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In The

Superior Court of Pennsylvania

Nos. 2105 EDA 2016, 2106 EDA 2016, 2107 EDA 2016, 2108 EDA 2016, 2109 EDA 2016, 2110 EDA 2016, 2111 EDA 2016 (consolidated)

KENNETH MURRAY, et al.
Plaintiffs/Appellants,

v.

AMERICAN LAFRANCE, LLC,

Defendant,

and FEDERAL SIGNAL CORP.,
Defendant/Appellee.

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

Appeal from Order Dated May 25, 2016 of the Court of Common Pleas of Philadelphia County, at No. 02536, Nov. Term, 2015

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Defense Institute ("PDI") is a non-profit association of defense attorneys and insurance company executives. PDI is a forum for developing public policy, exchanging ideas, and pursuing goals such as prompt, fair, and just claim resolution, improved administration of justice, enhancing the legal profession's public service, eliminating court congestion and delays in civil litigation, and other public-minded activities. 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 the five-county Philadelphia area. PADC protects and advances the interests of civil defendants and their counsel, disseminates knowledge within the defense trial bar, speaks for civil defendants and their interests in the administration of justice, and encourages 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 promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as *amicus curiae* to advocate for Due Process and against excessive personal jurisdiction over out-of-state defendants.

Members of these *amici*, and citizens of the Commonwealth of Pennsylvania and the City of Philadelphia, have a strong interest in reducing forum shopping that burdens Pennsylvania – and especially Philadelphia – courts with cases having nothing to do with the Commonwealth. Non-Pennsylvania plaintiffs suing non-Pennsylvania defendants over non-Pennsylvania facts overtax our courts and unfairly burden Pennsylvania jurors.

Plaintiffs' claimed jurisdiction is unconstitutional, as the United States Supreme Court has repeatedly ruled. 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. §5301, cannot trump federal constitutional limitations.

The panel majority's uniquely expansive form of general jurisdiction will attract litigation to Pennsylvania from throughout the country. Conversely, that holding extends an "unwelcome mat" to non-resident corporations, telling businesses nationwide that Pennsylvania disregards their constitutional rights. It would aggravate the hemorrhage of investment and jobs by deterring companies from starting or continuing business in the Commonwealth.

These *amici* respectfully submit this brief to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case. Undersigned counsel prepared this brief for PDI, PADC, and WLF on a pro bono basis.[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)

Statutes, Rules & Regulations

Other Authorities

STATEMENT OF THE QUESTION INVOLVED

Whether the trial court made an error of law in sustaining Appellee's preliminary objections and dismissing the action based on lack of personal jurisdiction?

SUMMARY OF ARGUMENT

The United States Supreme Court has repeatedly confined general personal jurisdiction (with rare, irrelevant exceptions) to corporations "at home" in the forum – incorporated there or maintaining their principal place of business. Nowhere else does Due Process permit suits over matters, such as this, with no factual nexus to a jurisdiction.

Plaintiffs – scores of non-resident litigants asserting non-Pennsylvania injuries − wrongly contend that Pennsylvania can supplant Due Process simply by amending a statute to provide that a corporation's registration to do business by itself creates "general jurisdiction." State statutes cannot override the federal constitution.

Plaintiffs' statutory construction is unconstitutional. All states require foreign corporations to register, so plaintiffs' reading would allow every state to impose general jurisdiction on every major corporation. The Supreme Court rejects such aggressive assertions of jurisdiction as "exorbitant" and "unacceptably grasping." Daimler AG v. Bauman, 571 U.S. 117, 138-39 (2014).

Since Daimler, almost every other state has found corporate registration an insufficient basis for general personal jurisdiction. Eight state high courts – California, Colorado, Delaware, Illinois, Missouri, Montana, Oregon, and Wisconsin − unanimously reject such jurisdiction. So do many other appellate decisions, state and federal, as well as trial courts in dozens of states. Plaintiffs would turn Pennsylvania into a constitutional outlier, inviting a flood of forum-shopping plaintiffs from all over the country.

Nor may Due Process be evaded by the legal fiction that corporate registration creates "consent" to general personal jurisdiction. The relevant statute explicitly distinguishes registration from consent, and the Supreme Court has not treated corporate registration as "consent" for nearly a century.

