No. 21-926

IN THE

Supreme Court of the United States

COOPER TIRE & RUBBER CO.,

Petitioner,

v.

TYRANCE MCCALL,

Respondent.

On Petition For A Writ Of Certiorari To The Georgia Supreme Court

REPLY BRIEF FOR PETITIONER

MEIR FEDER
Counsel of Record
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
mfeder@jonesday.com

HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

CHRISTOPHER S. ANULEWICZ
BALCH & BINGHAM LLP
30 Ivan Allen Jr. Blvd.
Suite 700
Atlanta, GA 30308

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE PARTIES AGREE THAT THE SPLIT IDENTIFIED IN THE PETITION WARRANTS THIS COURT'S REVIEW 3

II. MCCALL'S ATTEMPT TO EVADE THE QUESTION PRESENTED LACKS ANY COLORABLE BASIS 4

III. ALL OF THE DEFENSES OF THE DECISION BELOW LACK MERIT 7

IV. THIS CASE IS A BETTER VEHICLE THAN *MALLORY* 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., 570 U.S. 205 (2013) 8

Allstate Ins. Co. v. Klein, 422 S.E.2d 863 (Ga. 1992) 11

Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017) 2, 7

Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016) 2

DeLeon v. BNSF Ry. Co., 426 P.3d 1 (Mont. 2018) 7

Ex Parte Schollenberger, 96 U.S. (6 Otto) 369 (1877) 9

Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) 8, 9

Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016) 6

Groppi v. Wisconsin, 400 U.S. 505 (1971) 10

Illinois v. Gates, 462 U.S. 213 (1983) 5

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Lafayette Ins. Co. v. French,
59 U.S. (18 How.) 404 (1855) 9

Lanham v. BNSF Ry. Co.,
939 N.W.2d 363 (Neb. 2020) 7

Mallory v. Norfolk S. Ry. Co.,
266 A.3d 542 (Pa. 2021) 3, 8, 12

Michigan v. Long,
463 U.S. 1032 (1983) 13

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 8

O'Hare Truck Serv., Inc. v. City of Northlake,
518 U.S. 712 (1996) 8

Perry v. Thomas,
482 U.S. 483 (1987) 5

St. Clair v. Cox,
106 U.S. 350 (1882) 9

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.,
560 U.S. 702 (2010) 10, 11

Timbs v. Indiana,
139 S. Ct. 682 (2019) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015) 12

4A Wright & Miller, Fed. Prac. & Proc. § 1102 (4th ed. Apr. 2021 Update) 9

INTRODUCTION

The parties now agree that the question presented by this petition warrants this Court's review. A clear split exists over whether a state may assert general personal jurisdiction over an out-of-state corporation by deeming the corporation's registration to do business in the state to be consent to such jurisdiction. Respondent admits "it would be sensible for this Court to review the issue presented by Petitioner" in an appropriate case. Br. in Opp. at 4. And the petitioner in *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (U.S.)—where the Pennsylvania Supreme Court expressly disagreed with the Georgia Supreme Court—agrees that this split requires this Court's resolution. *See Mallory* Pet. 2.

In the face of this concededly certworthy issue, McCall implausibly claims that the court below did *not* broadly decide that Georgia courts may exercise general jurisdiction over any corporation that registers there. Rather, he contends, the court held only that registration suffices when combined with other fact-specific connections between the defendant, the case, and Georgia. This fanciful depiction bears no resemblance to the Georgia Supreme Court's actual decision, which was unequivocal about its broad holding: treating "corporate registration in Georgia [as] consent to general jurisdiction in Georgia does not violate federal due process." Pet. App. 20a. McCall cannot assert an alternative ground for affirmance that was neither pressed nor passed upon below.

