No. 21-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID RUFFING,

Plaintiff-Appellant,

v.

WIPRO LIMITED,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:20-cv-05545
Hon. Harvey Bartle III, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT AND REVERSAL

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November 3, 2021

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a nonprofit consumer advocacy organization with members in every state, appears before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in issues of court procedure that affect the availability of judicial fora in which injured consumers, workers, and members of the public may seek redress, as well as the courts' ability to provide such redress efficiently and effectively.

Public Citizen is concerned that restrictive views of the scope of federal courts' personal jurisdiction may unduly limit injured plaintiffs' access to justice. That concern is heightened when personal jurisdiction doctrine is employed to impair the utility of Fair Labor Standards Act (FLSA) collective actions, which offer the best means for redress in cases in which employers have harmed numerous employees, resulting in

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

injuries that are large in the aggregate, but not cost-effective to redress individually.

Public Citizen filed an amicus curiae brief in the pending appeal in *Fischer v. Federal Express Corp.*, No. 21-1683, addressing one of the questions at issue in this appeal: whether the limitations on personal jurisdiction set forth in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), prohibits a federal court in Pennsylvania from exercising specific jurisdiction over the defendant in an FLSA collection action with respect to the claims of opt-in plaintiffs whose claims arose in other states. As Public Citizen explained in that brief, *Bristol-Myers* is inapplicable to such cases. *See* Br. of Amicus Curiae Public Citizen in Supp. of Appellants and Reversal, *Fischer v. Fed. Express Corp.*, No. 21-1683 (3d Cir. July 29, 2021). *Bristol-Myers* was based on constitutional limits on the authority of *state* courts that do not apply in *federal* court. *See id.* at 5–10. And Federal Rule of Civil Procedure 4, which governs the service of a summons and complaint on a defendant, does not limit a federal court's authority with respect to out-of-state opt-in members of an FLSA collective action. *See id.* at 11–21.

Public Citizen files this brief to address the other issue in this appeal: whether 42 Pa. C.S.A. § 5301(a) is consistent with due process insofar as it provides that courts in Pennsylvania may exercise personal jurisdiction over foreign corporations that have registered to do business in the state. As explained below, the statute comports with due process. The Supreme Court has long held that it is consistent with due process for courts in a state to exercise personal jurisdiction over a foreign corporation based on the foreign corporation's consent to suit as part of its registration to do business in the state. And this Court held in *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), that registration to do business in Pennsylvania subjects a foreign corporation to personal jurisdiction by Pennsylvania courts because such registration carries with it consent to personal jurisdiction by courts in the state. Neither the relevant Supreme Court precedent nor *Bane* are affected by *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which neither addressed nor altered the standard for consent-based jurisdiction.

SUMMARY OF ARGUMENT

Pennsylvania law requires foreign corporations seeking to "do business" in Pennsylvania to register with the state. 15 Pa. C.S.A.

§ 411(a). "The concept of 'doing business' [in Pennsylvania] involves regular, repeated, and continuing business contacts of a local nature." *Id*. § 403 Comm. Comment (2014). It does not include "[d]oing business in interstate or foreign commerce," *id*. § 403(a)(11), and thus foreign corporations do not need to register to "transact[] business in interstate commerce" in Pennsylvania, *id*. § 403 Comm. Comment (2014). The only consequence provided in the statute if a foreign corporation doing business in the state does not register is that the corporation may not "maintain an action or proceeding" in the state." *Id*. § 411(b).

Pennsylvania law specifies that qualification of a foreign corporation to do business in Pennsylvania "constitute[s] a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person." 42 Pa. C.S.A. § 5301(a). Thus, as this Court recognized in *Bane*, registration by a foreign corporation to do business in Pennsylvania "carries with it consent to be sued in Pennsylvania courts." 925 F.2d at 640. "Consent is a traditional basis for assertion of jurisdiction long upheld as constitutional." *Id*. at 641. Accordingly, this Court held in *Bane* that

courts in Pennsylvania may exercise personal jurisdiction over foreign corporations that have registered to do business in Pennsylvania. *Id.*

In this case, plaintiff David Ruffing filed suit on behalf of himself and similarly situated employees in the District Court for the Eastern District of Pennsylvania, alleging, as relevant here, that defendant Wipro Limited violated the FLSA's overtime provisions. Wipro moved to dismiss the FLSA claims for lack of personal jurisdiction to the extent that they were brought on behalf of employees who were not employed by Wipro in Pennsylvania. Despite *Bane*, and although Wipro is registered to do business in Pennsylvania, the district court granted Wipro's motion. Focusing on *Daimler*, 571 U.S. 117, the court stated that "the standard for determining general personal jurisdiction has changed since *Bane* was decided" and that *Bane* is therefore "no longer binding on this court." Aplt. App. 17.

