In The

Superior Court of Pennsylvania

No. 802 EDA 2018

ROBERT MALLORY,
Plaintiff/Appellant,

v.

NORFOLK SOUTHERN RAILWAY CO.,
Defendant/Appellee.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA DEFENSE INSTITUTE, PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL, AND WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLEE

Appeal from Order Dated February 6. 2018 of the Court of Common Pleas of Philadelphia County, at No. 001961, Sept. Term, 2017

JAMES M. BECK (#37137)
Reed Smith LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103-7301
(215) 851-8168
jmbeck@reedsmith.com

Counsel for *Amici Curiae*

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Defense Institute ("PDI") was organized in 1969 as a non-profit association of defense attorneys and insurance company executives. PDI acts as a forum to develop public policy initiatives, to exchange ideas, and for pursuit of goals such as prompt, fair, and just claim resolution, improved administration of justice, enhancement of the legal profession's public service, elimination of court congestion and delays in civil litigation, and promotion of other public-minded activities. To achieve these ends, PDI represents its members in many areas, including legislation and litigation.

The Philadelphia Association of Defense Counsel ("PADC") is a non-profit association of approximately 300 lawyers from five-county Philadelphia area. Among its goals, PADC seeks to protect and advance the interests of civil defendants and their counsel, to disseminate knowledge and information within the defense trial bar, to serve as a spokesman for civil defendants and their interests in the administration of justice, and to encourage compliance with the highest standards of professional conduct.

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including Pennsylvania. WLF devotes much of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears in state

and federal courts in cases to advocate for Due-Process limits the exercise personal jurisdiction over out-of-state defendants.

Members of these *amici*, as well as the citizens of the Commonwealth of Pennsylvania and the City of Philadelphia, have a strong interest in preventing forum shopping that burdens Pennsylvania – and especially Philadelphia – courts with cases having nothing to with the Commonwealth. Cases by non-Pennsylvania plaintiffs against non-Pennsylvania defendants about non-Pennsylvania facts overtax our courts and unfairly burden Pennsylvania jurors.

This appeal has potentially wide-ranging impacts. It could attract asbestos (and other) litigation to Pennsylvania from all over the country. It could be an "unwelcome mat" to non-resident corporations, telling businesses nationwide that Pennsylvania does not respect their constitutional rights. Plaintiffs' sweeping personal jurisdiction theory would actively deter these businesses from starting or continuing to do business in Pennsylvania, continued the hemorrhage of investment capital and jobs from the Commonwealth.

This exercise of jurisdiction is also unconstitutional, as the United States Supreme Court has repeatedly ruled and the trial judge here, Hon. Arnold New, recognized. Under federal Due Process standards, general personal jurisdiction only exists where a corporate defendant is "at home" – incorporated or having its

principal place of business. A state statute, such as 42 Pa. C.S.A. §5301, cannot trump the constitution, no more than any other form of state law.

The *amici* respectfully submit this brief to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case. This brief has been prepared for PDI, PADC, and WLF on a pro bono basis by undersigned counsel.[1]

[1] Pursuant to Pa. R.A.P. 531(b)(2), *amici curiae* state that no person, other than the *amici*, their members, and their counsel, has paid for or authored the within *amicus curiae* brief, in whole or in part.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes, Rules & Regulations

Other Authorities

STATEMENT OF THE QUESTIONS INVOLVED

Does the Commonwealth of Pennsylvania have personal jurisdiction over Norfolk based on Norfolk's consent to jurisdiction pursuant to its application for certificate of authority under Pennsylvania law, 42 Pa. C.S.A. §5301, which conditions all foreign corporations who register under Pennsylvania law to consent to general jurisdiction as a condition to registering as a foreign corporation?

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States has repeated the constitutional Due Process standard for general personal jurisdiction over and over: with rare (and irrelevant here) exceptions, a corporation must be "at home" in the jurisdiction, incorporated or having its principal place of business there. Only in these limited circumstances can a corporation be sued over anything, even matters, such as this, with no factual nexus to the forum state.

Plaintiff wrongly asserts that Pennsylvania overcame this Due Process limitation by amending the Long-Arm statute, 42 Pa. C.S.A. §5301(a), so that registration to do business in Pennsylvania imposes "general" jurisdiction over any foreign corporation. A state statute simply cannot override the federal constitution.

As the trial court held, plaintiff's reading renders the Long-Arm statute unconstitutional. All states require foreign corporations to register, so plaintiff's reading would allow every state to impose general jurisdiction on every foreign corporation. The Supreme Court rejects such aggressive assertions of jurisdiction, holding them "exorbitant" and "unacceptably grasping." Daimler AG v. Bauman, 571 U.S. 117, 138-39 (2014).

Since Daimler was decided, literally every state in the nation, save Pennsylvania, has refused to base general personal jurisdiction on nothing more than corporate registration to do business. Since Daimler, eight state high

courts – California, Colorado, Delaware, Illinois, Missouri, Montana, Oregon, and Wisconsin − have unanimously rejected such jurisdiction. So has every other appellate court to consider the question, and about two dozen federal district courts. Plaintiff's contentions would make Pennsylvania an outlier, and would attract every asbestos plaintiff in the country unwilling to bring suit where they live.