Relatedly, McCall's and the *Mallory* parties' emphasis on the "quirk" that Georgia has an unusually narrow specific-jurisdiction statute is a red herring: the Georgia Supreme Court's holding rested on its mistaken belief that *Pennsylvania Fire* remains binding, not on the scope of the state's long-arm statute. Regardless, there is no indication that the Georgia legislature is considering expanding the specific-jurisdiction statute—let alone that it would go further and roll back the holding below that registration validly consents to general jurisdiction.

Further, McCall cannot defend the merits of the decision below on any rationale. That decision would effectively allow general jurisdiction over every corporation that does business in a state—"precisely the result that th[is] Court so roundly rejected in *Daimler*," *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016)—and the fig leaf of an extorted "consent" cures nothing. Georgia cannot constitutionally exclude out-of-state corporations from doing business, and therefore may not condition their admission on a coerced "consent" to surrender other rights. Moreover, the particular condition—consent to be sued in Georgia on matters *unrelated* to a corporation's in-state business—by definition lacks a nexus to Georgia's basis for imposing the condition, and therefore violates the unconstitutional-conditions doctrine. As for McCall's new (and forfeited) theory that otherwise-inadequate forum contacts suffice when paired with corporate registration, that contravenes, *inter alia*, *Bristol-Myers Squibb Co. v. Superior Court of California*, which rejects mixing and matching inadequate jurisdictional grounds to create jurisdiction. 137 S. Ct. 1773, 1781 (2017).

Finally, McCall and the *Mallory* parties are likewise incorrect that the *Mallory* petition presents a better vehicle. All strain to invent purported obstacles to deciding the constitutional issue in this case, but those obstacles have no colorable basis. Indeed, the very factors they cite—such as the presence of some in-state contacts and the Georgia statute's lack of an express registration-equals-consent provision—make this case far *more* typical than *Mallory*. This case is thus more likely to conclusively resolve the question presented. And, of course, it is this case—not *Mallory*—that broke from post-*Daimler* precedent and requires correction.

ARGUMENT

I. THE PARTIES AGREE THAT THE SPLIT IDENTIFIED IN THE PETITION WARRANTS THIS COURT'S REVIEW.

The petition listed eight state high courts or federal appellate courts that had held that general jurisdiction based on deemed consent via corporate registration violates due process. Pet. 10-13. The Pennsylvania Supreme Court now makes nine. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542 (Pa. 2021). Meanwhile, the contrary decision below still stands alone among post-*Daimler* decisions from such courts. The *Mallory* petition analyzes the split similarly and also urges review. *Mallory* Pet. 8-20. So, too, do the multiple amicus briefs supporting Cooper's petition, which highlight the importance of reining in unacceptably grasping assertions of jurisdiction and restoring predictability on this important issue.

McCall admits "it would be sensible for this Court to review the issue presented by Petitioner" in an appropriate case. Br. in Opp. 4. The only real question, therefore, is whether this case is an appropriate vehicle.

II. MCCALL'S ATTEMPT TO EVADE THE QUESTION PRESENTED LACKS ANY COLORABLE BASIS.

McCall tries to avoid the concededly certworthy issue by pretending the Georgia Supreme Court's decision rests on something other than its express holding. He asserts that the decision below turns not on whether consent via corporate registration can constitutionally justify general jurisdiction, but on the case's purported "strong ties to the forum state of Georgia." Br. in Opp. 4; *see also id.* at i. The record and the law foreclose this evasion.

First, the Georgia Supreme Court decided the categorical legal question Cooper's petition presents, not the case-specific question McCall belatedly asks. That court granted review "to reconsider [its] holding[] … that Georgia courts may exercise general personal jurisdiction over *any* out-of-state corporation" that registers in Georgia. Pet. App. 1a (emphasis added). In recounting the "undisputed underlying facts and procedural history," the decision below mentioned *only* Cooper's registration, not any other purported ties to Georgia. *Id.* at 2a-3a. And the court squarely held that treating "corporate registration in Georgia [as] consent to general jurisdiction in Georgia does not violate federal due process." *Id.* at 20a. This across-the-board holding, moreover, is precisely what McCall advocated to the

Georgia Supreme Court. *See* Br. of Appellee, *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021) (No. S20G1368), 2021 WL 1081897; Appellee's Supp. Br., *Cooper Tire*, 863 S.E.2d 81 (No. S20G1368), 2021 WL 1799992.