Daimler, however, addressed when courts may exercise general jurisdiction over a foreign corporation *absent* consent. *Daimler* did not eliminate consent as a basis for jurisdiction, alter the standard for determining whether a foreign corporation has consented to jurisdiction, or otherwise overrule the Supreme Court's or this Court's precedents

allowing personal jurisdiction to be based on a foreign corporation's consent to such jurisdiction as part of its registration to do business in the state. Under those precedents, courts in Pennsylvania may exercise personal jurisdiction over Wipro.

ARGUMENT

I. Under Supreme Court precedent, a foreign corporation's registration to do business in a state may constitute consent to the exercise of personal jurisdiction by courts in that state.

"[T]he requirement of personal jurisdiction represents first of all an individual right." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Accordingly, "like other such rights," personal jurisdiction can "be waived." *Id.* "[B]ecause the personal jurisdiction requirement is a waivable right, … a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985) (quoting *Ins. Corp. of Ireland*, 456 U.S. at 703); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion) (noting that a "person may submit to a State's authority in a number of ways," including "of course, explicit consent"). "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction

of the court," including the "voluntary use of certain state procedures." *Ins. Corp. of Ireland*, 456 U.S. at 703–04.

The Supreme Court has long recognized that a foreign corporation's compliance with a state statute governing the ability to do business in the state may constitute consent to personal jurisdiction by the state's courts and that a court's exercise of jurisdiction based on that consent does not offend due process. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), for example, an out-of-state insurance company was sued in Missouri state court over an insurance policy issued in Colorado. The defendant "had obtained a license to do business in Missouri, and to that end, in compliance with [a Missouri statute], had filed with the superintendent of the insurance department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company." *Id.* at 94. The defendant argued that service on the superintendent "was insufficient except in suits upon Missouri contracts," and that if the statute were construed otherwise, it would "encounter[] the 14th Amendment by denying to the defendant due process of law." *Id.* at 94–95. The Supreme Court rejected the defendant's

argument, stating that the Missouri Supreme Court's interpretation of the statute as applying to cases that did not involve Missouri contracts "hardly [left] a constitutional question open." *Id*. at 95. "[W]hen a power actually is conferred by a document," the Court explained, "the party executing it takes the risk of the interpretation that may be put upon it by the courts." *Id*. at 96. The "defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service" and the construction put upon it "did not deprive the defendant of due process of law even if it took the defendant by surprise." *Id*. at 95.

Similarly, in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939), an out-of-state corporation had, under a New York statute, designated a person upon whom a summons could be served in New York. The New York Court of Appeals had interpreted such a designation as giving the state courts personal jurisdiction over the corporation. *See id*. Citing *Pennsylvania Fire*, the Supreme Court reaffirmed that "[a] statute calling for such a designation is constitutional, and the designation of the agent 'a voluntary act.'" *Neirbo*, 308 U.S. at 175 (quoting *Penn. Fire*, 243 U.S. at 96). The Court found the designation constituted "actual consent by Bethlehem to be sued in the

courts of New York," and held that the consent extended to federal as well as state courts sitting in the state. *Id.*

In the years since, the Supreme Court has devoted significant attention to defining the scope of personal jurisdiction when a party has not given its consent to be sued in the state. Most notably, in the seminal case *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court discussed when a corporation can be deemed "present" in a state so as to allow the maintenance of suits against it in the state's courts "even though no consent to be sued or authorization to an agent to accept service of process has been given," *id.* at 317. The Court explained that such "'presence' … has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on." *Id.* Moreover, "some single or occasional acts of the corporate agent in a state … because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit" in the state with respect to those acts. *Id.* at 318. Jurisdiction in these types of cases, in which adjudicatory authority is based on the suit arising out of or relating to

the defendant's contacts with the forum, "is today called 'specific jurisdiction.'" *Daimler*, 571 U.S. at 127.

In addition, *International Shoe* recognized that there are "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against [the corporation] on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. "Adjudicatory authority so grounded is today called 'general jurisdiction.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (citation omitted).

Although *International Shoe* was "pathmarking" in the development of specific and general jurisdiction, *id. at* 919, it did not address or affect the analysis of jurisdiction based on actual consent. Thus, post-*International Shoe*, "[c]ourts can find personal jurisdiction in three ways: consent to general jurisdiction, general jurisdiction, or specific jurisdiction." *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 651–52 (E.D. Pa. 2016).

II. This Court held in *Bane* that registration to do business in Pennsylvania subjects a foreign corporation to the exercise of personal jurisdiction by Pennsylvania courts because registration carries with it consent to such jurisdiction.