ARGUMENT

I. FOREIGN CORPORATIONS NOT "AT HOME" IN PENNSYLVANIA CANNOT CONSTITUTIONALLY BE SUBJECT TO GENERAL PERSONAL JURISDICTION.

Plaintiffs' construction of Pennsylvania's Long-Arm Statute, 42 Pa.C.S. §5301(a), as automatically imposing "general" personal jurisdiction whenever a foreign corporation registers in Pennsylvania, is unconstitutional.

The United States Supreme Court has repeatedly held that corporate defendants must be "at home" to allow exercise of 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.

BNSF Railway. v. Tyrell, 137 S.Ct. 1549, 1554 (2017); see Daimler, 571 U.S. at 127 (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)).

This controlling precedent renders unconstitutional any state statute purporting to create general jurisdiction on lesser facts. 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 Dist., 570 U.S. 595, 607 (2013) (citations and quotation marks omitted). That would impose an "unconstitutional condition" on all foreign corporations' ability to conduct interstate commerce. Id.

If Pennsylvania could defeat Due Process by rewording its Long-Arm Statute, so could any other state. In Daimler, the Supreme Court 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 plaintiffs' consent-based general personal jurisdiction theory – needing no "continuous and substantial" activity, or even any activity,[2] for general jurisdiction – is *a fortiori* from Daimler:

> [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." BNSF, 137 S.Ct. at 1559.

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[2] Webb-Benjamin, LLC v. International Rug Group, LLC, 192 A.3d 1133 (Pa. Super. 2018), reached this ultimate extreme by holding that 42 Pa.C.S. §5301 imposed general personal jurisdiction "for acts committed prior to registration," when the corporate defendant did nothing in Pennsylvania at all. Id. at 1137.

All 50 states require corporate registration. 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). If these statutes create general jurisdiction – based on "consent" or anything else – in derogation of constitutional standards, interstate corporations would be subject to general jurisdiction **everywhere** they conducted business, without "continuous and substantial" business, and even without any actual in-state business.

Here, by disguising general jurisdiction as "consent," plaintiffs advocate exactly what the United States Supreme Court prohibited. Since Daimler, overwhelming precedent has rebuffed such arguments.

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

This Court is hardly the first to address the constitutional limits that Daimler and subsequent Supreme Court precedent place on jurisdictional claims grounded in corporate registration. Indeed, before Daimler, many states' appellate courts already determined that a foreign corporation's compliance with a mandatory registration statute, alone, failed to establish general jurisdiction over claims (as here) with no in-state nexus.[3] Daimler removed all doubt, and in the five years since Daimler, high courts in eight states addressed this precise issue, and have all held that corporate registration is constitutionally insufficient to support a state's exercise of general personal jurisdiction.

Before Daimler, Delaware – "home" to more corporations than any other state − had interpreted corporate registration by itself as imposing general

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[3] Freeman v. Second Judicial Dist., 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); Juarez v. United Parcel Service de Mexico S.A. de C.V., 933 S.W.2d 281, 284-85 (Tex. App. 1996); 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); North American Catholic Education Programming Foundation, Inc. v. Cardinale, 567 F.3d 8, 16 n.6 (1st Cir. 2009) (applying Rhode Island law); Consolidated Development Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) (applying Florida 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. 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).

jurisdiction in the same manner plaintiffs advocate here. See Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988). In Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016), the Delaware Supreme Court overruled Sternberg and recognized that predicating general jurisdiction on registration to do business alone 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 exercise general jurisdiction over it consistent with principles of due process.

137 A.3d at 127-28 (footnote omitted).

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.

> [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) (consent-based general jurisdiction "would result in universal personal jurisdiction for corporations complying with registration statutes in many states and would be inconsistent with" Daimler).

Likewise, the Supreme Court of Montana "conclude[d that] 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 registration from viable theories 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 original). Finding pre-Daimler decisions 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").

While Bristol-Myers Squibb Co. v. Superior Court, 137 S.Ct. 1773 (2017), addressed only specific "case-linked" personal jurisdiction (not at issue here), the California Supreme Court's earlier decision eliminated corporate registration as a basis for general jurisdiction. "[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).

Wisconsin reached the same conclusion in Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, 898 N.W.2d 70 (Wis. 2017). Ambac overturned contrary pre-Daimler lower court precedent and refused to base general jurisdiction solely on corporate registration, given the conflict with 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 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 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." Magill v. Ford Motor Co., 379 P.3d 1033, 1038 (Colo. 2016).

