Case No. SC 95514

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. NORFOLK SOUTHERN RAILWAY COMPANY, Relator,

v.

HONORABLE COLLEEN DOLAN, JUDGE OF THE TWENTY-FIRST JUDICIAL CIRCUIT IN THE COUNTY OF ST. LOUIS, DIVISION 20, Respondent.

BRIEF OF *AMICUS CURIAE*, WESTAR ENERGY, INC.

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INTEREST OF *AMICUS CURIAE*

The Jackson County Circuit Court recently dismissed claims against Westar Energy, Inc. ("Westar") for lack of personal jurisdiction.[1] The court applied principles of due process to find that Westar's registration to do business in Missouri was not consent to general jurisdiction here. That decision is on appeal to the Western District Court of Appeals. The ruling in this case could impact the outcome of that appeal, which arises in a different context from this one—because Westar merely registered to do business in Missouri and has essentially no business or other contacts within the state. Whatever the Court's other rulings in the case at bar, if the Court reaches the registration-as-consent argument, Westar respectfully requests that the Court do so with an eye toward the impact that ruling will have in other cases, including Westar's.

INTRODUCTION AND SUMMARY OF ARGUMENT

Westar appreciates the opportunity to offer this *amicus* brief. Westar does not intend to reiterate the Relator's discussion of the *Daimler* decision or recent opinions from around the country which have held that registration to do business does not confer general personal jurisdiction over a corporate defendant. While Westar agrees, generally, with those points and authorities, Westar wishes to use this opportunity to highlight different issues that we hope will bear on this Court's adjudication of the registration-as-consent argument.

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[1] *See* Judgment, filed April 29, 2016, in *Madlock, et al. v. Westar Energy, Inc., et al.,* Case No. 1516-CV18173 ("Judgment").

First, and foremost, a ruling in this case could have potentially far-reaching implications. Therefore, Westar will briefly describe the case in which the Jackson County Circuit Court dismissed claims against Westar for lack of general personal jurisdiction. This should provide an additional useful context from which the Court might view the registration issue.

Next, Westar will discuss the Missouri business registration statutes and prior appellate interpretations of those statutes, including this Court's observation that principles of due process may, of course, limit any contention that mere registration to do business is consent to general jurisdiction here. We will demonstrate that this Court's inclination to apply due process to limit the notion of registration as consent was, and is, consistent with United States Supreme Court authority and well-established due process jurisprudence.

Then we will discuss Missouri precedent holding that the Due Process Clause limits the exercise of personal jurisdiction, including where that jurisdiction is otherwise authorized by statute. We will point out that Missouri precedent is entirely consistent with recent United States Supreme Court decisions on these issues.

We will further demonstrate that because any assertion of consent to personal jurisdiction is subject to a due process analysis, "coerced consent" does not meet those standards. And to the extent the business registration statutes are read to imply or require consent to general personal jurisdiction, they impermissibly seek to impose an unconstitutional condition on the exercise of a fundamental constitutional right.

But even if the Missouri business registration statutes *could* expressly require consent to general personal jurisdiction, they do not. The statutes merely provide for appointment of an agent to receive service of process; they are silent as to personal jurisdiction. This stands in contrast to many Missouri statutes that expressly address consent to jurisdiction, illustrating that when the legislature intends to impose statutory consent to personal jurisdiction, it knows how to do so. Under basic principles of statutory construction, this Court should not extend the reach of the corporate business registration statutes beyond what the legislature enacted.

We will then address the U.S. Supreme Court decision in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), and point out the manifold ways in which that case is outmoded, archaic, limited by its facts and unpersuasive in resolving the modern-day question of whether registration to do business, standing alone, confers general personal jurisdiction for causes of action having little or no connection to the forum.

We will further argue that the Dormant Commerce Clause precludes an interpretation that the Missouri business registration statutes subject a foreign corporation to general personal jurisdiction here.

And finally, we will point out that transient jurisdiction, as discussed in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), does not apply to corporations. Accordingly, *Burnham* has no bearing on the exercise of general personal jurisdiction over a corporation, and certainly does not trump *International Shoe*, *Daimler*, or this Court's precedent holding that

principles of due process limit any ostensible exercise of personal jurisdiction over a non-resident defendant.

In conclusion, Westar will join Relator in asking this Court to find that registration to do business and appointment of an agent for service of process, standing alone, are not consent to general personal jurisdiction in Missouri.

WESTAR'S JUDGMENT BELOW

The case against Westar below arose out of an auto accident in Leavenworth, Kansas. Every event related to the claim occurred in Kansas. The decedent was a resident of Kansas, as are the plaintiffs. The decedent's estate, a cross-claimant, was created in Kansas pursuant to Kansas law.

The lower court found these facts to be true: "Westar is a business incorporated in the state of Kansas, currently a corporation in good standing, and with its principal place of business in Topeka, Kansas. Westar does not have any place of business in Missouri, does not produce electricity in Missouri, nor does it dispatch or oversee work crews in Missouri. While Westar provides electric generation, transmission and distribution services to approximately 698,000 residential, commercial, industrial, and wholesale industrial accounts in Kansas, Westar serves 3 (three) residential households in Missouri. Westar maintains no offices in and has no employees based in Missouri, including service and customer care centers, electric substations, storage facilities, or other physical locations. Westar does not own any property in Missouri." Judgment, at 13-14 (internal footnotes omitted). The court found that Westar's "scant connection to this forum," and "paltry

residential service presence in Missouri … attenuates any Missouri connection to the point of imperceptibility." *Id.,* at 14.

Westar moved to dismiss plaintiffs' and the estate's claims for lack of personal jurisdiction. Because no events related to the claim occurred in Missouri, the lower court found that "based on the facts of this case, specific jurisdiction is not an issue." *Id.*, at 4.

Plaintiffs and the estate argued that Westar's registration to do business in Missouri, standing alone, was consent to general personal jurisdiction. The circuit court disagreed, granting Westar's motions to dismiss. In a 17-page opinion, Judge Garrett observed that the Missouri Supreme Court has not to date addressed "'whether registration of a foreign corporation and designation of an agent for service of process, without more, is always sufficient to confer jurisdiction.'" *Id.*, at 5, quoting *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 168 (Mo. banc 1999). The lower court also noted this Court's further statement in *K-Mart*: "Any limitation on this issue is, '***of course, the Due Process Clause of the United States constitution.***'" *Id.*, quoting *K-Mart*, 986 S.W.2d at 168 (emphasis added).

In disposing of the registration-as-consent argument, Judge Garrett surveyed many reported decisions from around the country, and followed recent decisions of the Delaware Supreme Court and "the majority of federal courts" to find that mere registration to do business is not consent to general jurisdiction. Judgment, at 11-15, citing, *inter alia*, *Genuine Parts Co. v. Cepec*, [137 A.3d 123], 2016 Del. LEXIS 247, at *6 (Del. Apr. 18, 2016). The court found that subjecting Westar to jurisdiction merely on account of

registering to do business in Missouri would be an "exorbitant exercise of all-purpose jurisdiction," in contravention of *Daimler*, and in violation of Westar's due process rights. *Id.*, at 16.