In *Bane*, 925 F.2d 637, this Court confirmed that consent as a basis for personal jurisdiction continued past *International Shoe* and held that a foreign corporation's registration to do business in Pennsylvania subjected it to the exercise of personal jurisdiction by courts in Pennsylvania. *Bane* involved an age-discrimination suit filed in federal court in Pennsylvania against a Delaware corporation with its principal place of business in North Carolina. The district court dismissed the case for lack of personal jurisdiction, holding that it did not have specific jurisdiction over the defendant because the plaintiff's claim did not arise from the defendant's activities in Pennsylvania, and that it did not have general jurisdiction because the defendant's contacts in Pennsylvania were not sufficiently continuous and systematic. *Id*. at 639–40. This Court reversed, noting that the district court had "failed to consider the effect of [the defendant's] application for and receipt of authorization to do business in Pennsylvania." *Id*. at 640.

Under Pennsylvania law, "qualification as a foreign corporation under the laws of th[e] Commonwealth," and "[c]onsent, to the extent

authorized by the consent," constitute "a sufficient basis of jurisdiction to enable the tribunals of [Pennsylvania] to exercise general personal jurisdiction" over a corporation. 42 Pa. C.S.A. § 5301(a). The Court explained in *Bane* that it did not need to consider "whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact with the Commonwealth for purposes of the dichotomy between 'general' and 'specific' jurisdiction because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts." *Bane*, 925 F.2d at 640. "Consent is a traditional basis for assertion of jurisdiction long upheld as constitutional," the Court explained, and the defendant's "application for a certificate of authority can be viewed as its consent to be sued in Pennsylvania." *Id*. at 641.

III. The Supreme Court's decision in *Daimler* does not speak to the exercise of personal jurisdiction based on consent and therefore does not overturn relevant Supreme Court precedent or conflict with *Bane*.

Despite the Supreme Court's decision in *Pennsylvania Fire* and this Court's decision in *Bane*, the district court in this case held that it lacked personal jurisdiction over Wipro to the extent that any claims were brought by employees who did not work in Pennsylvania, even though Wipro had registered to do business as a foreign corporation in

Pennsylvania. Focusing on *Daimler*, 571 U.S. 117, the district court stated that there has been "[a] seismic change … in the world of personal jurisdiction" since *Bane* was decided, and that because "the standard for determining general personal jurisdiction has changed since *Bane* was decided, … *Bane* is no longer binding on this court." Aplt. App. 13, 17. *Daimler*, however, had nothing to do with personal jurisdiction based on consent, and it did not change the standard for determining personal jurisdiction on that basis.

In *Daimler*, Argentinian residents filed an action in the Northern District of California against a German company based on conduct occurring in Argentina. The Supreme Court held that the company's affiliations with California were insufficient to subject it to general jurisdiction in the state's courts. The Court explained that the test for determining whether a foreign corporation's affiliations with a forum are sufficient to subject it to general jurisdiction in the forum is whether the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler*, 571 U.S. at 139 (quoting *Goodyear*, 564 U.S. at 919 (quoting *International Shoe*, 326 U.S. at 317)). Applying the "limits traditionally

recognized" on general jurisdiction, and observing that the Court's decisions had "declined to stretch" those limits, *id.* at 132, the Court declined to expand general jurisdiction by holding that *any* contacts with a forum state that "can be said to be in some sense 'continuous and systematic'" are sufficient for general jurisdiction, *id.* at 139. Because the defendant's affiliations with California were not so continuous and systematic as to render the defendant "at home" in the state, the Court held that courts in California could not exercise general personal jurisdiction over the defendant. *Id.*

Thus, *Daimler* "focused on when corporations may be subject to general jurisdiction based on contacts with the forum." *Kraus v. Alcatel-Lucent*, 441 F. Supp. 3d 68, 75 (E.D. Pa. 2020). It did not address or otherwise concern itself with personal jurisdiction based on the defendant's consent to be sued in the forum, rather than on the extent of its contacts. The Court in *Daimler* did not mention *Pennsylvania Fire*, let alone suggest that it was overruling it.

The only time the *Daimler* opinion even refers to consent is in describing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), which the Court identified as one of its few "post-*International*

Shoe opinions on general jurisdiction." *Daimler*, 571 U.S. at 129. The Court stated that *Perkins* "remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum*." *Id.* (quoting *Goodyear*, 564 U.S. at 928) (emphasis added). By specifying that *Perkins* is the textbook case for general jurisdiction in the absence of consent to suit in the forum, *Daimler* made clear that there is a distinction between personal jurisdiction based on consent and personal jurisdiction based on contacts with the state and indicated that the line of cases that it was discussing involved jurisdiction where the defendant had *not* consented to personal jurisdiction in the forum. *See Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O'Malley, J., concurring) (explaining that *Daimler*'s description of *Perkins* "confirms that consent to jurisdiction is an alternative to the minimum contacts analysis discussed" in *Daimler*).

