Case No. 21-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID RUFFING,

Appellant,

v.

WIPRO, LTD.,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (Case No. 2:20-cv-05545)
The Honorable Harvey Bartle III

APPELLANT'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. This interlocutory appeal presents three important and recurring issues that have divided courts in the Third Circuit and across the country:

- Whether this Court's decision in *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), upholding the constitutionality of a Pennsylvania statute providing for general personal jurisdiction over nonresident companies that consent to jurisdiction by registering as foreign corporations, remains binding authority after recent Supreme Court cases limiting general jurisdiction over nonconsenting defendants;

- If this panel is not bound by *Bane*, whether Pennsylvania's registration statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment; and

- Whether a federal court has specific personal jurisdiction over a defendant in a collective action under the Fair Labor Standards Act that includes opt-in plaintiff-employees who worked for the defendant-employer outside the state where the federal court is located.

Resolution of these questions requires careful analysis of the Fair Labor Standards Act, the Federal Rules of Civil Procedure, Pennsylvania law, due-process principles drawn from the Fifth and Fourteenth Amendments, and Supreme Court and Third Circuit precedent about personal jurisdiction. Oral argument is essential to ensure the correct application of these legal principles. Appellant believes 20 minutes per side is appropriate in this case.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331 because this case arose under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.

This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). The district court certified its order for interlocutory review on April 21, 2021. App.24. Appellant petitioned this Court for permission to appeal on May 3, 2021. No. 20-8024, R.1. This Court granted the petition on July 29, 2021. App.1.

STATEMENT OF THE ISSUES

1. Does this Court's decision in *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), which upheld the constitutionality of a Pennsylvania statute providing for general jurisdiction over nonresident companies that consent to jurisdiction by registering to do business in the state, remain controlling authority after recent Supreme Court cases limiting general jurisdiction over nonconsenting defendants?

2. If the panel is not bound by *Bane*, is Pennsylvania's registration statute constitutional?

3. Does a federal court have specific personal jurisdiction over a defendant in a collective action under the Fair Labor Standards Act that includes opt-in plaintiff-employees who worked for the defendant-employer outside the state where the federal court is located?

These issues were raised in the parties' briefing on Appellee's motion to dismiss. ECF Nos. 6, 9–11. The district court resolved the questions in its memorandum opinion and order granting that motion in part. App.4–23.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. One other case pending before this Court, *Fischer v. Federal Express Corp.*, No. 21-1683, similarly asks whether a federal court has specific personal jurisdiction over a defendant in a Fair Labor Standards Act collective action that includes opt-in plaintiffs who worked for the employer outside the forum state. The parties recently completed briefing in that case.

There is a case pending before the Pennsylvania Supreme Court that, like this case, concerns the constitutionality of Pennsylvania's registration statute. *See Mallory v. Norfolk S. Ry. Co.*, No. 3 EAP 2021. The Pennsylvania Supreme Court heard oral argument in that case on September 21, 2021.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this interlocutory appeal, Appellee Wipro Limited asks this Court to make two sweeping changes to the settled law of personal jurisdiction.

First, it asks the Court to overrule its decision in *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), which upheld the constitutionality of a

Pennsylvania statute providing for general personal jurisdiction over foreign corporations that consented to such jurisdiction by registering with the state, and to declare Pennsylvania's statutory scheme unconstitutional.

Second, Wipro asks the Court to undo more than 80 years of precedent under the Fair Labor Standards Act ("FLSA") by holding that federal courts do not have specific personal jurisdiction over a defendant in a collective action to the extent that the action includes opt-in plaintiffs who worked for the employer outside the state where the federal court is located.

This Court should decline these requests. Nothing in the Constitution, case law, or commonsense requires such extraordinary changes. Respect for precedent demands that this Court follow *Bane*. Even if reconsidered de novo, compliance with Pennsylvania's registration statute is voluntary and the statute is therefore constitutional. And as for the FLSA, the prerequisites of service of process and personal jurisdiction are satisfied when the named plaintiff completes those steps.

Wipro's contrary arguments are drawn from two recent Supreme Court cases, *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

Building on the Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler* refined the rules for when a court has general jurisdiction over a corporation that has not consented to jurisdiction. Outside of an exceptional case, such a corporation is subject to general jurisdiction where it is "at home." *Daimler*, 571 U.S. at 137 (quoting *Goodyear*, 564 U.S. at 924). And the paradigm forums for that are the states where the company is incorporated and where it has its principal place of business. *Id.*

Three years later, the Court decided *Bristol-Myers*. *Bristol-Myers* held that California state courts lacked specific personal jurisdiction over a defendant with respect to state-law personal-injury claims of nonresident plaintiffs with no connection to California. 137 S. Ct. at 1782.