ARGUMENT

I. This Court Has Already Acknowledged That Due Process May Limit the Exercise of General Jurisdiction Over a Foreign Corporation That Has Merely Registered to Do Business Here.

In *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165 (Mo. banc 1999), this Court reviewed a finding by the Missouri Court of Appeals that registration to do business in Missouri is ***not*** consent to jurisdiction. *See State ex rel. K-Mart Corp. v. Holliger*, No. WD 54687, 1998 WL 327185, at *3 (Mo. Ct. App. W.D. June 23, 1998), *mot. for rhg. and/or transfer sustained and cause ordered transf'd* Sept. 22, 1998 ("The act of obtaining a registered agent in Missouri, as required by Missouri law, does not constitute consent by a foreign corporation to be sued for any cause of action, regardless of whether it arises out of the corporation's contacts with Missouri, in Missouri courts."). While the court of appeals decision is, of course, not binding on this Court, the reasoning of that decision is persuasive.

Initially, it should be noted that the court of appeals considered, and rejected, the holding of the Eighth Circuit Court of Appeals in *Knowlton v. Allied Van Lines, Inc.,* 900 F.2d 1196 (8th Cir. 1990). The court instead preferred the reasoning of the Fifth Circuit, as stated in *Wenche Siemer v. Learjet Acq. Corp.*, 966 F.2d 179 (5th Cir. 1992), which adhered much more closely to the principles of *International Shoe Co. v. Washington,* 326 U.S. 310

(1945). The court quoted with favor the holding in *Siemer* that, under applicable U.S. Supreme Court precedent, the existence of a registered agent in the forum is not consent to the general jurisdiction of the forum state. *K-Mart*, 1998 WL 327185, at *3, quoting *Siemer*, 966 F.2d at 183 (the concept of registration as consent is "'directly contrary to the historical rationale of *International Shoe* [*v. State of Wash.*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)] and subsequent Supreme Court decisions.'") (alteration in original). "'A registered agent, from any conceivable perspective, hardly amounts to the "general business presence" of a corporation so as to sustain an assertion of general jurisdiction.'" *Id.*

This Court did not reject or overrule the court of appeals on this point. However, the Court did discuss the subject. The Court noted that there "appears to be a difference of opinion in the federal courts as to this issue." *K-Mart*, 986 S.W.2d at 169, n. 4. The Court cited two examples: *Knowlton* and *Siemer* (the same cases discussed by the court of appeals). The Court pointed out that *Knowlton* equated appointment of an agent for service with consent to general jurisdiction, whereas *Siemer* held that consent to jurisdiction would be found "only where due process allows." *Id.* With this in mind, this Court observed that the notion that registration amounts to consent may be limited "***of course,*** by the due process clause of the United States constitution." *Id.* at 168 (emphasis added).

It is telling that this Court emphasized the due process limitations on the notion of registration as consent, which reflected the holding of *Siemer*, not *Knowlton*. While telling, it is not surprising given this Court's ongoing

adherence to *International Shoe* and its progeny. In that seminal case, the U.S. Supreme Court explained that "the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *Int'l Shoe*, 326 U.S. at 317; *accord*, *e.g.*, *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (following *International Shoe* to hold that the defendant was not subject to general personal jurisdiction merely because it appointed an agent for service of process).

And now, as *Daimler* and *Goodyear* make clear, "any use of the service of process provision for registered foreign corporations must involve an exercise of personal jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment." *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016) ("After *Daimler*, we hold that Delaware's registration statutes must be read as a requirement that a foreign corporation must appoint a registered agent to accept service of process, but not as a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware."), citing *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), and *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S.Ct. 2846 (2011); *see also Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016) (refusing to "risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely"). "A state court's assertion of jurisdiction exposes

defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear*, 131 S.Ct. at 2850, citing *Int'l Shoe*, 326 U.S. at 316.

This application of due process principles to the exercise of general personal jurisdiction, as reflected in *Daimler* and *Goodyear,* has led many other courts to reach the same conclusion. *See Cepec*, 137 A.3d at 126, 145 ("the majority of federal courts that have considered the issue of whether consent by registration remains a constitutional basis for general jurisdiction after *Daimler*" have found that is does not); *see also* Judgment, at 11 (same). As noted by the Second Circuit Court of Appeals, "'Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another. The principles of due process require a firmer foundation than mere compliance with state domestication statutes.'" *Brown*, 814 F.3d at 640, quoting *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971); *see also*, *e.g., Public Impact, LLC v. Boston Consulting Grp., Inc.*, 117 F. Supp. 3d 732, 739 (M.D.N.C. 2015) (rejecting registration as consent because all "'assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny'"), quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at *10 (D. Vt. 2009) (the notion of registration as consent to general jurisdiction is no longer viable after the Supreme Court's adoption of the "minimum contacts" approach to jurisdiction and due process in *International Shoe*).

The key to these holdings, as this Court has routinely held, and observed in *K-Mart*, is that the Due Process Clause limits the exercise of jurisdiction over an out-of-state defendant, even when a statute would otherwise confer jurisdiction. Now, after *Daimler*, which "considerably altered the analytic landscape for general jurisdiction," *Brown*, 814 F.3d at 629, it is even clearer that mere registration to do business, without more, cannot support the exercise of general jurisdiction over a foreign defendant. *See, e.g.*, *Cepec*, 137 A.3d at 127. In that event, specific jurisdiction will remain available for causes of action that arise out of the defendant's in-state activities, but not general, all-purpose jurisdiction for claims unrelated to the defendant's activities in the forum. *See id.*

II. Missouri Courts Consistently Apply Due Process Principles to Decide Personal Jurisdiction Questions.

It will come as no surprise that Missouri courts routinely apply due process principles to personal jurisdiction questions. The most apt example is when courts apply Missouri's long-arm statute. In *Bryant v. Smith Interior Design Group, Inc.*, for example, this Court explained: "The Fourteenth Amendment's Due Process Clause bars Missouri courts from exercising personal jurisdiction over a defendant where to do so offends 'traditional notions of fair play and substantial justice.'" 310 S.W.3d 227, 232 (Mo. banc 2010), quoting *Int'l Shoe Co. v. Washington*, 326 U.S. at 316. Similarly, in *Chromalloy Am. Corp. v. Elyria Foundry Co.*, this Court noted the two elements of the long-arm statute: "First, the suit must arise out of the activities enumerated in the long arm statute; second, the defendant must

have sufficient minimum contacts with Missouri *to* ***satisfy due process requirements***." 955 S.W.2d 1, 4 (Mo. banc 1997) (emphasis added).

While the long arm statute is not directly pertinent to the question of whether registration to do business, standing alone, can confer *general* personal jurisdiction over a foreign corporation, it is notable that both *Bryant* and *Chromalloy* followed *International Shoe* to recognize that the Due Process Clause limits Missouri's authority to impose personal jurisdiction on a non-resident defendant, even when the statute in question would, on its face, expressly confer personal jurisdiction. *See Bryant*, 310 S.W.3d at 232; *Chromalloy*, 955 S.W.2d at 5. Thus, due process must be considered whenever a court would purport to exercise personal jurisdiction, pursuant to statute or otherwise, over a non-resident defendant.