In addition to eight state supreme courts' unanimous rejection of corporate registration as grounds for general jurisdiction, numerous other post-Daimler appellate courts, state and federal, agree that such registration is constitutionally insufficient to sustain general personal jurisdiction. Nor can such registration, without more, create an "exceptional case" establishing general jurisdiction where a corporation is not otherwise "at home."

Most recently, in Aybar v. Aybar, ___ N.Y.S.3d ___, 2019 WL 288307 (N.Y. App. Jan. 23, 2019), an intermediate appellate court recognized that New York's "longstanding judicial construction" that permitted general jurisdiction by consent cannot survive Daimler.

> We hold that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which Daimler has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.

Id. at *5 (footnote omitted).

The Second Circuit, in Brown v. Lockheed-Martin Corp., 814 F.3d 619, 636 (2d Cir. 2016), refused to "err[] in casually dismissing related federal due process concerns" raised by basing general jurisdiction on the Connecticut corporate registration statute. Such jurisdiction, if conferred by corporate registration statutes, would create the same unconstitutional overreach condemned 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. at 637 (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).

Multiple intermediate state appellate courts have likewise held that Due Process precludes state corporate registration statutes from imposing general personal jurisdiction:

> **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).
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> **Florida**: Woodruff-Sawyer & Co. v. Ghilotti, 255 So.3d 423, 429 (Fla. App. 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).
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> **Kansas**: Kearns v. New York Community Bank, 400 P.3d 182 (table), 2017 WL 1148418, at *6 (Kan. App. March 24, 2017) ("being licensed to do business in a state does not make a corporation at home in that state").
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> **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).
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> **Texas**: Ford Motor Co. v. Cejas, 2018 WL 1003791, at *7-10 (Tex. App. Feb. 22, 2018) (in-state registered agents, among other contacts, do "not allege[] jurisdictional facts to support ... affiliations with Texas ... as to render [defendants] 'essentially at home' in Texas") (unpublished); 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" in Texas) (unpublished).[4]

Trial court decisions in numerous other states likewise refuse to ground general jurisdiction on registration of corporate defendants not "at home" as required by BNSF and Daimler. These include decisions under Pennsylvania,[5] New Jersey,[6] and Delaware[7] law − establishing the obsolescence of the pre-

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[4] The only contrary post-Daimler appellate decision outside Pennsylvania is Rodriguez v. Ford Motor Co., ___ P.3d ___, 2018 WL 6716038, at *3-5 (N.M. App. Dec. 20, 2018), in which the court declined to hold prior precedent as obsolete.

[5] 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, "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 registration lacked "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).

[6] Metropolitan Group Property & Casualty Insurance Co. v. Electrolux Home Products, Inc., 2018 WL 2422023, at *2 (D.N.J. May 29, 2018) ("to conclude that a corporation consents to personal jurisdiction based solely on registration would be inconsistent with Daimler"); Horowitz v. AT&T, Inc., 2018 WL 1942525, at *12 (D.N.J. April 25, 2018) ("consent by registration is inconsistent with … Daimler"; that theory "developed from an outmoded way of thinking about jurisdiction"); 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) ("doctrinal refinement reflected in ... the [Supreme] Court's 21st century approach to general and specific jurisdiction" has replaced "sweeping interpretation[s]" of "routine registration statute[s]"); McCourt v. A.O. Smith

Daimler decision, Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991), followed by the panel majority here. Post-Daimler federal district decisions in twenty-one additional jurisdictions reject corporate registration as a basis for general personal jurisdiction.

> **Alabama**: Beasley v. Providence Hospital, 2018 WL 2994380, at *3 (S.D. Ala. June 13, 2018) ("difficult to imagine a less exceptional circumstance than the unremarkable commonplace of an entity registering to do business in a foreign state or appointing an agent for service of process").
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> **Arkansas**: Antoon v. Securus Technologies, Inc., 2017 WL 2124466, at *3 (W.D. Ark. May 15, 2017) (rejecting proposition "that every single foreign corporation who lawfully conducts business within the state of Arkansas consents thereby to the exercise of general jurisdiction").
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> **District of Columbia**: Freedman v. Suntrust Banks, Inc., 139 F.Supp.3d 271, 279 (D.D.C. 2015) (corporate registration did not make defendants "any more 'at home' in the District of Columbia than they are 'at home' in [] other states").
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> **Georgia**: Orafol Americas, Inc. v. DBi Services, LLC, 2017 WL 3473217 (N.D. Ga. July 20, 2017) (being "registered to do business" held "woefully insufficient to render [defendant] 'at home' in Georgia").