To hear Wipro (and the district court below) tell it, *Daimler* and *Bristol-Myers* were watershed, game-changing events, undoing nearly everything about personal jurisdiction that came before them.

Wipro argues that *Daimler* effectively wiped the general-jurisdiction slate clean and reconstructed it so that a corporation could be subject to general jurisdiction—even by consent—in only two places: where it is incorporated and where it has its principal place of business. That means, on Wipro's telling, that the Pennsylvania registration statute—which provides that a foreign corporation that registers to do

business in the state is subject to general jurisdiction there—cannot stand.

And seizing on the superficial parallels between the proposed *state-court, state-law, mass-tort* action in *Bristol-Myers*, on one hand, and *federal-court FLSA collective actions*, on the other, Wipro insists that federal courts are powerless to exercise specific personal jurisdiction over it with respect to the claims of any opt-in plaintiffs in an FLSA collective action who worked outside the state where the federal court is located.

Neither argument holds up. Wipro ignores what Pennsylvania's registration statute says, what this Court has conclusively said about it, what the FLSA and the Federal Rules of Civil Procedure say about serving process and adding opt-in plaintiffs, and what *Daimler* and *Bristol-Myers* themselves say about the scope and meaning of their decisions.

Start with Pennsylvania's registration statute and what this Court said about it in *Bane*. This Court had no trouble concluding that the statute was constitutional. Declining to decide whether registration counted as a "continuous and systematic" contact that would support general jurisdiction, this Court instead determined that "registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts." 925 F.2d at 640. And "[c]onsent is a traditional basis for assertion of jurisdiction long upheld as constitutional." *Id.* at 641.

The reports of *Bane*'s death have been greatly exaggerated. Contrary to what the district court held, *Daimler* did not implicitly overrule *Bane*. *Daimler* instead refined the "continuous and systematic" standard for *nonconsensual* general jurisdiction that *Bane* expressly declined to rely on. *See Daimler*, 571 U.S. at 138–39. *Daimler* itself recognized that consent is an alternative ground for jurisdiction, distinguishing the nonconsensual form of jurisdiction that it was addressing from jurisdiction based on consent. *See id.* at 129. *Bane* and *Daimler*, then, blazed two different paths to general jurisdiction: one based on consent and the other based on minimum contacts.

These two cases aren't even inconsistent, let alone so inconsistent that the *Bane* panel's decision must be cast aside. *See Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009) (panel cannot overrule prior panel's decision unless the earlier decision conflicts with or cannot be reconciled with Supreme Court precedent). *Bane* and *Daimler* sit together comfortably, and *Bane* therefore remains controlling authority.

Pennsylvania's district courts overwhelmingly agree with this assessment. By Appellant's count, 30 courts have issued decisions in the last five years addressing the continuing vitality of *Bane*. Twenty-six of them have concluded that *Bane* remains good law. This nearly unanimous consensus tells the Court nearly all it needs to know. To aid

this Court, citations to these 30 decisions are listed in the first addendum to this brief.

And even if this Court were to relitigate *Bane* on the merits, the result would be the same. A party's consent is valid so long as it is given knowingly and voluntarily. Wipro's decision to register and consent to jurisdiction was both of those things. *Bane* and Pennsylvania law make the jurisdictional consequences of registration clear. Wipro, a sophisticated multi-national company, made a voluntary decision to register and accept those consequences. No provision of Pennsylvania law forced it to do so. To the contrary, foreign businesses remain free to operate in Pennsylvania without registering. Through its choice, then, Wipro made a clear-eyed bargain: it accepted benefits under Pennsylvania law while also agreeing to take on certain obligations—including amenability to general jurisdiction in Pennsylvania courts. Wipro now wants a do-over so that it can evade jurisdiction. It seeks to keep the benefit of its bargain while avoiding the obligations it signed up for. This Court shouldn't let it do that. Wipro's problem is one of its own making. It is a problem for the board room, not the courtroom.

Worse yet for Wipro, the Supreme Court has already determined that there is nothing involuntary about a foreign corporation's decision to consent to jurisdiction through registration. *See Penn. Fire Ins. Co. v.*

Gold Issue Min. & Milling Co., 243 U.S. 93, 96 (1917). That settles the issue.