Missouri precedent is entirely in line with the recent decisions of the U.S. Supreme Court in *Daimler* and *Goodyear,* both of which applied the Due Process Clause to limit a state's exercise of jurisdiction over a non-resident defendant. As Judge Garrett recognized: "Given Westar's lack of sufficient minimum contacts to Missouri . . ., to find that business registration is consent to personal jurisdiction, the Court would overstep its constitutional Due Process bounds in creating an impermissibly expansive view of general jurisdiction." Judgment, at 11; *see also* Judgment, at 16 ("[T]he use of Missouri's service of process provision for registered foreign corporations like Westar must involve an exercise of personal jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment.").

These examples demonstrate that Missouri courts follow *International Shoe* and recognize that the Due Process Clause limits the exercise of personal jurisdiction over a non-resident defendant.

III. Alleged Consent to Personal Jurisdiction Requires the Application of Due Process Principles.

A. Consent to Jurisdiction Must Comport With Due Process; Coerced Consent Does Not Meet Due Process Requirements.

A party may consent to personal jurisdiction. However, that consent must comport with due process. To illustrate this point, in *Chase Third Cent. Leasing Co., Inc. v. Williams*, the Missouri Court of Appeals addressed a forum selection clause in a contract: "Parties to a contract may agree in advance to submit to jurisdiction in a given court. A party can freely consent to the personal jurisdiction of a court because personal jurisdiction is a right capable of being waived. However, the forum selection clause containing ***the defendant's consent must comply with applicable due process standards***." 782 S.W.2d 408, 411 (Mo. Ct. App. W.D. 1989) (internal citations omitted) (emphasis added), following *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). "Thus, the clause must have been obtained through freely negotiated agreements absent fraud and overreaching and its enforcement must not be unreasonable and unjust." *Id.*

Similarly, in *Medicine Shoppe Int'l, Inc. v. J-Pral Corp.*, the Missouri Court of Appeals held that a choice of law provision in a contract was not consent to personal jurisdiction because it was "***not sufficiently definite***

nor so unequivocal on the question of submission to jurisdiction of Missouri courts, ***to constitute an effective waiver of the constitutional right of due process*** to be sued in a forum where in personam jurisdiction may clearly and properly be obtained in accordance with traditional notions of fair play and substantial justice." 662 S.W.2d 263, 274 (Mo. Ct. App. E.D. 1983) (emphasis added); *cf. Office Supply Store.com v. Kansas City Sch. Bd.*, 334 S.W.3d 574, 580 (Mo. Ct. App. W.D. 2011) (a defendant may consent to jurisdiction, but there was no evidence that school district agreed to the forum selection clause, and thus personal jurisdiction in out-of-state court was lacking).

In *Genuine Parts Co. v. Cepec*, the Delaware Supreme Court recognized that any assertion of consent to be sued is subject to due process considerations: "[T]he argument . . . that a business somehow must agree to being subject to general jurisdiction in every state in our nation, as a condition of doing business nationally," is a "grasping assertion of state authority [ ] inconsistent with principles of due process, and impliedly, with interstate commerce." 137 A.3d at 147. Other courts have likewise distinguished between voluntary consent to personal jurisdiction (as in the case of a forum selection clause in an arms-length contract, or voluntary submission to jurisdiction in a particular pending case) and "coerced consent" through a mandatory registration statute:

> The idea that a foreign corporation consents to jurisdiction in [the forum state] by completing a state-required form, without having Contact with [forum state], is entirely fictional. Due process is

> central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process.

Nutrishare, Inc. v. BioRX, LLC, No. CIV.S-08-1252 WBS EFB, 2008 WL 3842946, at *3 (E.D. Cal. Aug. 14, 2008) (alteration in original) (internal quotation omitted); *see Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) ("A defendant's consent must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.").

A recent decision of the California Supreme Court further illustrates this point. In *Bristol-Myers Squibb Co. v. Superior Court*, No. S221038, ___ P.2d ___, 2016 WL 4506107 (Cal. Aug. 29, 2016), the court stated:

> As the high court has explained, "[t]he purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies *growing out of transactions within the State*." (*Morris & Co. v. Ins. Co.* (1929) 279 U.S. 405, 408-409, 49 S.Ct. 360, 73 L.Ed. 762, italics added.) Accordingly, 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. The 'designation of an agent for service of

process and qualification to do business in California alone are insufficient to permit general jurisdiction.' [Citations.]"

2016 WL 4506107, at *8 (emphasis in original).

These decisions are consistent with Missouri precedent, cited above, applying due process principles as a limit to assertions that a party has consented to personal jurisdiction.

B. The Unconstitutional Conditions Doctrine Precludes Coerced Consent As A Basis for General Personal Jurisdiction.

As noted by the Delaware Supreme Court, the unconstitutional conditions doctrine provides that "a foreign corporation's consent to personal jurisdiction cannot be coerced or conditioned on the corporation waiving its right not to be subject to all-purpose jurisdiction in all but a few places where it has sufficient contacts." *Cepec*, 137 A.2d at 147, and at 147, n. 125, citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2594 (2013) ("[Under the unconstitutional conditions doctrine,] the government may not deny a benefit to a person because he exercises a constitutional right. . . . [T]he [doctrine] vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.") (alteration in original; internal quotations omitted). As explained by the U.S. Supreme Court in *Koontz*, "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's

enumerated rights by coercively withholding benefits from those who exercise them." 133 S.Ct. at 2595.

The U.S. Supreme Court recognized over a century ago that a state may not "requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] state, to surrender a right and privilege secured to it by the constitution." *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892). If compelled consent were allowed to trump enumerated constitutional rights, states could add numerous other so-called "consents" to their foreign corporation registration statutes. To illustrate, the Seventh Amendment provides a right to trial by jury in certain cases. *See, e.g., Tull v. United States*, 481 U.S. 412, 417-18 (1987). Certainly, the state could not require a foreign corporation to waive this right as a condition of doing business in the state. Similarly, "[t]he Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values'" (*i.e.*, income). *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 19 (2008). A state could not condition a corporation's right to do business on waiver of this protection, either. And neither can the State require a corporation to surrender fundamental rights guaranteed by the Due Process Clause as a condition of registering to do business in that State.

A doctrine of compelled consent also would run afoul of *Daimler's* directive that general jurisdiction cannot be based on merely "doing business" in a State. As *Daimler* explained: "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler AG v. Bauman*, 134 S.Ct. 746, 762 n. 20 (2014). A theory of registration as consent

would authorize any or all of the fifty states to coerce consent to general jurisdiction from any foreign corporation. But *Daimler* forecloses such an "exorbitant exercise[] of all-purpose jurisdiction." *See id.* at 761-62; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (the minimum contacts requirement "protects [a defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 2787 (2011) (plurality opinion) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

This line of authority is entirely consistent with the Missouri precedent cited above, in which this Court has consistently acknowledged the limits of due process on assertions of personal jurisdiction. As noted, Missouri courts have held that consent to personal jurisdiction must be "freely negotiated" and sufficiently "definite and unequivocal" to effect a "waiver of the constitutional right of due process" regarding personal jurisdiction in a particular forum. Coerced consent, pursuant to business registration statutes that say nothing about consent to jurisdiction, falls far short of this standard.