It is extraordinary that McCall—after successfully pushing this broad holding, which conflicts with other jurisdictions—now pretends that the decision below turns on grounds neither argued to the Georgia Supreme Court nor mentioned in its decision. Regardless, the purported existence of an alternative argument that "the courts below did not address … does not prevent [this Court] from reviewing the ground exclusively relied upon by the courts below." *Perry v. Thomas*, 482 U.S. 483, 492 (1987). To the contrary, because McCall's belated rationale was neither pressed nor passed upon below, it is not properly before this Court. *See Illinois v. Gates*, 462 U.S. 213, 221 (1983) (applying this principle to a party's "failure to have challenged an asserted federal claim"); *see also Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019) (declining to consider alternative ground "neither pressed nor passed upon below"). And there are "reasons of peculiar force" for this rule in reviewing a state-court decision. *Gates*, 462 U.S. at 218-19 (internal quotation marks omitted).

Second, McCall's attempt to evade the question presented is further foreclosed by the trial court's express ruling that "no nexus exists between [Cooper's] activities in Georgia and [McCall's] claims against it, for the purposes of specific personal jurisdiction." Pet. App. 33a. McCall did not challenge that ruling in either state appellate court,

nor did either court address it. *See id.* at 1a-32a. Accordingly, McCall cannot belatedly proffer specific jurisdiction as an alternative reason the decision below was consistent with due process.

Because specific jurisdiction is inapplicable here, McCall instead must argue for a sliding scale—i.e., that facts inadequate for specific jurisdiction can suffice when combined with registration. But this Court has already rejected the possibility of such a mix-and-match basis for personal jurisdiction. *See* Point III, *infra*. And even if such a theory were cognizable, the presence of facts like those McCall highlights would not affect this case's certworthiness, because such facts are commonplace. Contrary to McCall's claim that the split cases involved "no connection to the forum state," Br. in Opp. 12, several had connections strikingly similar to those McCall asserts here.

For example, McCall claims "strong ties" between this lawsuit and Georgia because both other defendants are Georgia residents. *E.g.*, *id.* at 4, 6-7. But *Genuine Parts Co. v. Cepec* held that due process precluded Delaware from exercising jurisdiction over a non-resident corporation based on registration even though "[f]ive of the seven defendants [were] Delaware corporations." 137 A.3d 123, 128 (Del. 2016). Similarly, McCall notes that one of Cooper's eleven distribution facilities is located in Georgia. Br. in Opp. 7. But the Nebraska Supreme Court rejected jurisdiction via registration despite allegations that the defendant "maintain[ed] 11 percent of its workforce in Nebraska, [was] the second highest tax payer in Nebraska, and ha[d] stated that Nebraska is one of the most important

states in which it operates." *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 372-73 (Neb. 2020).

In short, McCall cannot evade the question presented based on facts that were irrelevant to the Georgia Supreme Court's decision and that are far from unique to this case.

III. ALL OF THE DEFENSES OF THE DECISION BELOW LACK MERIT.

Neither the novel sliding-scale theory McCall concocts nor the broader general jurisdiction theory the Georgia Supreme Court actually adopted can save the judgment below.

As to the former, the "strength of the requisite connection between the forum and the specific claims at issue" necessary for specific jurisdiction cannot be "relaxed" based on even "extensive forum contacts that are unrelated to those claims." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781. Because "[z]ero plus zero is still zero," two insufficient jurisdictional theories do not add up to a sufficient basis for jurisdiction. *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 8 (Mont. 2018). Here, then, the contacts insufficient for specific jurisdiction cannot justify an otherwise-unconstitutional exercise of jurisdiction based on extorted consent.