Nor can plaintiff escape Due Process through the legal fiction that the administrative act of registration as a foreign corporation is some form of express "consent" to general personal jurisdiction. The Long-Arm Statute distinguishes between the two, but even if it did not, the Supreme Court does not recognize mandatory corporate registration as a form of "consent" – and has not for nearly a century. In the current constitutional construct for personal jurisdiction, registration to do business is, at most, a factor for courts to consider in determining specific, case-linked jurisdiction.

ARGUMENT

I. PENNSYLVANIA CANNOT CONSTITUTIONALLY IMPOSE GENERAL PERSONAL JURISDICTION ON A FOREIGN CORPORATION THAT IS NOT "AT HOME" IN THE COMMONWEALTH.

Here, the trial court, Hon. Arnold L. New, is correct. To the extent that the Pennsylvania Long Arm Statute, 42 Pa. C.S.A. §5301(a), is interpreted to confer automatic "general" personal jurisdiction solely because a foreign corporation registers in Pennsylvania in order to do business, that statute – so interpreted – is unconstitutional.

The United States Supreme Court has repeatedly held that corporate defendants must be "at home" in order to support a state's general jurisdiction – not merely that they conduct "continuous and substantial" business.

> Our precedent . . . explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not "at home" in the State and the episode-in-suit occurred elsewhere.

BSNF Railway. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017); see Daimler, 571 U.S. at 127 (foreign corporate "affiliations with the State [must be] so 'continuous and systematic' as to render them essentially at home in the forum State") (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011)).

Following this Supreme Court precedent, Judge New correctly held that a state statute purporting to impose general jurisdiction on lesser facts than the

Supreme Court's Due Process standards is unconstitutional. Pennsylvania may not "requir[e] the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution." Koontz v. St. Johns River Water Management District, 570 U.S. 595, 607 (2013) (citations and quotation marks omitted). That would impose an "unconstitutional condition" on the ability of foreign corporations to conduct interstate commerce. Id.

If Pennsylvania could defeat Due Process by statute, so could any other state. In Daimler the Supreme Court specifically rejected, as "unacceptably grasping," legal theories that "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." 571 U.S. at 138 (quotation marks omitted). The unconstitutionality of plaintiff's general personal jurisdiction "consent" theory – which needs no "continuous and substantial" corporate activity, or even any activity at all,[2] as a predicate to general jurisdiction – is *a fortiori* from Daimler:

---

[2] This ultimate extreme was actually reached in Webb-Benjamin, LLC v. International Rug Group, LLC, ___ A.3d ___, 2018 WL 3153602 (Pa. Super. June 28, 2018), where a panel of this Court held that §5301 imposed general personal jurisdiction "for acts committed prior to registration" when the corporate defendant conducted no Pennsylvania activity at all. Id. at *3. Neither Webb-Benjamin, nor the subsequent decision in Murray v. American Lafrance, LLC, ___ A.3d ___, 2018 WL 4571804 (Pa. Super. Sept. 25, 2018), considered the constitutional ramifications of such rulings.

> [T]he same global reach would presumably be available in every other State. . . . Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

571 U.S. at 139 (citation and quotation marks omitted). "A corporation that operates in many places can scarcely be deemed at home in all of them." Id. at 139 n.20. "[I]n-state business . . . does not suffice to permit the assertion of general jurisdiction." Tyrell, 137 S. Ct. at 1559.

All 50 states and the District of Columbia have corporate registration laws. E.g., T. Monestier, "Registration Statutes, General Jurisdiction, & the Fallacy of Consent," 36 Cardozo L. Rev. 1343, 1363-64 n.109 (2015) (collecting all 50 states' registration statutes). Thus, if a registration statute could create general jurisdiction – based on "consent" or anything else – in derogation of constitutional standards, interstate corporations could be subjected to general jurisdiction **everywhere** they conducted business, even if that business is not "continuous and substantial," and even if they actually conducted no business at all.

Here, Judge New correctly held that, "[b]y wrapping general jurisdiction in the cloak of consent, Pennsylvania's mandated corporate registration attempts to do exactly what the United States Supreme Court prohibited." Mallory v. Norfolk Southern Railway Co., 2018 WL 3025283, at *6 (Pa. C.P.

Phila. Co. May 30, 2018). Every other appellate court, state and federal, outside Pennsylvania has reached the same conclusion.

II. A NATIONWIDE MOUNTAIN OF PRECEDENT REJECTS CORPORATE REGISTRATION AS AN INDEPENDENT BASIS FOR GENERAL PERSONAL JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN DAIMLER.

This Court is hardly the first to consider the constitutional ramifications of Daimler and subsequent Supreme Court precedent on jurisdictional claims grounded in corporate registration statutes. Many appellate courts had concluded, even before Daimler, that a foreign corporation's compliance with mandatory state-law registration requirements, without any other factual predicate, cannot establish general jurisdiction over causes of action (as here) having nothing to do with a state.[3] Daimler, however, leaves no doubt as to the