Simply put, *Daimler* was not about consent-based jurisdiction. It did not eliminate consent as a basis for jurisdiction or alter the standard for determining when a corporation consented to jurisdiction. Accordingly, it did not overturn *Pennsylvania Fire* or "disturb the Third

Circuit's ruling in *Bane* that personal jurisdiction based on consent … can be established by registering to do business in Pennsylvania." *Sciortino v. Jarden, Inc.*, 395 F. Supp. 3d 429, 438 n.10 (E.D. Pa. 2019).

In concluding that *Bane* was no longer good law, the district court stated that "*Daimler* repudiated the rule that general personal jurisdiction existed whenever a corporation's contacts with a state were 'continuous and systematic,'" which "was the standard for general personal jurisdiction that *Bane* recognized." Aplt. App. 16 (quoting *Int'l Shoe*, 326 U.S. at 317). Because "the standard for determining general personal jurisdiction has changed since *Bane* was decided," the court continued, "*Bane* is no longer binding on this court." *Id*. at 17. As an initial matter, *Daimler* did not repudiate existing standards; it applied traditional jurisdictional limits and precedents. *See* 571 U.S. at 132. More importantly for this case, and as the district court itself correctly recognized, "*Bane* did not rule based on [the 'continuous and systematic'] standard in light of the Pennsylvania consent statute." Aplt. App. 16–17. Instead, *Bane* was based on the consent to jurisdiction inherent in a foreign corporation's registration to do business in Pennsylvania. The Supreme Court's application of a standard that was *not* applied in *Bane*

does not create a conflict between *Bane* and Supreme Court caselaw or otherwise provide a reason not to follow *Bane*, let alone a reason not to follow the Supreme Court precedent on consent to jurisdiction.

The district court also stated that *Daimler*'s limitations on general jurisdiction would be undermined if state courts could exercise personal jurisdiction "over every entity doing business within its borders simply because the entity has registered to do business there." Aplt. App. 17. *Daimler* was concerned, however, with the types of affiliations that would render a corporation subject to general jurisdiction *in the absence* of the corporation's consent to jurisdiction in the relevant forum. It noted that, if foreign corporations were subject to the exercise of personal jurisdiction in every state in which their sales were sizable, they would not be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472). The concerns about whether foreign corporations can structure their conduct to avoid suit do not arise when, as here, personal jurisdiction is based on consent. Corporations can avoid such jurisdiction by refraining from consenting.

The district court discounted the role of foreign corporations'

consent, stating that consent given as part of registering to do business in a state is "not a voluntary choice and is inconsistent with due process." Aplt. App. 17. But the district court ignored that foreign corporations are not required to register to engage in interstate commerce—only to avail themselves of the privilege of engaging in local activities. And both the Supreme Court and this Court disagree with the district court on this point. In *Nierbo*, the Supreme Court explained that a statute calling for the designation of an agent for service of process "as part of the bargain by which [a corporation] enjoys the business freedom" of the state "is constitutional, and the designation of the agent 'a voluntary act.'" 308 U.S. at 175 (quoting *Penn. Fire*, 243 U.S. at 96); *see also id*. (concluding that the consent given through designation of the agent was "actual consent"). Similarly, in *Davis v. Smith*, 253 F.2d 286, 288–89 (3d Cir. 1958), this Court recognized that, "[e]ven though a statute may require the designation of an agent to receive service of process, such designation is still deemed a voluntary act evidencing consent to the suit." And in *Bane*, this Court held that a court in Pennsylvania could exercise personal jurisdiction over a foreign corporation that had registered to do business in the state because "such registration by a foreign corporation

carries with it consent to be sued in Pennsylvania courts." 925 F.2d at 640. The district court pointed to no change in the law concerning when consent is voluntary since the Supreme Court's and this Court's decisions on the issue. Certainly, *Daimler*, which did not deal with consent, does not evidence such a change.

As this Court recognized in *Bane*, "[c]onsent is a traditional basis for assertion of jurisdiction long upheld as constitutional." *Id.* at 641. "The ruling in *Daimler* does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania." *Bors*, 208 F. Supp. 3d at 653. Accordingly, the district court's holding with respect to personal jurisdiction should be reversed.

CONCLUSION

This Court should reverse the district court's ruling that it lacks personal jurisdiction over the FLSA claims of employees who did not work for the defendant in Pennsylvania.

Respectfully submitted,

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November 3, 2021

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