IV. The Missouri Business Registration Statutes Say Nothing About Consent to Jurisdiction, In Contrast to Many Other Missouri Statutes That Explicitly Address Consent.

A. The Missouri Business Registration Statutes Say Nothing About Consent to General Personal Jurisdiction.

In *K-Mart*, the court of appeals pointed out that Missouri's registration statutes (R.S.Mo. §§ 351.594 and 506.150) "merely provide the means in which to serve a defendant with notice of a lawsuit. Neither statute indicates that proper service under the statute is sufficient to invoke personal jurisdiction." 1998 WL 327185, at *2 (Mo. Ct. App. W.D. June 23, 1998).[2] The court further explained: "In fact, § 506.150.1(3) states that service shall be made '[u]pon a … foreign corporation … when by law it may be sued as such, by delivering a copy of the summons and of the petition to … any other agent … required by law to receive service of process." *Id.* (quoting the statute) (alterations in original). The court found that the language of the statutes did not support or contemplate consent to jurisdiction: "Given the restrictive language of § 506.150, it appears that service is only proper if there is a separate legal basis, apart from § 506.150, for obtaining personal jurisdiction. The Missouri legislature provides for such jurisdiction of a non-resident defendant in § 506.500, Missouri's long-arm statute. Surely the legislature would have provided language indicating a grant of jurisdiction in §§ 351.594

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[2] Westar remains mindful that the court of appeals' decision in *K-Mart* is not precedential; however, the court's discussion of the business registration statutes is helpful and on point.

and 506.150 if it had intended for those statutes to create personal jurisdiction over a foreign corporation." *Id.*

The court of appeals thus found that, had the legislature intended for registration to constitute consent to personal jurisdiction, it would have said so, as it did in the long-arm statute. This makes perfect sense—where the legislature plainly knows how to provide for something and does so in one place, but not another, the omission is clearly meaningful. *See, e.g., State v. Hardin*, 429 S.W.3d 417, 420 (Mo. banc 2014) (citing examples); *see also* Official Comment to 1984 Model Business Corporation Act Section 15.05 (silent on jurisdiction). "[T]he rule of statutory construction stated as '*expressio unius est exclusio alterius*,' or 'the express mention of one thing implies the exclusion of another,' allows an inference that obvious omissions are generally presumed to be intentional exclusions." *McCoy v. The Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 594 (Mo. Ct. App. W.D. 2012).

Thus, the omission of any reference to jurisdiction in Missouri's business registration statutes is meaningful.[3]

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[3] As noted in *Brown v. Lockheed Martin Corp.*, the due process concerns are "more acute in the absence of a defendant corporation's explicit consent to the state's powers." 814 F.3d 619, 626 (2d Cir. 2016). Like the Connecticut statutes at issue in *Brown*, the Missouri business registration statutes do not "contain express language alerting the potential registrant that by complying with the statute and appointing an agent it would be agreeing to submit to the jurisdiction of the state courts." *See id.* at 636. As a result, the Second Circuit Court of Appeals declined to "infer from an ambiguous statute and

B. Many Other Missouri Statutes Expressly Reference Consent to Jurisdiction.

Significantly, in at least eighteen other instances, the Missouri legislature has expressly codified by statute a requirement that a party consents to jurisdiction as a condition of engaging in a particular activity. *See, e.g.,* R.S.Mo. § 473.117(3) (nonresident personal representative filing a designation "*submits personally to the jurisdiction of the court*"); R.S.Mo. § 469.909(4) (trustee delegate "*submits to the jurisdiction of the courts* of this state even if the delegation agreement provides other"); R.S.Mo. § 456.033(2) (beneficiaries "*are subject to the jurisdiction of the court*"); R.S.Mo. § 436.440(4) (agent of trust "*submits to the jurisdiction of the courts* of this state"); R.S.Mo. § 456.8-807(4) (trust delegate "*submits to the jurisdiction of the courts* of this state"); R.S.Mo. § 402.136(4) (agent managing an institutional fund for certain persons "*submits to the jurisdiction of the courts* of this state"); R.S.Mo. § 456.033(1) (trustee "*submits personally to the jurisdiction of the court*"); R.S.Mo. § 473.685 ("*A foreign personal representative submits himself to the jurisdiction of the courts of this state*" through variety of actions); R.S.Mo. § 375.246 (insurer required to "*submit to the jurisdiction of this state*," "*appoint the director as its agent for service of process in this state*", and "*comply with all requirements necessary to give such courts jurisdiction*"); R.S.Mo. § 456.2-202(1) (trustee "*submits personally to*

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the mere appointment of an agent for service of process a corporation's consent to general jurisdiction, creating precisely the result that the Court so roundly rejected in *Daimler*." *Id.* at 640.

the jurisdiction of the courts of this State"); R.S.Mo. § 456.2-202(2) (recipient of trust distribution "*submits personally to the jurisdiction of the courts*"); R.S.Mo. § 214.330(11) (trustee who accepts position "*submits personally to the jurisdiction of the courts* of this state", "*shall consent in writing to the jurisdiction of the State of Missouri*", and shall consent to "*the appointment of the office of secretary of state as its agent for service of process*"); R.S.Mo. § 140.190(2) (nonresident bidder required to file "*an agreement in writing consenting to the jurisdiction of the circuit court*" and appointing an agent for service); R.S.Mo. § 456.8-808(11) (a trust protector "*submits personally to the jurisdiction of the courts of this state*"); R.S.Mo. § 362.105(1)(14) (bank that engages in certain activity "*shall consent to supervision and inspection by that office and shall be subject to the continuing jurisdiction of that office.*"); R.S.Mo. § 375.881 (suspension of certificate of authority of a foreign insurance company authorized if company "*has refused to submit to the jurisdiction of a court of this state*" based on diversity); R.S.Mo. § 210.829 (2) (person engaging in specified activity "*submits to the jurisdiction of the courts*"); *see also* R.S.Mo. § 347.186.5(7)(a) (operating agreements for limited liability companies may require "*consent to personal jurisdiction*"); *cf.* Mo. Sup. Ct. R. Form 34 (sureties "*hereby submit themselves to the jurisdiction of the said Appellate Court* and of any other court" and appoint clerk as agent); Mo. Sup. Ct. R. 81.11 ("*By entering into a supersedeas bond, the surety submits to the jurisdiction of the trial court*" and appoints clerk as its agent for service); Mo. Sup. Ct. R. 37.26 ("*By entering into a bond the obligors*

submit to the jurisdiction of the court in which the defendant is required to appear" and appoint clerk as their agent for service).