---

[3] Freeman v. Second Judicial District, 1 P.3d 963, 968 (Nev. 2000); Goodyear Tire & Rubber Co. v. Ruby, 540 A.2d 482, 487 (Md. 1988); Byham v. National Cibo House Corp., 143 S.E.2d 225, 231 (N.C. 1965); Renfroe v. Nichols Wire & Aluminum Co., 83 N.W.2d 590, 594 (Mich. 1957); Asshauer v. Glimcher Realty Trust, 228 S.W.3d 922, 933 (Tex. App. 2007); Thomson v. Anderson, 6 Cal. Rptr.3d 262, 269 (Cal. App. 2003); Alderson v. Southern Co., 747 N.E.2d 926, 939 (Ill. App. 2001); Washington Equipment Manufacturing Co. v. Concrete Placing Co., 931 P.2d 170, 172-73 (Wash App. 1997); Gray Line Tours v. Reynolds Electrical & Engineering Co., 238 Cal. Rptr. 419, 421 (Cal. App. 1987); King v. American Family Mutual Insurance Co., 632 F.3d 570, 579 (9th Cir. 2011) (applying Montana law); Cossaboon v. Maine Medical Center, 600 F.3d 25, 37 (1st Cir. 2010) (applying New Hampshire law); Pittock v. Otis Elevator Co., 8 F.3d 325, 328-29 (6th Cir. 1993) (applying Ohio law); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181-82 (5th Cir. 1992) (applying Texas law); Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1245 (7th Cir. 1990) (applying Indiana law); Sandstrom v. ChemLawn Corp., 904 F.2d 83, 89 (1st Cir. 1990) (applying Maine law); Pearrow v.

prerequisites of Due Process for general personal jurisdiction. Thus, in the four years since the Supreme Court decided Daimler, high courts in eight states have addressed this precise issue. The results are unanimous. All of these courts have ruled the same way – corporate registration is constitutionally insufficient to support a state's exercise of general personal jurisdiction.

Prior to Daimler, Delaware – "home" to more corporations than any other state − had interpreted its corporate registration statute to impose general jurisdiction in the same manner plaintiff advocates here – solely on the basis of a foreign corporation's registration to do business. See Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988). In Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016), Delaware's highest court overruled Sternberg and recognized that predicating general jurisdiction on a foreign corporation's registration to do business is incompatible with Daimler:

> An incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market. Daimler makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not "essentially at home" in a state for claims having no rational connection to the state. . . . Hence, Delaware cannot

---

National Life & Accident Insurance Co., 703 F.2d 1067, 1069 (8th Cir. 1983) (applying Arkansas law); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1036 (10th Cir. 1975) (applying New Mexico law); Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 748 (4th Cir. 1971) (applying South Carolina law).

> exercise general jurisdiction over it consistent with principles of due process.

137 A.3d at 127-28 (footnote omitted). As here, the unconstitutional general personal jurisdiction assertion in Cepec was by a non-resident plaintiff claiming asbestos exposure at out-of-state locations.

Following Cepec, the Missouri Supreme Court rejected general jurisdiction based on corporate registration in State ex. rel. Norfolk Southern Railway Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017). "[A] broad inference of consent based on registration would allow national corporations to be sued in every state, rendering Daimler pointless." Id. at 51. The Missouri court rebuffed the same arguments, made against the same defendant, under the same statutory scheme (the Federal Employees Liability Act ("FELA")) as here.

> [Plaintiff's] arguments blur the distinction between general and specific jurisdiction. . . . The prior suits against [defendant] were suits based on specific jurisdiction because they concerned injuries that occurred in Missouri or arose out of [defendant's] activities in Missouri. . . . Nonetheless, the minimum contacts that suffice to provide specific jurisdiction . . . do not also confer general jurisdiction over a particular company for a non-Missouri-related lawsuit.

Id. at 47. Accord State ex rel. Bayer Corp. v. Moriarty, 536 S.W.3d 227, 232-33 (Mo. 2017) (reiterating that general jurisdiction based on corporate registration "would result in universal personal jurisdiction for corporations complying with registration statutes in many states and would be inconsistent with" Daimler).

Most recently, the Supreme Court of Montana, in another FELA case, reached the same result. "We conclude a company does not consent to general personal jurisdiction by registering to do business in Montana and voluntarily conducting in-state business activities." DeLeon v. BNSF Railway Co., 426 P.3d 1, 4 (Mont. 2018). The court distinguished this claim from other types of "consent":

> Registration-based consent is distinguishable from other types of consent jurisdiction in its breadth. It permits a court to obtain **general** personal jurisdiction over a defendant − it is not limited to one case or one contract.

Id. at 6 (emphasis added). Dismissing pre-Daimler decisions as outdated, DeLeon held:

> [E]xtending general personal jurisdiction over all foreign corporations that registered to do business in Montana and subsequently conducted in-state business activities would extend our exercise of general personal jurisdiction beyond the narrow limits recently articulated by the Supreme Court. . . . Every state requires foreign corporations doing in-state business to register. . . Reading our registration statutes to confer general personal jurisdiction over foreign corporations would swallow the Supreme Court's due process limitations on the exercise of general personal jurisdiction, and we accordingly refuse to do so.

Id. at 8-9 (citations omitted).

Similarly, the Illinois Supreme Court, in Aspen American Insurance Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440 (Ill. 2017), denied that mere corporate registration creates general jurisdiction:

> [T]hat a foreign corporation registered to do business in Illinois is subject to the same duties as a domestic one in no way suggests

> that the foreign corporation has consented to general jurisdiction. . . . [T]hat a foreign corporation has registered to do business under the Act does not mean that the corporation has thereby consented to general jurisdiction over all causes of action, including those that are completely unrelated to the corporation's activities in Illinois.

Id. at 447-48. Accord Campbell v. Acme Insulations, Inc., 105 N.E.3d 984, 993 (Ill. App. 2018) ("Nor does the fact that [defendant] has a registered agent for service of process in Illinois show that it consented to jurisdiction in this State") (asbestos personal injury case).