Turn now to *Bristol-Myers*, the FLSA, and specific personal jurisdiction. Wipro and other employers contend that *Bristol-Myers* created a novel and far-reaching constitutional limitation for FLSA collective actions and other group litigation, one that prohibits federal courts from exercising specific personal jurisdiction over employers with respect to the claims of any would-be opt-in plaintiffs who worked outside the state where the federal court is located.

That proposed limitation is meritless. So long as the named plaintiff in an FLSA collective action satisfies the prerequisites of service of process and personal jurisdiction, the court may validly assert personal jurisdiction over the defendant with respect to the entire collective action. *Bristol-Myers* does not suggest—let alone require—otherwise.

This Court should leave the law of personal jurisdiction where it stands. Nothing in the Constitution, the applicable statutes or rules, the caselaw or commonsense—or least of all basic principles of "fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)—supports the radical reconceptualization of personal jurisdiction that Wipro asks the Court to endorse.

The district court's interlocutory order should be reversed.

STATEMENT OF THE CASE

Wipro is an Indian information technology company with its principal place of business in Bangalore, India. App.56. Wipro does significant business around the world and in the United States, employing IT workers in locations across the country. App.54, 56. It is registered to do business in Pennsylvania. App.54.

Appellant David Ruffing worked at Wipro's data center in West Norriton, Pennsylvania. App.58. He filed a complaint seeking unpaid overtime under the FLSA against Wipro in the U.S. District Court for the Eastern District of Pennsylvania. App.31. Ruffing maintains that Wipro failed to pay him and other similarly situated information technology employees overtime, and that when Wipro did pay overtime, it was paid late. App.56–57, 63–65. Given the broadscale nature of the violation alleged, Ruffing brought his suit "on behalf of himself" as well as all other "similarly situated" workers, including those that worked for Wipro outside Pennsylvania. App.56–57.

The FLSA authorizes suits by aggrieved employees on behalf of "themselves and other employees similarly situated." *See* 29 U.S.C. § 216(b). Unlike in class actions governed by Rule 23, similarly situated employees must affirmatively join—or opt into—the suit by filing their "consent in writing" "in the court in which such action is brought." *Id.* Once the named plaintiff makes a colorable showing that the challenged

policy affects similarly situated workers, district courts typically conditionally certify the case as a collective action and send "notice concerning the pendency of the collective action, so that [similarly situated employees] can make informed decisions about whether to participate." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012).

Anticipating that out-of-state workers would join the case, Wipro moved to partially dismiss Ruffing's complaint for lack of personal jurisdiction under Rule 12(b)(2). ECF No. 9. Wipro did not dispute that the court had jurisdiction over it with respect to Ruffing's claims. ECF No. 9-1 at 4. Nor did it dispute that the court had jurisdiction over it with respect to the claims of other Wipro employees who, like Ruffing, worked in Pennsylvania. *Id.* Wipro argued instead that the court did not have personal jurisdiction over it to hear the claims of employees who worked *outside* Pennsylvania. *Id.* Wipro therefore sought to preemptively exclude any non-Pennsylvania employees from joining the case through the FLSA's opt-in procedure. *Id.*

The district court granted Wipro's motion in relevant part. App.2. Citing *Bristol-Myers*, the court held that it lacked specific personal jurisdiction over Wipro with respect to opt-in plaintiffs who worked for Wipro outside Pennsylvania. App.19–20.

The district court also decided that it did not have general personal jurisdiction over Wipro. App.12–19. The court acknowledged that Wipro had registered with Pennsylvania as a foreign corporation. It accepted that Pennsylvania law provides that such registration "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction." App.12. And it recognized that this Court ruled in *Bane* that compliance with Pennsylvania's registration statute—the same one at issue in this case—is a valid basis for general jurisdiction. App.12–13.

But the court concluded that *Bane* is no longer controlling authority because, in its view, *Daimler* made a "seismic change" to personal-jurisdiction law. App.13. Although the court recognized that *Bane* and *Daimler* were decided under different standards—with *Daimler* refining the traditional "continuous and systematic" rule for general jurisdiction, and *Bane* expressly disclaiming reliance on that rule in holding that registration as a foreign corporation constitutes consent to jurisdiction—the court still concluded that, after *Daimler*, *Bane* was no longer binding precedent. App.16–17. The district court then held that Pennsylvania's registration statute violated due process because, in the court's view, companies do not voluntarily consent to jurisdiction through registration. App.17.

The district court granted Ruffing's motion to certify the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b). App.24. This Court granted Ruffing's petition to appeal. App.1.