That leaves the Georgia Supreme Court's actual general jurisdiction holding. As the petition explained, purported "consent" extracted as the price of doing business in the state cannot support general jurisdiction. Pet. 18-19. This Court's Dormant Commerce Clause cases—as McCall does not contest—forbid states from excluding out-of-state corporations while permitting in-state corporations to

operate. *Id.* at 20. Also, even if states *could* exclude out-of-state corporations, the unconstitutional-conditions doctrine prevents states from conditioning corporate admission on consent to suit for matters *unrelated* to forum conduct. *Id.* at 21-22; *see Mallory*, 266 A.3d at 569-70. McCall and the *Mallory* petitioner contend that it is "reasonable" to force large, out-of-state corporations to choose between waiving due process protections or accepting "the economic loss of [the state's] market." *Mallory* Pet. 24-25; *see* Br. in Opp. 23. But that ignores the requirement that conditions be *sufficiently related* to the benefit conferred, regardless of the relative burden imposed. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). By definition, general jurisdiction applies only to lawsuits that are *not* "relate[d] to" to a defendant's forum contacts. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Moreover, because the unconstitutional-conditions doctrine "prevent[s] the government from coercing people into giving … up" constitutional rights, notice of the coercive condition is no defense. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).[1]

Also erroneous is the *Mallory* petition's suggestion (at 26) that "[s]ince at least the middle of the 19th century, this Court has upheld state statutes that require corporations to consent to jurisdiction as a

---

[1] McCall is incorrect (at 23) that the unconstitutional-conditions cases Cooper's petition cited all "involve rights of individuals, not business entities." *See* Pet. 21 (citing *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013)); *see, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

condition of doing business in the state." None of those 19th century cases involved litigation unrelated to the defendant's forum-state business. *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) ("litigation arising out of [out-of-state corporations'] transactions in the state"); *Ex Parte Schollenberger*, 96 U.S. (6 Otto) 369, 371 (1877) (counsel's argument) (insurance policies issued within forum state); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 408 (1855) ("We limit our decision to the case of a corporation acting in a State foreign to its creation … making contracts there and being sued on them ….").

Nor is the *Mallory* petition correct that the holding of the Pennsylvania Supreme Court (and the many similar decisions) discriminate in favor of corporations. *See Mallory* Pet. 27 (citing *Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring in the judgment)). *No* individual or entity is subject to general jurisdiction in a forum merely because it does business there through its agents; an agent's presence does not subject the principal to suits unrelated to the forum. *See, e.g.*, 4A Wright & Miller, Fed. Prac. & Proc. § 1102 (4th ed. Apr. 2021 Update). Exposing corporations to general jurisdiction outside their "home" states based on their agents' actions would treat such corporations worse, not better.

In short, there is no constitutional basis for the Georgia Supreme Court's holding that corporate registration amounts to valid consent to general jurisdiction.

IV. THIS CASE IS A BETTER VEHICLE THAN *MALLORY*.

Both McCall and the *Mallory* parties have it backwards when they contend that this case is an inferior vehicle.

Notably, the *Mallory* petition does not deny that the question presented was cleanly raised and passed upon below. Moreover, several of the split cases feature facts mirroring those that McCall claims (at 4) set this case apart. *See supra* at 6-7.

Likewise, there is no basis for the *Mallory* petition's claim (at 30) that this Court could be "forced to wade into the merits of the Georgia Supreme Court's interpretation of Georgia's statute." No party contests that state-law interpretation, and this Court in any event generally lacks the power to second-guess a state high court's authoritative interpretation of state law. *E.g.*, *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971). The exceptional cases in which this Court may assess antecedent state-law issues arise only when necessary "[t]o ensure that there is no 'evasion' of [this Court's] authority to review federal questions." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 725 (2010). Indeed, the language the *Mallory* petition quotes (at 30) from Professor Wechsler discusses the adequate-and-independent state-ground doctrine—a circumstance where the state-law holding would *prevent* consideration of a federal question. The *Mallory* petition identifies no federal interest that would justify this Court's re-examination of an authoritative state-law

determination that, as here, does *not* stand as an obstacle to reaching a federal question.