Water Products Co., 2015 WL 4997403, at *4 (D.N.J. Aug. 20, 2015) ("single fact that Defendant registered to do business ... is insufficient to conclude that it 'consented' to jurisdiction").

7 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, 817 F.3d 755 (Fed. Cir. 2016).

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) (defendant being "qualified and registered to do business in the State of Mississippi" held "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").

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).

North Dakota: HomeRun Products, LLC v. Twin Towers Trading, Inc., 2017 WL 4293145, at *4 (D.N.D. Sept. 27, 2017) ("[m]ere registration to transact business in North Dakota does not render [defendant] subject to general jurisdiction in the state").

Oklahoma: Aclin v. PD-RX Pharmaceuticals, Inc., 189 F.Supp.3d 1294, 1305 (W.D. Okla. 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).

South Carolina: Gracious Living Corp. v. Colucci & Gallaher, PC, 216 F.Supp.3d 662, 668 (D.S.C. 2016) (service on "statutory agent of service" held "insufficient … to meet the 'at home' standard").

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").

> **West Virginia**: Javage v. General Motors, LLC, 2017 WL 6403036, at *1 (N.D.W. Va. Aug. 18, 2017) (rejecting argument "that this Court may exercise personal jurisdiction over the Defendant simply because it is a corporation that is registered to do business" as "not comport[ing]" with Supreme Court precedent), aff'd, 736 F.Appx. 418 (4th Cir. 2018) (affirming "for the reasons stated by the district court").[8]

Accepting the panel majority's rationale would make Pennsylvania an extreme constitutional outlier. Mere registration to do business is nowhere close to enough for general jurisdiction in cases such as this, where claims by forum-shopping non-residents are devoid of factual nexus to the Commonwealth.

Bane and Bane-bound federal district court decisions are unconstitutional relics. Bane's one-paragraph discussion held only that "consent" was "a traditional basis of jurisdiction," citing pre-International Shoe precedent. 925 F.2d at 641. Daimler specifically instructs that Pennoyer-era cases "should not attract heavy reliance today." 571 U.S. at 138 n.18.[9] Bane is neither persuasive nor controlling.

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[8] See also New York Commercial Bank v. Heritage Green Development, LLC, 2017 WL 954197, at *2 (Va. Cir. March 7, 2017) ("[d]esignating an agent does not amount to continuous and systematic operations that render [defendant] 'essentially at home' in Virginia, as is minimally required for general personal jurisdiction") (emphasis added).

[9] Also obsolete is Bane's equating corporate registration with "purposeful availment." 925 F.2d at 640 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). "Purposeful availment," and Burger King, concern specific jurisdiction – not general jurisdiction, and certainly not consent. Burger King, 471 U.S. at 472 (excluding consent). The "'purposeful availment' requirement ensures that a defendant will not be haled into a

Under our federal system, a state statute cannot thwart Due Process standards recognized by the Supreme Court, and applicable to the states under the Fourteenth Amendment. The Pennsylvania Supreme Court has repeatedly declared state statutes unconstitutional for violating federal Due Process guarantees. E.g., Commonwealth v. Noel, 857 A.2d 1283, 1287-88 (Pa. 2004); Commonwealth v. Williams, 733 A.2d 593, 603 (Pa. 1999); see In re Estate of Carter, 159 A.3d 970, 977-78 (Pa. Super. 2017).

Finally, with general jurisdiction based on corporate registration already rejected by virtually every other state with a large mass tort docket,[10] acceptance of plaintiffs' position would truly "open the floodgates to a myriad of lawsuits." U.S. Sugar Co. v. American Sweeteners, Inc., 750 A.2d 344, 347 (Pa. Super. 2000). Pennsylvania should not become a nationwide mecca for any and all mass tort plaintiffs who, like these 100+ plaintiffs, are unwilling to file their actions in their states of residence.[11]

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jurisdiction solely as a result of … 'attenuated' contacts." Id. at 475 (citation omitted). Bare corporate registration epitomizes an "attenuated contact."