As these citations make clear, when the Missouri legislature intends for an act to constitute consent to jurisdiction, it plainly says so. But it did not say so in the Missouri business registration statutes. That omission is meaningful, as the court of appeals easily concluded in *K-Mart*. This was also the ruling of the Missouri federal court in *Keeley v. Pfizer Inc.,* 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015), in which the court held that compliance with the Missouri business registration statutes does not establish consent to general jurisdiction in Missouri. *Cf.*, *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, n. 4 (Mo. banc 2015) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014) ("This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.")). "'Indeed, the legislature's use of different terms . . . is presumed to be intentional and for a particular purpose,' *Armco Steel v. Kansas City*, 883 S.W.2d 3, 7 (Mo. banc 1994), and we 'cannot simply insert terms that the legislature has omitted' under the pretense of statutory construction, *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 454 (Mo. banc 2013)." *Jefferson ex rel. Jefferson v. Mo. Baptist Med. Ctr.*, 447 S.W.3d 701, 708 (Mo. Ct. App. E.D. 2014).

C. The *Knowlton* Decision Is Inapposite.

In *Knowlton v. Allied Van Lines*, the Eighth Circuit Court of Appeals held that registration to do business under the Minnesota business registration statute was consent to personal jurisdiction in Minnesota. 900

F.2d 1196 (8th Cir. 1990). This conclusion was based upon a close reading of two specific provisions of the Minnesota business registration statute. In particular, the court noted that the Minnesota statute relating to withdrawal of a corporation from the state expressly provided that the corporation would remain subject to jurisdiction for claims arising out of its activities within the state. *Id.* at 1199.[4] The court then compared this language to the language of the Minnesota statute requiring a foreign corporation to register and appoint an agent for service of process. Because the registration statute did not contain the express language referencing liabilities or obligations arising out of business done within the state, the court inferred that the Minnesota legislature did not intend to limit jurisdiction under the business registration statutes to causes of action relating to activities within the state. *See id.* ("These words of limitation, occurring in the very same section of the statute, clearly indicate that the Legislature knew how to limit the purposes of service of process when it wanted to.").

The Missouri business registration statutes are materially different from the Minnesota statute considered in *Knowlton*. In Missouri, the corporate withdrawal statute does not say anything about liabilities or

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[4] Minn. Stat. § 303.13 Subdivision 1(2) provided "that if the corporation has withdrawn from the state, [service on the Secretary of State] is valid 'only when based upon a liability or obligation of the corporation incurred within this state or arising out of any business done in this state by the corporation prior to the issuance of a certificate of withdrawal.'" *Knowlton*, 900 F.2d at 1199 (quoting the statute).

obligations arising in the state. The Missouri statute instead merely requires the withdrawing corporation to "appoint[] the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in the state." R.S.Mo. § 351.596.2(3). The statute says nothing about in-state or out-of-state liabilities or obligations. Thus, unlike the Minnesota withdrawal statute in *Knowlton*, the Missouri withdrawal statute does not contain language from which it could be implied or inferred that the Missouri legislature intended for business registration, generally, to create personal jurisdiction for causes of action unrelated to in-state activities. This is a material distinction that renders *Knowlton* inapposite. *See Keeley,* 2015 WL 3999488, at *4 n. 2 (declining to follow *Knowlton* because the Minnesota statute at issue there was materially different from the Missouri business registration statutes); *see also* Judgment, at 12 (in which Judge Garrett found a federal magistrate's decision following *Knowlton* "overly facile in its comparison of the meaning of Minnesota's registration statute to those for Missouri.").

In further contrast to *Knowlton's* analysis of the Minnesota statute, in Missouri the legislature has expressly referenced consent to jurisdiction in at least eighteen other statutes, as discussed above. This conclusively demonstrates the significance of our legislature's omission of any reference to consent to jurisdiction in the Missouri business registration statutes. The Missouri legislature's express treatment of consent to jurisdiction in many other statutes thus precludes *Knowlton's* case-specific inference of general jurisdiction, which was premised on how the Minnesota legislature

delineated the scope of post-withdrawal jurisdiction in a materially different statute.[5]

Finally, it should be emphasized that *Knowlton* did not cite any authority for its assertion that designating an agent for service of process is consent to general jurisdiction. *See Knowlton*, 900 F.2d at 1199. *Knowlton*'s persuasive value is further limited for that reason, in addition to the others identified above, and especially after *Goodyear* and *Daimler* significantly curtailed the scope of general personal jurisdiction allowed under the Due Process Clause.

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[5] The *Knowlton* decision has been criticized on additional grounds. *See* Tanya Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1382 (2015) ("The *Knowlton* court's reasoning is not persuasive."). As Professor Monestier explains, the *Knowlton* court's assumption that the United States Supreme Court, in *Ins. Corp. of Ireland, Ltd. v. Comp. des Bauxites de Guinee*, 456 U.S. 694 (1982), omitted registration from its list of types of consent to personal jurisdiction because it was "obvious," cannot be squared with the Supreme Court's inclusion on that list of consent by contractual arrangement, which is not "unobvious." *Id.*, quoting *Viko v. World Vision, Inc.*, 2009 WL 2230919, at *6 (D. Vt. July 24, 2009).

D. Principles of Due Process Preclude a Finding that the Missouri Business Registration Statutes Require or Imply Consent to General Personal Jurisdiction.

As noted above, even in the case of the Missouri long-arm statute, the defendant's statutory consent to jurisdiction is still subject to a due process analysis. In other words, even under a statute where the defendant expressly consents or submits to jurisdiction, the court must still determine whether the exercise of jurisdiction comports with due process. *See, e.g., Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. banc 2010); *Chromalloy Am. Corp. v. Elyria Foundry Co.,* 955 S.W.2d 1, 4 (Mo. banc 1997). This is an important point: the long-arm statute, unlike the business registration statutes, says that any person, corporation, or other actor who commits any of the enumerated acts in the long-arm statute "thereby submits such person, firm or corporation . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts." R.S.Mo. § 506.500.1. The long-arm statute, unlike the business registration statutes, thus contains an explicit statement that the party is subject to jurisdiction under the statute; even so, the court must still perform the due process analysis. *See Bryant*, 310 S.W.3d at 232*; Chromalloy*, 955 S.W. 2d at 4. If due process must be considered even in the case of an explicit submission to jurisdiction as stated in the long-arm statute, it can hardly be ignored in the case of the business registration statutes, which contain no such express submission to jurisdiction.

This same analysis led the courts in *Cepec*, *Brown*, and in many other cases to find that mere compliance with business registration statutes did not confer general personal jurisdiction over the defendant corporation.

