IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 160 EDM 2023

SYNGENTA CROP PROTECTION, LLC and
SYNGENTA AG,

Petitioners,

v.

DOUGLAS NEMETH, *et al.*,
CHEVRON U.S.A. INC., and
FMC CORPORATION,

Respondents.

(IN RE: PARAQUAT PRODUCTS LIABILITY LITIGATION)

On Petition for Permission to Appeal as for the August 24, 2023 Order of the Court of Common Pleas of Philadelphia County, at No. 220500559

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS

BRITTANY C. ARMOUR
HOGAN LOVELLS US LLP
1735 Market Street
Philadelphia, PA 19103
(267) 675-4600
brittany.armour@hoganlovells.com

Counsel for Amicus Curiae
National Association of Manufacturers

November 22, 2023

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

CASES:

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Manufacturers submits this brief as *amicus curiae* in support of Petitioner.[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs 13 million men and women, contributes $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NAM writes in this case because consent by registration theories like those adopted by the trial court below will inhibit cross-border commerce. If expanding operations into Pennsylvania—and registering to do business here as the corporate-registration statutes require—can open up a manufacturer to suits on *all* claims, regardless of their connection to the Commonwealth, manufacturers will hesitate to

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pa.R.A.P. 531(b)(2).

do business here. Consent by registration infringes on the sovereign prerogatives of those States with a closer connection to the parties and claims at issue, offending the federalism principles that underlie personal jurisdiction. Syngenta Crop's petition thus presents important legal questions that should be decided by this Court.

STATEMENT OF THE ISSUE PRESENTED

Did the trial court egregiously abuse its discretion in refusing to certify its overruling of Syngenta Crop's personal-jurisdiction preliminary objections for interlocutory appeal when the constitutionality of consent by registration is unresolved in the Commonwealth following *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023)?

Yes. The constitutionality of consent-by-registration theories of personal jurisdiction under the dormant Commerce Clause is an important question of law over which there is a substantial ground for difference of opinion such that the trial court's refusal was an abuse of discretion egregious enough to justify this Court's prerogative correction.

SUMMARY OF ARGUMENT

I. Consent-by-registration theories like those adopted by the trial court below violate the dormant Commerce Clause in two ways. First, consent by registration unconstitutionally discriminates against out-of-state corporations by requiring out-of-state corporations to consent to general jurisdiction in the Commonwealth to do

business here while not imposing any reciprocal obligations on Pennsylvania corporations when they do business elsewhere. Second, consent by registration unduly burdens interstate commerce by forcing out-of-state companies to choose between doing business in the Commonwealth on the one hand and being subject to suit here on all claims regardless of their connection to Pennsylvania on the other.

Faced with that unpalatable choice, some small businesses will simply choose not to expand in Pennsylvania, disrupting the national market for goods and services that the dormant Commerce Clause is meant to protect. Pennsylvanians will suffer, too, as they will be denied greater choice and greater competition in the goods and services that they buy. Larger corporations, meanwhile, may not abandon the Pennsylvania market entirely. But they may well choose to knowingly violate the registration requirement and accept the consequences rather than subject themselves to suit on all claims here. That benefits no one, as out-of-state companies refusing to register will make service of process harder and impose greater costs on Pennsylvanians seeking to sue out-of-state companies on claims that *are* connected to the Commonwealth.

II. Consent by registration also violates the federalism principles at the heart of personal jurisdiction. Personal-jurisdiction restrictions on courts hearing claims unconnected to their States against non-resident defendants ensures that States do not overstep and regulate conduct that should rightfully be policed by some other

State. But Plaintiffs' suits burden Pennsylvania judges and Pennsylvania jurors with claims that rightfully should be determined by a different State's judges and jurors. Upholding consent by registration, as the trial court did, blesses the worst sort of forum shopping, where plaintiffs bring claims in Pennsylvania simply because it is perceived as plaintiff friendly. The Court should grant the petition to put a stop to that practice.

ARGUMENT

As the only explicit consent-by-registration State in the country, Pennsylvania uniquely faces the question following *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023) of whether consent-by-registration theories of personal jurisdiction violate the U.S. Constitution's dormant Commerce Clause. And it is a question that should be resolved promptly by this Court so both robust interstate trade and comity among the fifty co-equal States can be preserved.

I. PENNSYLVANIA'S CONSENT-BY-REGISTRATION STATUTE VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT DISCRIMINATES AGAINST AND UNDULY BURDENS INTERSTATE COMMERCE.

1. "The Commerce Clause grants Congress power to 'regulate Commerce . . . among the several States,'" with "[t]hese 'few simple words . . . reflect[ing] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations

among the Colonies and later among the States under the Articles of Confederation.'" *Comptroller of Treasury of Md. v. Wynne,* 575 U.S. 542, 548 (2015) (citations omitted and ellipses in *Wynne*). The dormant Commerce Clause establishes "this Nation [as] a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). And the dormant Commerce Clause's role in protecting the National market by blocking laws that interfere with the national common market is confirmed by "history and . . . established case law." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019).

