1993 WL 45987, at *3–4 (E.D. Pa. Feb. 17, 1993), rev'd, 7 F.3d 1110 (3d Cir. 1993) (finding the defendant's ERISA argument "attractive," but deciding against it because "the slate is not clean" without the Supreme Court's direct overruling of circuit law).

280. Hutto v. Davis, 454 U.S. 370, 374–75 (1982).

consent-by-registration statute reveals that, far from an aberration, lower-tier inconsistency is a feature of our constitutional system.

Fortunately, anarchy has a bright side. The legal hole is not completely black. Breaking down the lower tiers of the hierarchy frees a judge to examine constitutional questions anew, with fresh eyes and ideas. A robe and an oath do not transform a judge into "a passionless thinking machine," stripped "of all predilections."[281] As precedent is not robotic, judges are not robots. With all due respect to Blackstone, judges are not oracles either. Rather, they are humans burdened with human fallibility.[282] Judges are also blessed with human creativity. That creativity permeates the law. In the eloquent words of New Jersey Supreme Court Justice Stewart G. Pollock, "To deny the similarities between artistic and judicial endeavors . . . would ignore the reality that judging, particularly in hard cases, is unavoidably creative."[283]

The evolution of constitutional jurisprudence invites all judges to engage their intellect and perspective, unrestrained by the decisions of others wearing a black robe who have answered the question previously outside the halls of the U.S. Supreme Court. Our founding charter both enshrines and expands equality. Supreme Court Justice Benjamin N. Cardozo described judging as the balancing of one's "ingredients," "philosophy," "logic," "analogies," "history," "customs," "sense of right, and all the rest."[284] Raising the highest and hardest stakes, the Constitution also opens the widest space.

IV. CONCLUSION

Pennsylvania's statute originated in the routine of a corporate registration form and transformed into the beauty of a legal singularity. A

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281. *In re* J.P. Linahan, Inc., 138 F.2d 650, 653 (2d Cir. 1943).

282. *Id.* at 654; *see* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921) (describing reluctance of judges to discuss "that they are subject to human limitations").

283. Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 593 (1996); *see* Laura S. Fitzgerald, *Towards A Modern Art of Law*, 96 YALE L.J. 2051 (1987) ("To acknowledge the creative quality of law is to recognize its kinship to other endeavors traditionally called 'art.'"); Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1033 (1996) (arguing that "nonrational elements are central in law today," including imagination and emotion); CARDOZO, *supra* note 282, at 161 ("[T]he whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us . . . have been accustomed to believe.").

284. CARDOZO, *supra* note 282, at 162 (writing that a judge, "adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales").

constitutional question can create an event horizon, beyond which the lower tiers of the judicial hierarchy crack and the correct law appears in disparate opinions. The U.S. Supreme Court has now declared Pennsylvania's consent-by-registration statute to comport with due process, adding the new contour of *Mallory v. Norfolk Southern Railway Co.* to the age-old landscape of personal jurisdiction. Just as federal and state courts decided prior Fourteenth Amendment challenges to the statute in different ways in different moments, so future constitutional questions will invite that same creativity. Cracks let in the light.