V. The Court Should Not Rely on *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*

A. *Pennsylvania Fire / Gold Issue* Is No Longer Good Law.

For decades, courts and commentators have been expounding on the manifold ways in which the U.S. Supreme Court decision in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) (sometimes referred to as "*Pennsylvania Fire*" and sometimes as "*Gold Issue*"), is outmoded, archaic, limited by its facts, and generally unpersuasive in resolving the modern-day question of whether registration to do business, standing alone, is sufficient to confer general jurisdiction for causes of action unrelated to a foreign corporation's activities in the forum state. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 638 (2d Cir. 2016) ("[T]he Supreme Court's analysis in recent decades, and in particular in *Daimler* and *Goodyear*, forecloses such an easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business and appointment of an agent under a state statute lacking explicit reference to any jurisdictional implications."); *Freeman v. Cnty. of Washoe*, 1 P.3d 963, 968 (Nev. 2000) ("The United States Supreme Court in *International Shoe* and its progeny has shifted the focus of the jurisdictional inquiry from a state's physical power over a defendant to fundamental fairness and has abandoned the reasoning of *Gold Issue*.");

Display Works, LLC v. Bartley, No. 16-583, 2016 WL 1644451, at *8 (D.N.J. Apr. 25, 2016) (*Pennsylvania Fire* "developed from an outmoded way of thinking about jurisdiction . . . *Daimler* seriously changed this formulation."). "[C]ourts have recognized that Supreme Court decisions since *Pennsylvania Fire* 'cast doubt on the continued viability' of that decision." *Public Impact, LLC v. Boston Consulting Grp. Inc.*, 117 F. Supp. 3d 732, 739 (M.D.N.C. 2015) (internal quotation omitted).

Most scholarly commentators "are in agreement that jurisdiction based on registration to do business violates the Due Process Clause." Tanya Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent,* 36 Cardozo L. Rev. 1343, 1347 (2015); *see also* Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 758-59 (1988) (*Pennsylvania Fire* no longer viable under the due process standards of *International Shoe* and its progeny); D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 Del. J. Corp. L. 1, 16-17 (1990) (*Pennsylvania Fire* "may have been correct under the controlling jurisdictional principles when it was issued, but it does not withstand constitutional scrutiny today.").

Courts presented with citations to *Pennsylvania Fire* as support for the registration-as-consent argument typically point to the territorial basis for jurisdiction that held sway before *International Shoe* shifted the focus from physical presence to fairness. For example, in *Brown*, the court explained how the traditional need for a defendant's physical presence in a state fit

awkwardly with 19th century ideas about corporations. 814 F.3d at 631. Back then, a corporation was only deemed present in its state of incorporation. *Id*. Business registration statutes were enacted "primarily to allow states to exercise jurisdiction over corporations that, although not formed under its laws, were transacting business within a state's borders and thus potentially giving rise to state citizens' claims against them." *Id*. at 632. Thus, the purpose of registration statutes was to give states jurisdiction over controversies growing out of transactions in the state. *Id.* "The jurisdiction thus created—subject to satisfaction of certain procedural and other requirements—is now generally known as 'specific' personal jurisdiction." *Id*. Because the purpose of the registration requirement was to supply the corporation's "presence" for purposes of territorial-based jurisdiction, it was always something of a fiction. *Id*. at 633. But registration was never more than "a promise, fairly extracted, to appear in state court on actions by a state's citizens arising from the corporation's operations in the jurisdiction." *Id*.; *see Morris & Co. v. Ins. Co.*, 279 U.S. 405, 408-09 (1929) (same). As explained by another federal court addressing this same topic:

> "The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted

> the immunity as to venue. . .." *Neirbo* [*Co. v. Bethlehem Shipbuilding Corp*], 308 U.S. [165], 60 S.Ct. 153 [(1939)]. The creation of this "consent" formulation made the holdings in *Pennsylvania Fire* and *Neirbo* possible.

Display Works, 2016 WL 1644451, at *8, and at *9 ("[T]he categorical rule of consent explained in *Pennsylvania Fire* and *Neirbo* is substantially circumscribed by our reading of more recent Supreme Court cases."); *Brown*, 814 F.3d at 639 (in *Daimler*, the Supreme Court "described the 19th century territorial approach to personal jurisdiction embodied in *Pennoyer* as having 'yielded to a less rigid understanding' of personal jurisdiction, 'spurred by changes in the technology of transportation and communication, and the tremendous growth of interstate business activity'"; accordingly, the Court "cabined the impact of two cases of the *Pennsylvania Fire* era . . . as 'indeed uph[olding] the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum.'"), quoting *Daimler*, 134 S.Ct. at 761 n. 18 (internal cross reference omitted).

It is significant that, following *International Shoe*, "'the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)] rest, became the central concern of the inquiry into personal jurisdiction.'" *Daimler*, 134 S.Ct. at 754, quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). "This newer contact-based approach did not need to rely on consent in order to sue foreign corporations. As such, the *Daimler* Court

warned that citations to cases 'decided in the era dominated by *Pennoyer's* territorial thinking should not attract heavy reliance today.'" *Display Works*, 2016 WL 1644451, at *8, quoting *Daimler*, 134 S.Ct, at 761 n. 18.[6]

B. At Most, *Pennsylvania Fire* Concerns Service of Process, Not Blanket Consent to General Personal Jurisdiction.

A federal court in Vermont recently pointed out that the holding in *Pennsylvania Fire* was, at most, addressed to consent to service only. *Viko v. World Vision, Inc.*, 2009 WL 2230919, at *9 (D. Vt. 2009). The court found this to be true for three reasons: (1) the lower court's finding of jurisdiction was based, in part, upon the premise that companies subject to suit on the basis of registration were also conducting business in the forum; (2) the opinion itself speaks only of effective service, while there is no indication that the Missouri statute was jurisdictional; and (3) the prevailing practice during this era required a showing that a corporation was actually doing business in the forum state, along with adequate service, to establish jurisdiction. *Id.* Accordingly, the court concluded that *Pennsylvania Fire* "allowed states to use registration statutes as a means to reach foreign corporations and enforce their jurisdiction, but it did not increase their jurisdiction to include

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[6] Like *Pennsylvania Fire*, *Neirbo* also relied heavily on the territorial approach to personal jurisdiction, and therefore is one of the cases characterized as overruled by *Shaffer* and *Daimler*. *See Shaffer*, 433 U.S. at 213 ("[t]o the extent that prior decisions are inconsistent with [the *Int'l Shoe*] standard, they are overruled.").

registered foreign corporations that maintained no other business contacts in the forum." *Id.*[7]

C. Subsequent Missouri Authority Likewise Undermines the Continued Viability of the *Pennsylvania Fire* Decision.

Missouri appellate authority after *Pennsylvania Fire* / *Gold Issue* further undermines reliance on that U.S. Supreme Court opinion today. As noted by this Court in *State ex rel. Phoenix Mut. Life Ins. Co. v. Harris*, in the *Gold Issue* case, the U.S. Supreme Court reviewed a holding of this Court concerning the Missouri statute that requires registration by foreign insurance companies, and held that the "statute rationally might bear the construction there put upon it," *i.e.,* by this Court. 121 S.W.2d 141, 143 (Mo. banc 1938). But ten years later, the question came up again, in *State ex rel. Am. Cent. Life Ins. Co. v. Landwehr,* 300 S.W. 294 (Mo. banc 1927), *overruled in part by Phoenix Mut. Life Ins*. In that case, the foreign insurance company was licensed in Missouri, but the insurance policy sued upon was issued in Kansas and the insured lived and died there, and the beneficiary was a

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[7] The court also pointed out that this same analysis applies to Judge Cardozo's opinion in *Bagdon v. Phil. & Reading Coal & Iron Co*., 217 N.Y. 432, 111 N.E. 1075 (N.Y. 1916), upon which *Pennsylvania Fire* relied. *Id*. at *10. And, significantly, Judge Cardozo later qualified his view on this subject, indicating that service is a necessary but not sufficient element of the jurisdictional equation, and must be combined with a showing that the defendant actually conducts business in the forum state. *See Viko*, 2009 WL 2230919, at *9.