Further, even in the rare cases where this Court examines state-court determinations of state law, it deferentially asks only whether the state-court ruling has "fair support" in state law. *Stop the Beach*, 560 U.S. at 725 (internal quotation marks omitted). Cooper does not argue here that the state-law interpretation of the Georgia statute was incorrect, let alone that it lacked "fair support."

Similarly unpersuasive is the *Mallory* parties' claim that the decision below depends on a quirk of Georgia law (the unavailability of long-arm specific jurisdiction), or their speculation that the Georgia legislature might change that law. *Mallory* Pet. 32-33; *Mallory* Br. in Opp. 9. The constitutional decision below rested on the Georgia Supreme Court's erroneous belief that it was bound to follow this Court's 1917 decision in *Pennsylvania Fire*, *see* Pet. App. 15a-20a, not on any state law quirk. And any suggestion the statute may be changed is rank speculation: there is no indication that any statutory change is under consideration, let alone one that would not merely expand specific jurisdiction but also eliminate Georgia's subjection of corporate registrants to general jurisdiction.

The *Mallory* petition's suggestion that the Pennsylvania registration statute's express mention of consent makes that case a better vehicle is similarly erroneous. Cooper has never disputed that the 1992 decision in *Allstate Insurance Co. v. Klein*, 422 S.E.2d 863 (Ga. 1992), provided ample notice that Georgia treats registration as consent to general

jurisdiction. The form of notice—statutory in Pennsylvania, through *Klein*'s longstanding statutory interpretation in Georgia—is immaterial.

Furthermore, if the difference in statutory language *did* matter, that would make this case the superior vehicle. As the *Mallory* petition admits, *only* Pennsylvania's statute "directly address[es] the jurisdictional consequences of registering to do business." *Mallory* Pet. 29 (quoting Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1366 (2015)). Accordingly, as the Pennsylvania Supreme Court acknowledged, "the precise issue presented [there] may be peculiar to Pennsylvania." *Mallory*, 266 A.3d at 564.

The same conclusion follows from McCall's argument that jurisdiction can rest on a mix-and-match combination of registration and case-specific contacts that are inadequate to support specific jurisdiction. Even assuming such facts may be relevant, that would commend a grant in this case, not *Mallory*. Because the facts of *Mallory* (as McCall argues) involve no connection to the forum state, a grant would reach only such cases; the Court would have no occasion to address jurisdiction based on corporate registration plus case-specific contacts. In contrast, a grant and reversal in this case would address that circumstance.

In addition, as explained above and in the petition, the Pennsylvania Supreme Court plainly reached the right result. This Court should prefer this case to *Mallory* because its intervention will matter to the actual controversy before it. Moreover, because "the

primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard," *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting), state court decisions that correctly uphold constitutional rights are especially poor vehicles compared to state court decisions that erroneously reject them.

In sum, the purported distinctions between this case and *Mallory* are irrelevant to the squarely-presented constitutional question. This case presents a better vehicle than *Mallory* for definitively resolving the existing split.

CONCLUSION

The petition for a writ of certiorari should be granted.

March 11, 2022

Respectfully submitted,

MEIR FEDER
Counsel of Record
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
mfeder@jonesday.com

HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

MATTHEW J. RUBENSTEIN
JONES DAY
90 South 7th Street
Suite 4950
Minneapolis, MN 55402

CHRISTOPHER S. ANULEWICZ
BALCH & BINGHAM LLP
30 Ivan Allen Jr. Blvd.
Suite 700
Atlanta, GA 30308

Counsel for Petitioner