A state law can violate the dormant Commerce Clause in two ways. It can "discriminate[] against out-of-state goods or nonresident economic actors." *Tennessee Wine & Spirits Retailers*, 139 S. Ct. 2449, 2461. Or it can impose "undue burdens" on interstate commerce. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

Consent by registration does both. First, it discriminates against the out-of-state corporations. As Justice Alito's *Mallory* concurrence explained, the Pennsylvania consent-by-registration scheme discriminates against out-of-state corporations in "practical effect" because it "forc[es] them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania

companies generally face no reciprocal burden for expanding operations into another State." 143 S. Ct. at 2053 n.7 (Alito, J., concurring). A statute that discriminates against interstate commerce, in turn, can only be upheld if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Or.*, 511 U.S. 93, 101 (1994)). Consent by registration cannot survive that level of scrutiny. Forcing a non-Pennsylvania company to answer for claims with no connection to Pennsylvania brought by someone with no connection to Pennsylvania does not serve any legitimate Pennsylvania interest.

Consent by registration also imposes an undue burden on interstate commerce. In conducting the necessary analysis, this Court does not write on a blank slate. The U.S. Supreme Court has warned that "States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses." *United States v. Lopez*, 514 U.S. 549, 579-580 (1995). And in measuring state statutes' imposition on commerce, the Court has specifically held that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a

significant burden." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988).

Bendix Autolite held that it was an unconstitutional burden on interstate commerce to put an out-of-state corporation to the choice between consenting to general personal jurisdiction in the State through registration and having the statute of limitations for claims against the corporation be tolled during the period the corporation went unregistered. *Id*. at 893-894. In Pennsylvania, burden on interstate commerce is even more significant than in *Bendix*. The out-of-state corporation must choose between consenting to general personal jurisdiction in the Commonwealth through registration on the one hand and not being able to do business here on the other. If the surrender of a statute-of-limitations defense is too great a burden to justify consent by registration, then surrender of the right to do business in the Commonwealth is also too great a burden to justify consent by registration. The unconstitutionality of consent by registration under the dormant Commerce Clause follows directly from *Bendix*. And that is why multiple courts, even before Justice Alito's *Mallory* concurrence, questioned consent by registration's constitutionality on dormant Commerce Clause grounds. *See*, *e.g.*, *Genuine Auto Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016); *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2016 WL 2866166, at *4 (D. Kan. May 17, 2016). The Court should grant the petition to hold similarly.

2. Even starting from first principles, the Court should conclude that the burden on interstate commerce from consent by registration far outweighs any justification for the practice. Consent by registration prevents smaller businesses from expanding and may induce other businesses to intentionally violate the registration requirement to avoid consent by registration. The result? A Balkanized national market and more burdens on interstate businesses and the plaintiffs that seek to sue them.

Most businesses in America are small businesses. *See Mallory*, 143 S. Ct. at 2054 n.8 (Alito, J., concurring) (noting that a majority of corporations have fewer than five employees). Most manufacturers are small manufacturers, too. There are almost 600,000 small manufacturers in the United States, and 99% of all manufacturers are small ones. U.S. Small Business Administration, Support for Manufacturing Businesses, https://www.sba.gov/about-sba/organization/sba-initiatives/support-manufacturing-businesses#id-how-sba-helps-small-manufacturing-businesses (Nov. 13, 2023). A small business from New Jersey, Ohio, or New York may well decide not to expand its operations into Pennsylvania if the price of doing so is potentially having all of its disputes—including those from its home State—being heard in the Commonwealth's courts. That is particularly so because a small expansion into Pennsylvania—say, opening a single retail outlet or a modest distribution center—can lead to disproportionately large litigation

exposure. A company may well decide that expanding into the Pennsylvania market simply isn't worth the risk.

That will inhibit the "national unitary market" that the dormant Commerce Clause is designed to protect. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). Out-of-state businesses will be harmed, obviously, by their inability to grow. But Pennsylvanians will suffer, too, as they are denied goods and services from out-of-state firms, reducing the selection available to them and limiting competition with local companies. The dormant Commerce Clause was meant to guard against exactly that result.

Larger companies are unlikely to ignore or withdraw from the Pennsylvania market. But consent by registration may well lead companies to choose to intentionally violate the Pennsylvania registration statute rather than comply and face the jurisdictional consequences that come along with it. In a consent-by-registration regime, "a corporation who defie[s] registration statutes could face lesser jurisdictional consequences than a corporation who complie[s] and register[s]." Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 Wake Forest L. Rev. 999, 1006 (2012). That is certainly the case in Pennsylvania. Under the corporate-registration statute, the only consequence of not registering when registration is required is that the unregistered company cannot maintain a suit as a plaintiff in the Pennsylvania courts. Pa. C.S. § 411(b). That restriction, while

inconvenient, may be palatable for larger corporations that can use their legal departments and contracts to channel potential affirmative suits to a State that does not impose consent by registration.