resident of Kansas. *See Phoenix Mut. Life Ins.*, 121 S.W.2d at 143. The Court held that service on the Superintendent of Insurance was invalid, overruling that far the majority opinion in the *Gold Issue* case. *Id.* The Court in *Phoenix Mut. Life Ins.* further noted *American Central's* recognition of "legislative intent that the statute 'should be for the benefit of those persons doing business with such companies in this state.'" *Id.* at 144, quoting *Am. Cent.* This, accompanied by review of the relevant statutory provisions from 1879 to the present time, led this Court to hold: "[C]ertain it is that the statute requires all suits and proceedings in this state to be based upon business transacted in Missouri, while the company was operating here under license." *Id.* at 145. Accordingly, any blanket pronouncement about consent to jurisdiction in Justice Holmes's opinion is limited by this Court's subsequent limitation of the very statutory interpretation upon which that opinion was based.

D. The Evolution of the Unconstitutional Conditions Doctrine Demonstrates that *Pennsylvania Fire* Would Be Decided Differently Today.

Examination of the evolution of the unconstitutional conditions doctrine also helps to explain the apparent tension between Pennsylvania *Fire* and modern-day personal jurisdiction decisions. As Professor D. Craig Lewis explains, at the time Justice Holmes wrote the *Pennsylvania Fire* / *Gold Issue* opinion, he was firmly of the view that if the state had the absolute power to withhold a benefit, it necessarily had the power to attach any condition it chose to the grant of the benefit. Lewis, 15 Del. J. Corp. L. at

11. "By that reasoning, Holmes would have seen no unconstitutional conditions problem in *Gold Issue*: since the state could exclude foreign corporations, it was fully empowered to admit them on any condition whatsoever; and because it therefore could extract an unlimited consent to jurisdiction as a condition of entry, enforcing that consent would raise no constitutional question." *Id.* at 17. But "[t]he Court's initial acceptance of [Holmes'] reasoning was short-lived, and Holmes soon found himself arguing his position in dissent, while the majority of the Court repeatedly reaffirmed the unconstitutional conditions doctrine." *Id.* at 11-12. Thus, if *Gold Issue* were decided today, the unconstitutional condition issue would be viewed differently, following *International Shoe's* (and *Daimler's*) emphasis on minimum contacts and the connections among the defendant, the litigation, and the state. *See id.* at 18. But for the *Gold Issue* Court, operating under the territorial doctrine of *Pennoyer*, these issues would have been irrelevant. *Id.*

E. Additional Factors Limit the Application of *Pennsylvania Fire* Today.

Finally, there are additional factors limiting the applicability of *Pennsylvania Fire* today. The statute under consideration in that 1917 case required a foreign insurance company to register to do business in the state, and to execute a power of attorney making service on an in-state representative "the equivalent of personal service." 243 U.S. at 95. The Court observed: "[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts." *Id.* at 96. Shortly thereafter, the Court limited that decision's

reach, noting strong "reasons for a limited interpretation of … compulsory assent" by way of a state statute. *Robert Mitchell Furn. Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921). In *Robert Mitchell Furniture*, the Court held that only when a "state law either expressly [extends] or by local construction" is interpreted to extend jurisdiction over an out-of-state defendant regarding out-of-state business, should a court construe the statute as such. *Id.* As noted above, nothing in Missouri's corporate business registration statutes expressly submits the registering corporation to the jurisdiction of Missouri courts.

As Judge Garrett found in Westar's case below, "[t]he decisions . . . that see consent to general jurisdiction as the price exacted for doing business within a state also ignore that, post-*Daimler*, 'a foreign corporation's consent to personal jurisdiction cannot be coerced or conditioned by the corporation waiving its right not to be subject to all-purpose jurisdiction in all but a few places where it has sufficient contacts.'" Judgment, at 10-11, quoting *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 147 (Del. 2016).

As noted, this Court has consistently followed *International Shoe* to recognize the constitutional limits imposed by due process on the exercise of personal jurisdiction. There is no cause to abandon that precedent, or the reasoning behind it, particularly now that *Daimler* and *Goodyear* have further constricted the scope of general personal jurisdiction available under the Due Process Clause.

VI. The Dormant Commerce Clause Precludes A Finding That A Foreign Corporation Is Subject to General Personal Jurisdiction Merely By Registering To Do Business in the State.

The United States Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. That power also has a "negative or dormant implication," which "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations omitted). Under the dormant Commerce Clause, a statute faces strict scrutiny and is almost always invalid if it "discriminates against interstate commerce." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

In *Davis v. Farmers' Coop. Equity Co.*, 262 U.S. 312 (1923), the U.S. Supreme Court struck down a business registration statute on the grounds that it violated the Commerce Clause. In that case, a Kansas plaintiff sued a Kansas railroad over a bill of lading issued in Kansas for the transport of grain from one point in Kansas to another. The suit was brought in Minnesota, despite the lack of any connection between the action and the forum, on the premise that the defendant had appointed an agent for service of process pursuant to a Minnesota statute and was therefore subject to jurisdiction in the state. *Id.* at 314. The statute in question required every foreign interstate carrier to submit to suit in Minnesota as a condition of maintaining a soliciting agent in the state, which the defendant did. *Id.* The Court found that the exercise of jurisdiction over the defendant in Minnesota

violated the Commerce Clause: "This condition imposes upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the commerce clause." *Id.* at 315.

Similarly, the Delaware Supreme Court recognized that "exacting such a disproportionate toll on commerce [as would occur if a business registration statute required consent to general jurisdiction] is itself constitutionally problematic" in light of the Commerce Clause. *Cepec*, 137 A.3d at 142, and n. 108; *see Viko*, 2009 WL 2230919, at *10, n. 17 (citing *Davis* in noting that "placing this condition on foreign corporations engaged in interstate commerce may exceed states' authority under the Dormant Commerce Clause"); *see also Cepec*, 137 A.3d at 142, n. 108, citing T. Griffin Vincent, *Toward a Better Analysis for General Jurisdiction*, 41 Baylor L. Rev. 461, 485 (1989) ("Predicating jurisdiction solely on a corporate defendant's designation of a resident agent for receipt of service may be an impermissible burden on interstate commerce. Although such an exercise of judicial jurisdiction is not directly discriminatory, there is no compelling state interest justifying general jurisdiction based on such tenuous contacts.").