While the United States Supreme Court in Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) ("BMS"), addressed only specific "case-linked" personal jurisdiction (not at issue here), the California Supreme Court's earlier decision also concerned general jurisdiction − eliminating corporate registration. "[A] corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions." Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 884 (Cal. 2016), reversed on other grounds, 137 S. Ct. 1773 (2017).

The same conclusion was reached under Wisconsin law. In Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, 898 N.W.2d 70 (Wis. 2017), the court overturned contrary pre-Daimler lower court

precedent and refused to base general jurisdiction on corporate registration, because that would conflict with the constraints of federal Due Process:

> The shade of constitutional doubt that Goodyear and Daimler cast on broad approaches to general jurisdiction informs our assessment of this court's older cases. . . . [W]e instead give preference to prevailing due process standards when interpreting a contemporary statute for the first time. . . . [S]ubjecting foreign corporations to general jurisdiction wherever they register an agent for service of process would reflect the "sprawling view of general jurisdiction" rejected by the Supreme Court.

Id. at 81-82 (citations and quotation marks omitted).

The Oregon Supreme Court took the same position in another FELA case, Figueroa v. BNSF Railway Co., 390 P.3d 1019 (Or. 2017), "conclud[ing] that appointing a registered agent to receive service of process merely designates a person upon whom process may be served. It does not constitute implied consent to the jurisdiction of the Oregon courts." Id. at 1021-22. Similarly, the Colorado Supreme Court ruled in Magill v. Ford Motor Co., 379 P.3d 1033 (Colo. 2016), that corporate registration cannot support general jurisdiction where a defendant's in-state contacts "pale in comparison to the significant contacts that were deemed 'slim' in Daimler." Id. at 1038.

In addition to the unanimous rejection of registration-based general jurisdiction by all eight state high courts to have considered the issue since Daimler, numerous other appellate courts, state and federal, concur that corporate registration is not a constitutional basis for general personal

jurisdiction. Nor can such registration, without more, create an "exceptional case" establishing general jurisdiction where a corporation is not otherwise "at home."

The Second Circuit, in another asbestos case, Brown v. Lockheed-Martin Corp., 814 F.3d 619 (2d Cir. 2016), refused to "err[] in casually dismissing related federal due process concerns" raised by a plaintiff's assertion of general jurisdiction based on the Connecticut corporate registration statute. Such jurisdiction, if conferred by corporate registration statutes, created the same constitutional concerns decided by the Supreme Court in Daimler:

> In any event, we can say that the analysis that now governs general jurisdiction over foreign corporations − the Supreme Court's . . . more demanding "essentially at home" test . . . − suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate "consent" − perhaps unwitting − to the exercise of general jurisdiction by state courts.

Id. (footnote omitted). Plaintiff's theory was an ill-concealed "back door" attempt at stealing away what Daimler has mandated:

> If mere registration and the accompanying appointment of an in state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and Daimler's ruling would be robbed of meaning by a back-door thief.

Id. at 640. Accord Waite v. All Acquisition Corp., 901 F.3d 1307, 1319 & n.5 (11th Cir. 2018) ("we reject the exercise of general personal jurisdiction based on such implied consent"; "an overly broad interpretation of [a state]

registration scheme as providing consent might be inconsistent with the Supreme Court's decision in Daimler") (applying Florida law); Gulf Coast Bank & Trust Co. v. Designed Conveyor Systems, LLC, 717 F. Appx. 394, 398 (5th Cir. 2017) (rejecting "outdated view[s] of general jurisdiction"; no general jurisdiction via corporate registration) (applying Louisiana law); Am Trust v. UBS AG, 681 F. Appx. 587, 589 (9th Cir. 2017) ("consent to general personal jurisdiction" not created by registering to do business) (applying California law).

Several intermediate state appellate courts have likewise held that state corporate registration statutes cannot create general personal jurisdiction where such jurisdiction is not permitted by Due Process:

> **Arizona**: "[T]here is no need to base personal jurisdiction solely upon a murky implication of consent to suit − for all purposes and in all cases − from the bare appointment of an agent for service. We therefore agree with those decisions holding that registration statutes do not imply consent to general jurisdiction." Wal-Mart Stores, Inc. v. Lemaire, 395 P.3d 1116, 1120 (Ariz. App. 2017).
>
> **Florida**: Woodruff-Sawyer & Co. v. Ghilotti, ___ So.3d ___, 2018 WL 4100386, at *4 (Fla. App. Aug. 29, 2018) (general jurisdiction "not appropriate" under Daimler "without more" than corporate registration and agent for service of process); Magwitch, LLC v. Pusser's West Indies, Ltd., 200 So.3d 216, 218 (Fla. App. 2016) (Corporate registration cannot create general jurisdiction absent predicate facts).
>
> **New Jersey**: Given Daimler's "clear narrow application of general jurisdiction," the court "cannot agree [that] business registration rises to consent to submit to the general jurisdiction in the forum." Dutch Run Mays Draft, LLC v. Wolf Block LLP, 164

A.3d 435, 444 (N.J. App. Div.), certif. denied, 173 A.3d 596 (N.J. 2017).