[10] As discussed above, states rejecting general personal jurisdiction as asserted here include California, Florida, Illinois, Maryland, Missouri, New Jersey, New York, Ohio, and Texas – all having large mass tort dockets.

[11] Such cases are already being filed. See Gorton v. Air & Liquid Systems Corp., 2019 WL 757945, at *3 (E.D. Pa. Feb. 20, 2019) (asbestos case; consent-based jurisdiction allowed for "California, Montana, Nevada, Oregon and Ohio" exposures).

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

Both the panel majority and plaintiffs equate corporate registration with "consent." The Supreme Court, however, has treated these concepts differently since it abandoned territoriality for its current "contacts" approach to personal jurisdiction in International Shoe Co. v. Washington, 326 U.S. 310 (1945).[12]

Indeed, the very statute at issue, 42 Pa.C.S. §5301, **itself** expressly distinguishes between "qualification as a foreign corporation" and "consent":

> (a) **General rule**. − The existence of any of the following relationships … 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.

(Emphasis added). By treating registration and "consent" separately, the Long-Arm Statute's language belies plaintiffs' contentions.

Further contrary to plaintiffs' arguments, the United States Supreme Court has addressed "consent" jurisdiction since International Shoe. The Court

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

expressly abandoned "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). The Court "cast aside" "consent" arguments for general jurisdiction as "purely fictional":

> We initially upheld [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). Pennoyer-era decisions "inconsistent" with current Due Process standards have been expressly "overruled." Shaffer, 433 U.S. at 212 n.39.

In accord with this precedent, the Supreme Court's most thorough post-International Shoe discussion of consent **does not even recognize** corporate registration as a form of "consent." See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) ("ICI"). All the "variety of legal arrangements" recognized as "consent" in ICI were grounds for case specific – not general − jurisdiction:

- "[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;"[13]
- "[W]aive[r] if not timely raised"; and
- "[F]ail[ure] to comply with a pretrial discovery order."

Id. at 704-06 (citations and quotation marks omitted). See J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880-81 (2011) (consent discussion following ICI) (plurality opinion). Corporate registration statutes involving general jurisdiction are conspicuously absent from both ICI and McIntyre.

"Consent" extracted from a threat to prevent a corporation from doing business in Pennsylvania is no consent at all. Koontz, 570 U.S. at 607. Rather, that a corporation "secure[d] a license and to designate a statutory agent upon whom process may be served" only "provide[s] a helpful but not a conclusive test" for jurisdiction. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952).

Amicus Pennsylvania Ass'n for Justice ("PAJ") contends that Pennsylvania's corporate domestication statutes are so toothless that they are "not actually coercive." Br. at 5. That argument is beside the point since,

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13 The examples in ICI were 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").

coercive or not, state statutes cannot trump federal Due Process.[14] PAJ's argument further ignores decades of Pennsylvania precedent strongly enforcing the statutory "doing business" requirement against unregistered foreign corporations.[15]

The United States Supreme Court did allow general jurisdiction based on corporate registration in Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917), a century-old decision from deep within the now-defunct Pennoyer era. Given Shaffer's rejection of the "consent" concept as "fictional," see, supra, at pp. 21-22, Pennsylvania Fire is undoubtedly among the decisions that Shaffer overruled. Thus, Pennsylvania Fire "should not attract heavy reliance today." Daimler, 571 U.S. at 138 n.18 (citation omitted).

> 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

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14 See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (Due Process may preclude jurisdiction "[e]ven if the defendant would suffer minimal or no inconvenience," "the forum State has a strong interest," and "the forum State is the most convenient location for litigation").

15 E.g., Clairol, Inc. v. Commonwealth, 518 A.2d 1165, 1169 (Pa. 1986) (employing "representatives" to "drum up business" was "doing business"); Wenzel v. Morris Distributing Co., 266 A.2d 662, 667 (Pa. 1970) (shipping any goods into Pennsylvania was "doing business"); Myers v. Mooney Aircraft, Inc., 240 A.2d 505, 511-12 (1967) (same for "sporadic" advertising and product repairs); Hoffman Construction Co. v. Erwin, 200 A. 579, 580 (Pa. 1938) (same for "perform[ing] one contract").

> 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. "[T]hat strict territorial approach [has] yielded to a less rigid understanding." Aybar, 2019 WL 288307, at *6 (quoting Daimler, 571 U.S. at 126).