In *Daimler*, the U.S Supreme Court implicitly recognized the substantial burden a foreign corporation would face if required to defend litigation everywhere it does business. *See Daimler*, 134 S.Ct. at 761 (exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous and systematic course of business is "unacceptably grasping" and an "exorbitant exercise[ ] of all-purpose jurisdiction."). The burden is even greater where, as in *Davis* (and as in Westar's case below), the

defendant does no or comparatively little business in the State. As noted by the Delaware Supreme Court, "[i]t is one thing for every state to be able to exercise personal jurisdiction in situations when corporations face causes of action arising out of specific contacts in those states; it is another for every major corporation to be subject to the general jurisdiction of all fifty states." *Cepec*, 137 A.3d at 143; *see Brown*, 814 F.3d at 640 (if corporations are subject to general jurisdiction merely by registering to do business in a state, "*Daimler's* ruling would be robbed of meaning by a back-door thief."). In other words, while specific jurisdiction is usually available to protect the interests of a state regarding a foreign corporation's in-state activities, all-purpose general jurisdiction over causes of action unrelated to the activities of the corporation in the forum cannot be based on registration to do business in the forum, unaccompanied by a level of corporate activity sufficient to render the corporation essentially at home, under *Daimler*.

Therefore, this Court should not interpret the Missouri business registration statutes as an express or implicit consent to general jurisdiction. To do so would discriminate against interstate commerce in practical effect, rendering the statutes *per se* invalid under the Commerce Clause. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid.").

VII. Transient Jurisdiction, As Discussed In *Burnham v. Superior Court of California*, Does Not Apply to Corporations.

In the case of *Burnham v. Superior Court of California*, the U.S. Supreme Court addressed transient jurisdiction (or so-called "tag

jurisdiction") over a New Jersey man who was physically present in California and served with process while visiting his children there. 495 U.S. 604, 608 (1990). The Court reaffirmed the historical rule that "personal service upon a physically present defendant suffice[s] to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there." *Id.* at 612.

As noted by the United States Court of Appeals for the Ninth Circuit, "*Burnham* was a split decision, with no opinion receiving the support of a majority of the Court." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067 (9th Cir. 2014). Significantly, "[n]one of the various opinions in *Burnham* discussed tag jurisdiction with respect to artificial persons." *Id.* As the Ninth Circuit explained: "Physical presence is a simple concept for natural persons, who are present in a single, ascertainable place. This is not so for corporations, which can only act through their agents and can do so in many places simultaneously." *Id.* at 1067-68. As a result, "corporations 'have never fitted comfortably in a jurisdictional regime based primarily on "de facto power over the defendant's person."'" *Id.* at 1068, quoting *Burnham*, 495 U.S. at 610 n. 1 (opinion of Scalia, J.), quoting *Int'l Shoe*, 326 U.S. at 316.

The Ninth Circuit further explained: "While a corporation may in some abstract sense be 'present' wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*." *Id.* at 1068, citing *Burnham*, 495 U.S. at 617-18 (distinguishing the physical presence required for tag jurisdiction from the "purely fictional" concept of constructive "presence" though business contacts). "*International Shoe* indicates that a

corporation may be subject to personal jurisdiction only when its contacts with the forum support either specific or general jurisdiction. In the almost seventy years since *International Shoe*, the Supreme Court has never suggested anything else." *Id.*, citing *Goodyear*, 131 S.Ct. at 2853. "To the contrary, the Court has required an analysis of a corporation's contacts with the forum state even when tag jurisdiction, if available, would have made such analysis unnecessary." *Id.* at 1068.

Moreover, "[t]he Supreme Court's recent decision in *Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." *Id.* at 1070. The Ninth Circuit Court of Appeals therefore held that "*Burnham* does not apply to corporations. A court may exercise general personal jurisdiction over a corporation only when its contacts 'render it essentially at home' in the state." *Id.* at 1064, quoting *Daimler*, 134 S.Ct. at 751.

Other courts have come to the same conclusion. For example, in *Wenche Siemer v. Learjet Acq. Corp.*, the United States Court of Appeals for the Fifth Circuit likewise found *Burnham* inapplicable to the question of personal jurisdiction over a corporate defendant. 966 F.2d 179, 182 (5th Cir. 1992) (describing plaintiffs' reference to *Burnham* as "puzzling," because "*Burnham* did not involve a corporation and did not decide any jurisdictional issue pertaining to corporations."). The court explained that "[t]o assert, as plaintiffs do, that mere service on a corporate agent automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles. This concept is directly contrary to the historic

rationale of *International Shoe* and subsequent Supreme Court decisions." *Id.* at 183, citing *Int'l Shoe*, 326 U.S. at 316-19. The court further noted the decision of *Perkins v. Benguet Cons. Mining Co.*, 342 U.S. 437, 445-48 (1952), in which the "Court refused to find jurisdiction based solely upon service on the [corporation's] president, and went on to state that the fact that a corporation's activities caused it to have a registered agent in the forum state was 'helpful but not a conclusive test' in the jurisdictional equation." *Id.*, quoting *Perkins*, 342 U.S. at 445. The court further opined: "A registered agent, from any conceivable perspective, hardly amounts to 'the general business presence' of a corporation so as to sustain an assertion of general jurisdiction." *Id.* at 183. The court concluded that defendant's appointment of an agent for service of process was not "a waiver of its right to due process protection." *Id.*; *accord*, *Worldcare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 351-52 (D. Conn. 2011) ("[I]t would be remiss of this Court to rely on *Burnham* to cursorily discard 'minimum contacts' due process analysis to evaluate personal jurisdiction over foreign corporations" because "*Burnham* . . . did not address service upon a foreign corporation through service on a registered agent for service. Furthermore, there was no plurality opinion written in *Burnham*, suggesting that perhaps the holding should be limited to the particular facts set forth therein."); *Krishanti v. Rajaratnam*, No. 2:09-CV-05395, 2014 WL 1669873, at *5 (D.N.J. Apr. 28, 2014) ("Plaintiffs' reliance on *Burnham* is misplaced, as the holding in *Burnham* only applies to individuals, not corporations.").

It is worth noting that this Court, in *K-Mart*, indicated its approval for the reasoning of the *Siemer* decision, as discussed above. And just like *Siemer* and the other cases cited above, this Court's precedent mandates application of due process principles when evaluating assertions of personal jurisdiction. This due process analysis is equally warranted—if not more so—in the case of a foreign corporation that has merely appointed an agent for service of process here, but has not engaged in a level of business activities in the state that would render it essentially "at home" in the forum under *Daimler*. Moreover, if mere corporate registration to do business is deemed tantamount to the physical presence of a natural person, thereby allowing a form of corporate "tag general jurisdiction," that exception would swallow the rule of *Daimler* and render irrelevant the long-standing minimum contacts analysis required by *International Shoe* and progeny. As many courts have held, that simply is not, and cannot be, the law.

Because transient jurisdiction does not apply to corporations, mere registration to do business and appointment of an agent for service of process does not, standing alone, confer general personal jurisdiction over a foreign corporation.

CONCLUSION

For all the foregoing reasons, Westar respectfully requests that this Court rule that registration to do business in the State of Missouri and appointment of an agent for service of process, standing alone, are not consent to general personal jurisdiction in this State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. Per Rule 84.06(c), the word count of this brief is 12,051, as determined by Microsoft® Office Word 2010.
4. The brief was prepared using "Century Schoolbook" font in 13 point size, in Microsoft® Office Word 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on registered counsel via the Missouri Courts E-filing System on September 9, 2016, and the undersigned further certifies that the original has been signed by counsel for *Amicus Curiae* and counsel is maintaining the same pursuant to Rule 55.03(a).

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