"No one benefits from this 'efficient breach' of corporate-registration laws." *Mallory*, 143 S. Ct. at 2054 (Alito, J., concurring). Corporations, which now need to add a new layer of legal risk management to their operations, obviously do not benefit. But plaintiffs do not benefit either. Corporate registration statutes, by requiring the corporation to appoint a local agent for service of process, assure plaintiffs of a local person or entity authorized to receive notice of their suit against the out-of-state corporation. *See*, *e.g.*, *Chavez v. Bridgestone Americas Tire Operations, LLC*, 503 P.3d 332, 347 (N.M. 2021) (explaining that, even without consent by registration, registration statutes "provid[e] a convenient means of identifying a corporate agent with authority to accept service"); *Genuine Parts*, 137 A.3d at 142 (corporate registration statutes "requir[e] a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases.") If corporations do not register, plaintiffs will need to arrange for service of their suits in potentially far away forums, adding additional expense and complexity to what should be a straightforward beginning to any lawsuit. Consent by registration will therefore not just gum up the works of interstate trade, but also interstate legal

proceedings. The Court should grant the petition to confirm that the dormant Commerce Clause does not permit these harmful consequences.

II. CONSENT-BY-REGISTRATION OFFENDS FEDERALISM.

1. Consent by registration also offends the federalism principles at the core of the personal-jurisdiction doctrine. "[T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *see also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (personal-jurisdiction limitations are "territorial limitations" on state power). But "[t]he sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in . . . the original scheme of the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293; *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.) (explaining that "each State has a sovereignty that is not subject to unlawful intrusion by other States" and that if a "State were to assert jurisdiction in an inappropriate case, it would upset the federal balance").

The dormant Commerce Clause, in particular, enforces the States' separate sovereign spheres. The dormant Commerce Clause "mediate[s] the States' competing claims of sovereign authority" to regulate matters affecting interstate commerce. *National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1156-57

(2023). The dormant Commerce Clause ensures that a State's attempts to regulate commerce respect Congress's primacy over interstate commerce and "also respect the interests of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). Put to practice, the federalism aspect of personal jurisdiction requires consideration of "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017).

Pennsylvania, however, has *no* interest in Plaintiffs' cases. Syngenta Crop. is not a Pennsylvania corporation or headquartered here. And an overwhelming number of Plaintiffs are not Pennsylvania residents and were not exposed to or injured by Syngenta Crop's products in Pennsylvania. Pennsylvania has no conceivable interest in adjudicating a dispute that does not arise from or relate to acts done here or involve a defendant corporation that is essentially at home here. With consent-by-registration statutes, "[t]he state . . . attempts to extract the corporation's consent to all-purpose adjudicative authority, but without relinquishing anything additional in return." Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 443 (2012). That lopsided "'exchange' has lost its connection to the state's appropriate regulatory power." *Id.* No principle, much less

federalism, is served by allowing Plaintiffs to sue in a forum with no connection to their cases.

2. Condoning Plaintiffs' attempt to bring their suits in Pennsylvania will bless Plaintiffs' "forum-shopping—suing in [Pennsylvania] because it [is] thought plaintiff-friendly, even though their cases had no tie to the State." *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1031 (2021); *see also Mallory*, 143 S. Ct. at 2049 n.1 (Alito, J., concurring) (collecting sources detailing Pennsylvania's reputation as a plaintiff-friendly forum). And the burdens of that forum shopping will fall disproportionately on Pennsylvania's already taxed court system and jurors. The Philadelphia Court of Common Pleas' mass-tort program—which attracts most of these suits with no connection to the Commonwealth—has dipped to the lowest levels in years, but still touts over *4,000* cases in its backlog. Aleeza Furman, The Legal Intelligencer, *Philadelphia's Mass Tort Program Shrinks, but Still Packs a Punch*, May 9, 2023.

Those 4,000 cases must be resolved by Philadelphia juries and Philadelphia judges, "forcing disinterested local citizens to bear the burden of remote litigation while truly interested citizens los[e] their ability to monitor the proceedings." Seth B. McFardland, *A One-Two Punch to Forum Shopping: Recent Judicial and Legislative Amendments to South Carolina's Corporate Venue Jurisprudence*, 57 S.C. L. Rev. 465, 474 (2006) (describing the burdens that forum shopping places on

localities). These citizen and judicial resources are ones that can—and should—be put towards Pennsylvania disputes involving Pennsylvania citizens or Pennsylvania conduct. And Plaintiffs' claims are ones that should be resolved by States in courts and by juries that "have significant interests at stake—'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' as well as enforcing their own safety regulations." *Ford Motor Co.*, 141 S. Ct. at 1030 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)). This Court should put a stop to consent-by-registration forum shopping by granting the petition and reversing.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

/s/ Brittany C. Armour
BRITTANY C. ARMOUR (PA #324455)
HOGAN LOVELLS US LLP
1735 Market Street
Philadelphia, PA 19103
(267) 675-4600
brittany.armour@hoganlovells.com

Counsel for Amicus Curiae
National Association of Manufacturers

November 22, 2023

CERTIFICATE OF COMPLIANCE

I certify under Pa. R. A. P. 2135(d) that, excluding the parts of the document exempted by Pa. R. A. P. 2135(b), this document contains 3,005 words.

/s/ Brittany C. Armour
Brittany C. Armour