Under the post-Daimler personal jurisdiction framework, "consent," construed as registering to do business, no longer supports general jurisdiction. "'Extorted actual consent' and 'equally unwilling implied 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 a factor for specific "case-linked" personal jurisdiction. These defendants' registration cannot be dispositive here, since specific jurisdiction is not asserted.

IV. PENNSYLVANIA'S LONG-ARM STATUTE CANNOT DEFEAT DUE PROCESS LIMITATIONS ON PERSONAL JURISDICTION.

"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 Long-Arm Statute does not, and cannot, override federal constitutional law. See 42 Pa.C.S. §5308 ("tribunals of this Commonwealth may exercise jurisdiction … only where the contact with this Commonwealth is sufficient under the Constitution of the United States"); 42 Pa.C.S. §5307 (jurisdiction only "to the extent permitted by the Constitution of the United States"). Where "the United States Supreme Court has quite plainly decreed" a constitutional outcome, that result 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).

Plaintiffs' statutory arguments prove far too much. If express inclusion of "general jurisdiction" in §5301(a) could overcome federal Due Process limitations on that subsection's first two prongs ("qualification" and "consent"),[16] then Due Process likewise would not limit that subsection's third prong, imposing "general jurisdiction" for "carrying on of a continuous and systematic part of [a registrant's] general business within this Commonwealth." Id. §5301(a)(2)(iii). But every Supreme Court personal jurisdiction decision since Goodyear, 564 U.S. 915, has declared "continuous and substantial" business alone to be constitutionally insufficient.

Further, treating corporate registration as *ipso facto* "consent" to general jurisdiction, notwithstanding absence of any Pennsylvania-related nexus, cannot be squared with the Long-Arm Statute's provisions explicitly limiting jurisdiction to that permitted by "the Constitution of that United States." 42

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[16] See §5301(a)(2)(i-ii).

Pa.C.S. §§5307, 5308, 5322(b). These sections preclude unconstitutional application of the Long-Arm Statute, even if such a construction could be teased from other statutory language. See also 1 Pa.C.S. §1922(3) (enacting "presumption" that "the General Assembly does not intend to violate the Constitution of the United States").

Judge Bowes' panel dissent demonstrates that the Long-Arm Statute may be interpreted consistently with Due Process. Heedless of interpretive presumptions, and of the obligation to construe statutes to avoid constitutional infirmities,[17] a different panel of this Court read the Long-Arm Statute as conferring general jurisdiction solely on corporate registration. Webb-Benjamin, 192 A.3d at 1138-39.[18] That decision should be overruled, as it ignored controlling Due Process limitations that an overwhelming weight of post-Daimler authority recognize as precluding "consent"-based assertion of general personal jurisdiction. Webb-Benjamin erroneously credited federal district court decisions declaring themselves bound by Bane, supra, which, as

[17] "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) (citation and quotation marks omitted).

[18] Another recent decision, Hammons v. Ethicon, Inc., 190 A.3d 1248 (Pa. Super. 2018), turned on specific personal jurisdiction issues, and did not involve consent-based general jurisdiction.

already discussed, supra, at pp. 19, is a pre-Daimler Third Circuit decision with sparse reasoning.

Finally, plaintiffs' position rewards foreign corporations that break the law. If defendants had ignored Pennsylvania law and never registered to do business, no consent argument would exist, and thus no basis for general jurisdiction. Perversely, under plaintiffs' construction, breaking the Long-Arm Statute would leave corporate defendants better off than compliance. That absurd result is yet another reason not to predicate general jurisdiction on registration alone. Neighboring New Jersey rightly rejected any "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.[19] This Court should do likewise.

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

CONCLUSION

For the above reasons, and for those articulated by defendant, the order of the Court of Common Pleas, sustaining defendant's preliminary objections on the basis of personal jurisdiction, should be affirmed.

Respectfully submitted,

March 4, 2019

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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 6,945 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 March 4, 2019, I caused two true and correct copies of the foregoing Brief of *Amici Curiae* Pennsylvania Defense Institute, Philadelphia Association of Defense Counsel, Washington Legal Foundation, and Pennsylvania Coalition for Civil Justice Reform in Support of Appellee on Reargument En Banc to be served by via U.S. Mail upon the following counsel:

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