Texas: Salgado v. OmniSource Corp., 2017 WL 4508085, at *5 (Tex. App. Oct. 10, 2017) (a registered agent "without evidence of substantial business relations or other contacts, is not enough to subject a nonresident defendant to general jurisdiction") (citation omitted) (unpublished); Northern Frac Proppants, II, LLC v. 2011 NF Holdings, LLC, 2017 WL 3275896, at *16 (Tex. App. July 27, 2017) ("general jurisdiction . . . not established by showing that foreign business entities . . . were registered to do business" and "had registered agents for service of process") (unpublished).

Literally dozens of trial court decisions in numerous other states also reject corporate registration as a basis for general jurisdiction when a corporate defendant is not "at home" as required by Tyrell and Daimler. These include decisions applying Pennsylvania,[4] New Jersey,[5] and Delaware[6] law, thus

---

[4] Antonini v. Ford Motor Co., 2017 WL 3633287, at *2 n.2 (M.D. Pa. Aug. 23, 2017) ("regist[ration] to do business in Pennsylvania" among other contacts, was "insufficient to establish general jurisdiction" in Pennsylvania); McCaffrey v. Windsor at Windermere Ltd. Partnership, 2017 WL 1862326, at *4 (E.D. Pa. May 8, 2017) (Pennsylvania corporate registration did not show "contacts with Pennsylvania [that] are so continuous and systematic as to render them essentially at home") (citation and quotation marks omitted); Spear v. Marriott Hotel Services, Inc., 2016 WL 194071, at *2 (E.D. Pa. Jan. 15, 2016) (no general personal jurisdiction based "solely on the fact that defendants are registered to do business" in Pennsylvania).

[5] Horowitz v. AT&T, Inc., 2018 WL 1942525, at *12 (D.N.J. April 25, 2018) ("consent by registration is inconsistent with" Daimler; registration-based general personal jurisdiction "developed from an outmoded way of thinking about jurisdiction" and is "inconsistent with the Supreme Court's recent Daimler decision"); Boswell v. Cable Services. Co., 2017 WL 2815077, at *6 (D.N.J. June 29, 2017) (corporation's registration to do business did "not mean it consented to general jurisdiction in New Jersey"); Display Works, LLC v. Bartley, 182 F. Supp.3d 166, 176-77 (D.N.J. 2016) ("the doctrinal refinement reflected in . . . the [Supreme] Court's 21st century approach to

undercutting the pre-Daimler decision in Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991), relied upon by plaintiff and his *amicus*. Post-Daimler federal district decisions in seventeen additional jurisdictions likewise refuse to equate corporate registration with general personal jurisdiction.[7] Plaintiff is thus

---

general and specific jurisdiction" has replaced "sweeping interpretation[s]" of "routine registration statute[s]"); McCourt v. A.O. Smith Water Products Co., 2015 WL 4997403, at *4 (D.N.J. Aug. 20, 2015) ("The single fact that Defendant registered to do business . . . is insufficient to conclude that it 'consented' to jurisdiction") (asbestos case).

[6] AstraZeneca AB v. Mylan Pharmaceuticals, Inc., 72 F. Supp.3d 549, 556 (D. Del. Nov. 5, 2014) ("In light of the holding in Daimler, the court finds that [defendant's] compliance with Delaware's registration statutes − mandatory for doing business within the state − cannot constitute consent to jurisdiction"), aff'd on other grounds, 925 F.2d 637 (Fed. Cir. 1991).

[7] **Arkansas**: Antoon v. Securus Technologies, Inc., 2017 WL 2124466, at *3 (W.D. Ark. May 15, 2017) (rejecting argument "that every single foreign corporation who lawfully conducts business within the state of Arkansas consents thereby to the exercise of general jurisdiction"); **District of Columbia**: Freedman v. Suntrust Banks, Inc., 139 F. Supp.3d 271, 279 (D.D.C. 2015) (corporate registration did not establish that "Defendants are any more 'at home' in the District of Columbia than they are 'at home' in [] other states"); **Hawaii**: Bralich v. Sullivan, 2018 WL 1938297, at *4 (D. Haw. April 23, 2018) ("existence of [a registered] agent alone appears insufficient to establish personal jurisdiction"); **Indiana**: U.S. Bank National Ass'n v. Bank of America, N.A., 2015 WL 5971126, at *6 (S.D. Ind. Oct. 14, 2015) ("Merely registering to do business in Indiana . . . does not establish personal jurisdiction over a corporation."); **Massachusetts**: Cossart v. United Excel Corp., 2014 WL 4927041, at *2 (D. Mass. Sept. 30, 2014) ("Registration . . . cannot satisfy general jurisdiction's requirement of systematic and continuous activity."), rev'd on other grounds, 804 F.3d 13 (1st Cir. 2015) (specific jurisdiction); **Michigan**: Magna Powertrain De Mexico S.A. De C.V. v. Momentive Performance Materials USA LLC, 2016 WL 3574652, at *4 (E.D. Mich. June 16, 2016) ("reject[ing] the idea that the registration statutes allow an inference of consent to general personal jurisdiction"); **Mississippi**: Pitts v. Ford Motor Co., 127 F. Supp.3d 676, 683 (S.D. Miss. 2015) (that defendant "is qualified

correct that there is a "mountain of precedent" (br. at 10) on corporate

---

and registered to do business in the State of Mississippi . . . [is] insufficient to establish that [it] is susceptible to general jurisdiction"); **Nevada**: Hunt v. Auto-Owners Insurance Co., 2015 WL 3626579, at *5 n.2 (D. Nev. June 10, 2015) (corporate registration "insufficient to bring defendants within this court's jurisdiction"); **New York**: Minholz v. Lockheed Martin Corp., 227 F. Supp.3d 249, 264 (N.D.N.Y. Dec. 30, 2016) ("exercise of general personal jurisdiction based on registration alone would be counter to the principles of due process articulated" in Daimler; pre-Daimler precedent no longer viable); Amelius v. Grand Imperial LLC, 64 N.Y.S.3d 855, 866-69 (N.Y. Sup. 2017) (same); **North Carolina**: Public Impact, LLC v. Boston Consulting Group, Inc., 117 F. Supp.3d 732, 739 (M.D.N.C. 2015) ("courts have interpreted Daimler to mean that a defendant's mere conformance with a State's business registration statute cannot constitute consent to jurisdiction and therefore is not sufficient for general jurisdiction") (citations and quotation marks omitted); **Oklahoma**: Aclin v. PD-RX Pharmaceuticals, Inc., 189 F. Supp.3d 1294, 1305 (W.D. Okla. June 1, 2016) ("declin[ing] to exercise general jurisdiction over the Defendants on the basis of their registration in the state"); **Rhode Island**: Phoenix Insurance Co. v. Cincinnati Indemnity Co., 2017 WL 3225924, at *4 (Mag. D.R.I. March 3, 2017) ("mere designation of an agent for service of process cannot alone establish general jurisdiction over a foreign corporation), adopted, 2017 WL 2983879 (D.R.I. July 13, 2017); **Tennessee**: Western Express, Inc. v. Villanueva, 2017 WL 4785831, at *6 (M.D. Tenn. Oct. 24, 2017) ("mere designation of an agent for service of process . . . does not, standing alone, constitute consent to the general jurisdiction of the state"); **Utah**: Oversen v. Kelle's Transportation Service, 2016 WL 8711343, at *3 (D. Utah May 12, 2016) (rejecting general jurisdiction; noting "the constitutional questions that would arise if the [registration] statute were interpreted to require that all entities must consent to general personal jurisdiction in Utah"); **Vermont**: Bertolini-Mier v. Upper Valley Neurology Neurosurgery, P.C., 2016 WL 7174646, at *4 (D. Vt. Dec. 7, 2016) ("mere registration to do business in Vermont is not determinative of the jurisdictional questions in this case"); **Virgin Islands**: In re Asbestos Products Liability Litigation (No. VI), 2014 WL 5394310, at *11 (E.D. Pa. Oct. 23, 2014) (registration "alone is not enough to establish that [defendant] 'is fairly regarded as at home' in the forum"); **Washington**: Dokoozian Construction LLC v. Executive Risk Specialty Insurance Co., 2015 WL 12085859, at *2 (W.D. Wash. July 28, 2015) ("reject[ing] the idea that the appointment of an agent for service of process alone works as consent to be sued in that state").

registration and general personal jurisdiction, however this "mountain" buries his position that mere corporate registration alone is sufficient.

The Pennsylvania cases plaintiff cites are the outliers. As a legal matter, a state statute cannot overcome the Due Process standards enunciated by the Supreme Court, and applicable to the states under the Fourteenth Amendment. E.g., Commonwealth v. Noel, 857 A.2d 1283, 1287-88 (Pa. 2004); Commonwealth v. Williams, 733 A.2d 593, 603 (Pa. 1999); In re Estate of Carter, 159 A.3d 970, 977-78 (Pa. Super. 2017) (all declaring Pennsylvania statutes unconstitutional for violating federal Due Process guarantees).

Finally, as a practical matter, now that every other state burdened by major asbestos litigation has correctly rejected corporate registration to do business as a ground for general personal jurisdiction,[8] acceptance of plaintiff's position would transform Pennsylvania into a nationwide mecca for any and all

---

[8] As discussed, states with controlling appellate authority contrary to plaintiff's position include California, Florida, Illinois, Maryland, Missouri, Ohio, New Jersey, and Texas. The only state with an asbestos-heavy docket that lacks appellate precedent precluding registration-based general jurisdiction is New York, and there trial courts routinely reject that theory in asbestos cases. E.g., New York City Asbestos Litigation, 2018 WL 3859695, at *2-3 (N.Y. Sup. Aug. 14, 2018) ("Daimler rendered this method of acquiring personal jurisdiction outmoded and inapplicable. The mere fact that a corporation is registered to do business is insufficient to confer general jurisdiction."); New York City Asbestos Litigation, 2018 WL 3575072, at *3 (N.Y. Sup. July 25, 2018) (same).

asbestos claimants who, for whatever reason, are not willing to file their actions in their states of residence.

III. "CONSENT" IS NOT A PROPER BASIS FOR GENERAL PERSONAL JURISDICTION.

Throughout their arguments, plaintiff and his *amicus* use corporate registration requirements and "consent" synonymously. These concepts are quite distinguishable, and have been treated differently since the Supreme Court replaced jurisdiction based on territoriality with its present "contacts" approach to personal jurisdiction in International Shoe Co. v. Washington, 326 U.S. 310 (1945).[9] Indeed, the very statute declared unconstitutional here, 42 Pa. C.S.A. §5301, **itself** expressly distinguishes between "qualification as a foreign corporation" and "consent":

> (a) **General rule**. − The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise **general personal jurisdiction**. . . .
>
> * * * *
>
> (2) Corporations. −
>
> (i) Incorporation under or **qualification as a foreign corporation** under the laws of this Commonwealth.
>
> (ii) **Consent**, to the extent authorized by the consent.
>
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

[9] Overruling Pennoyer v. Neff, 95 U.S. 714 (1877).

(Emphasis added). The very statute in question establishes that registration to do business and "consent" are different things.

The United States Supreme Court has dispensed with "the fiction[] of implied consent to service on the part of a foreign corporation" in favor of "ascertain[ing] what dealings make it just to subject a foreign corporation to local suit." Shaffer v. Heitner, 433 U.S. 186, 202-03 (1977). It has found the same arguments plaintiff makes here to be "purely fictional":

> We initially upheld these [corporate registration] laws under the Due Process Clause on grounds that they complied with Pennoyer's rigid requirement of either "consent," or "presence." As many observed, however, the consent and presence were purely fictional. Our opinion in International Shoe cast those fictions aside. . . .

Burnham v. Superior Court, 495 U.S. 604, 617-18 (1990) (citations omitted).

Significantly, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) ("ICI"), relied on heavily by both plaintiff and his *amicus*, **does not include** corporate registration as a currently recognized form of "consent." Rather, the "variety of legal arrangements have been taken to represent express or implied consent" recognized in ICI consisted of:

- "[S]ubmi[ssion] to the jurisdiction of the court by appearance";
- "[P]arties to a contract may agree in advance";
- "[A] stipulation entered into by the defendant";
- "[C]onsent [is] implicit in agreements to arbitrate";

- "[C]onstructive consent to the personal jurisdiction of the state court [inheres] in the voluntary use of certain state procedures;"[10] and
- "[W]aive[r] if not timely raised"; and
- "[F]ail[ure] to comply with a pretrial discovery order."

456 U.S. at 704-06 (citations and quotation marks omitted).[11] Corporate registration statutes are conspicuously absent from the Supreme Court's list – and with good reason.

"Consent" squeezed from a threat to prevent this defendant from operating its trains on its Pennsylvania tracks, or otherwise doing business in Pennsylvania,[12] is no consent at all. Koontz, 570 U.S. at 607. As the Supreme Court observed in Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), for a corporation "to secure a license and to designate a statutory agent

---

[10] The examples involved legal procedures specific to individual cases. See Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (non-resident plaintiff consents to counterclaims); Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 30 (1917) ("filing a plea in abatement, or taking the question to a higher court").

[11] See J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880-81 (2011) (another, more recent, Supreme Court discussion of consent likewise omitting corporate registration).

[12] See 15 Pa. C.S.A. §403(10), listing "[o]wning, without more, property" as not "doing business" in Pennsylvania. Even assuming that §403 applies – contrary to its express limitation to "this chapter" – its minimal carve-outs hardly make failure to register a viable alternative that could support valid "consent."

upon whom process may be served" only "provide[s] a helpful but not a conclusive test" for jurisdiction. Id. at 445.[13]

The last United States Supreme Court case to apply a state corporate registration statute as plaintiff advocates was Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917) ("Pa. Fire"), a century-old decision from deep within the now-defunct Pennoyer era. In Daimler, the Supreme Court cautioned that "cases decided in the era dominated by Pennoyer's territorial thinking should not attract heavy reliance today." 134 S. Ct. at 761 n.18 (citation omitted). Thus:

> Pennsylvania Fire cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation . . . [of] a routine registration statute and an accompanying power of attorney that Pennsylvania Fire credited as a general "consent" has yielded to the doctrinal refinement reflected in Goodyear and Daimler] and the Court's 21st century approach to general and specific jurisdiction.

Brown, 814 F.3d at 639. "Pennsylvania Fire has yielded to the two-prong analysis for long-arm jurisdiction set forth in recent decades by the Supreme Court." Magwitch, 200 So. 3d at 218.

Under the current framework for personal jurisdiction, "consent" by registering to do business as a foreign corporation no longer supports general jurisdiction. "'Extorted actual consent' and 'equally unwilling implied

---

[13] Under Perkins, if §403 is relevant to personal jurisdiction, it is only as a list of corporate activities that implicate the "minimum contacts" test of "case-linked" special jurisdiction. See BMS, 137 S. Ct. at 1782.

consent' are not the stuff of due process." Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 889 (S.D. Tex. 1993) (citation omitted). At most, corporate registration is one factor in considering specific "case-linked" personal jurisdiction. As such, the defendant's registration – occurring decades ago – cannot be dispositive in this case, in which specific jurisdiction is not asserted.

IV. DUE PROCESS LIMITATIONS ON PERSONAL JURISDICTION CANNOT BE DEFEATED BY PENNSYLVANIA'S LONG ARM STATUTE.

"The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause." ICI, 456 U.S. at 702. Personal jurisdiction "represents a restriction on judicial power . . . as a matter of individual liberty." Id. Pennsylvania's statutes concerning personal jurisdiction simply cannot override federal constitutional law. See 42 Pa. Cons. Stat. §5308 ("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"); 42 Pa. C.S.A. §5307 (jurisdiction only extends "to the extent permitted by the Constitution of the United States"). Where "the United States Supreme Court has quite plainly decreed" the outcome of a constitutional issue, federal constitutional law cannot "be supplanted by the invocation of a contrary approach to [the same issue] under state law." Annenberg v. Commonwealth, 757 A.2d 338, 351 (Pa. 2000).

Plaintiff's erroneous arguments prove far too much. If express mention of "general jurisdiction" in §5301(a) were enough to overcome contrary federal Due Process limitations under the first two prongs of that subsection ("qualification as a foreign corporation" or "consent"),[14] then the same would be true for that subsection's third prong, imposing "general jurisdiction" by reason of any foreign corporation's "carrying on of a continuous and systematic part of its general business within this Commonwealth." Id. §5301(a)(2)(iii). However, every United States Supreme Court personal jurisdiction decision since at least Goodyear, 564 U.S. 915, in 2011 has declared "continuous and substantial" business constitutionally insufficient.

Further, plaintiff's argument that corporate registration is *ipso facto* "consent" to general jurisdiction, notwithstanding absence of any factual relationship between this case and Pennsylvania, cannot be squared with other sections of the Long-Arm Statute that explicitly limit jurisdiction to what is permitted by "the Constitution of that United States." 42 Pa. C.S.A. §§5307, 5308, 5322(b). These sections of the Long-Arm Statute preclude any part of that statute from being applied unconstitutionally, even if such a construction could be teased from other statutory language. See also 1 Pa. C.S.A. §1922(3)

[14] See §5301(a)(2)(i-ii).

(imposing the "presumption" that "the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth").

It is certainly possible to interpret the Long-Arm Statute to conform to Due Process norms. See Murray v. American Lafrance, LLC, ___ A.3d ___, 2018 WL 4571804, at *6-13 (Pa. Super. Sept. 25, 2018) (Bowes, J. dissenting). However, heedless of these presumptions, and of the obligation to construe statutes to avoid constitutional questions,[15] prior panels of this Court have recently read the Long-Arm Statute as conferring general jurisdiction on a lesser showing than federal Due Process requires. Murray, 2018 WL 4571804, at *3; Webb-Benjamin, ___ A.3d ___, 2018 WL 3153602, at *4-5 (Pa. Super. June 28, 2018). Under those recent precedents, the constitutional issue presented here cannot be avoided, and Judge New was correct to hold the Long-Arm Statute unconstitutional as plaintiff is seeking to apply it.

Finally, Plaintiff also asserts that "[t]he only penalty for unregistered corporations is the ability to bring actions in the Commonwealth . . . that are unrelated to property in Pennsylvania." Br. at 8. Even if that were true, which it is not, suppose that this defendant simply ignored its obligations under

---

[15] "The 'canon of constitutional avoidance' provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Commonwealth v. Ricker, 170 A.3d 494, 513 (Pa. 2017) (quoting MCI WorldCom, Inc. v. Pa. Public Utility Comm'n, 844 A.2d 1239, 1249-50 (Pa. 2004)) (internal citations omitted).

Pennsylvania law and never registered at all. The only factual predicate for plaintiff's arguments being absent, defendant could not be subjected to general jurisdiction. Thus, under plaintiff's construction of the Long-Arm Statute, corporate defendants would be better off breaking the law than following it. Such an absurd result as another reason not to predicate general jurisdiction on registration to do business. Neighboring New Jersey rightly rejected the "principle [that] would place 'an outlaw who refused to obey the laws of the state in better position than a corporation which chooses to conform.'" Dutch Run, 164 A.3d at 444.[16] This Court should do likewise.

[16] Quoting Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 150 (S.D.N.Y. 1915) (L. Hand, J.).

CONCLUSION

For all of the above reasons, and for the reasons articulated by defendant Norfolk in its papers, the order of the Court of Common Pleas, holding 42 Pa. C.S.A. §5301(a) unconstitutional insofar as it allows general personal jurisdiction on nothing more than a foreign corporation's routine registration to do business in Pennsylvania, should be affirmed.

Respectfully submitted,

October 24, 2018

/s/ James M. Beck

JAMES M. BECK (#37137)
Reed Smith LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103-7301
(215) 851-8168

Counsel for *Amici Curiae* Pennsylvania Defense Institute,
Philadelphia Association of Defense Counsel and Washington Legal Foundation

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 531(b)(3). Specifically, it contains 6,904 words based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief.

I hereby further certify that on October 24, 2018, I caused two true and correct copies of the foregoing Brief of Appellant to be served by via U.S. Mail upon the following counsel:

David A. Damico, Esq.
Ira L. Podheiser, Esq.
Nina W. Gusmar, Esq.
Burns White LLC
48 26th Street
Pittsburgh, PA 15222

Ralph G. Wellington, Esq.
Schnader, Harrison Segal & Lewis LLP
1600 Market St., Suite 3600
Philadelphia, PA 19103-7286

Counsel for Defendant-Appellee Norfolk Southern Railway Co.

Daniel C. Levin, Esq.
Laurence S. Berman, Esq.
Luke T. Pepper, Esq.
Levin Sedran & Berman
510 Walnut St., Suite 500
Philadelphia, PA 19106-3697

Counsel for Plaintiff-Appellant Robert Mallory

Ruxandra M. Laidacker, Esq.
Charles L. Becker, Esq.
Kline & Specter, P.C.
1525 Locust St., 19th Floor
Philadelphia, PA 19102

Counsel for Amicus Curiae Pennsylvania Association for Justice

/s/ James M. Beck
James M. Beck