ARGUMENT

Ruffing seeks to maintain a nationwide FLSA collective action in Pennsylvania federal court. He may do so for two independent reasons. First, Wipro has consented to general personal jurisdiction in Pennsylvania. Second, even absent consent, a named plaintiff may maintain a nationwide collective action under the FLSA when, as here, he can serve process and establish specific personal jurisdiction in his chosen forum.

I. STANDARD OF REVIEW.

This Court reviews the district court's personal-jurisdiction decisions de novo. *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020).

II. THIS PANEL IS BOUND BY THIS COURT'S DECISION IN *BANE*.

Pennsylvania requires some foreign companies to register with the state. That registration makes those companies subject to general jurisdiction in Pennsylvania's courts. This Court upheld Pennsylvania's statutory scheme in *Bane*, concluding that "registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts." 925 F.2d at 640. The Supreme Court reached the same conclusion about

similar registration statutes in a series of decisions in the first half of the twentieth century beginning with *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). The Supreme Court's recent cases limiting general jurisdiction over *nonconsenting* defendants do not conflict with *Bane* or the Supreme Court's earlier jurisprudence on registration statutes. *Bane* and *Pennsylvania Fire* therefore remain binding authority.

A. Consent and Minimum Contacts Are Independent Grounds for Personal Jurisdiction.

Courts must have personal jurisdiction—or authority over parties—to issue decisions that bind the parties. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Due process constrains this authority. *See Walden v. Fiore*, 571 U.S. 277, 283 (2014).

The constraints that due process places on personal jurisdiction have evolved over time. The modern doctrine begins with *Pennoyer v. Neff*, 95 U.S. 714 (1878). *Pennoyer* "held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum." *Daimler*, 571 U.S. at 125. Under *Pennoyer*'s "strict territorial approach," *id.* at 126, a party had to be present in, or consent to, the sovereign's jurisdiction. *See Pennoyer*, 95 U.S. at 733.

That approach posed problems for exercising jurisdiction over nonresident individuals and companies—problems made pressing by "changes in the technology of transportation and communication, and the

tremendous growth of interstate business activity" in the "late 19th and early 20th centuries." *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 617 (1990). To ensure that courts could have jurisdiction over nonresident companies and individuals called to account for their in-state conduct, states began experimenting with statutory mechanisms to obtain their presence or consent. *Id.*

In a long line of cases beginning with *Ex parte Schollenberger*, 96 U.S. 369 (1877), the Supreme Court blessed these arrangements. *Schollenberger*, like this case, began with a lawsuit brought against nonresident companies in the Eastern District of Pennsylvania. *Id.* at 374. The plaintiffs argued that a Pennsylvania statute requiring the companies to designate an in-state agent for service of process was sufficient to confer jurisdiction over the out-of-state defendants. *Id.* The Supreme Court agreed, concluding that the companies "agreed that they may be sued" in Pennsylvania, "in consideration of a grant of the privilege of doing business within the State." *Id.* at 376. The Court held that a state legislature may validly require a foreign corporation to consent to personal jurisdiction as a condition of being granted the right to do business there. *Id.* at 376–77; *see St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (same).

The Court reaffirmed this principle in *Pennsylvania Fire*, holding that an Arizona corporation was subject to general jurisdiction in

Missouri in a suit about a Colorado insurance policy. 243 U.S. at 94–95. The reason? The company had consented to personal jurisdiction by obtaining a license to do business in Missouri. As part of the licensing process, the company had complied with a state law requiring it to file a form with a state agency "consenting that service of process" on the agency would be "deemed personal service upon the company." *Id.* at 94. The company argued that due process prohibited the suit because it had no connection to Missouri. *Id.* at 94–95. The Court disagreed. The corporation had "voluntary[ily]" complied with a state registration statute that subjected it to general jurisdiction. *Id.* at 96. That "hardly le[ft] a constitutional question open." *Id.* at 95.

The Court endorsed its holding in *Pennsylvania Fire* several times in the years that followed. "[E]ach time the issue arose, the Supreme Court reaffirmed that registration statutes, mandatory for doing business, could confer jurisdiction through consent." *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 768 (Fed. Cir. 2016) (O'Malley, J., concurring). *See Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921); *Louisville & N.R. Co. v. Chatters*, 279 U.S. 320, 329 (1929); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939).

By 1940, then, there were two separate but equally well defined paths to personal jurisdiction: presence and consent. And on the consent

side of the ledger, it was clear that states could validly require a foreign corporation to consent to general personal jurisdiction as a condition of being granted the right to do business in the state. *See Dehne v. Hillman Inv. Co.*, 110 F.2d 456, 457–58 (3d Cir. 1940); *Penn. Fire*, 243 U.S. at 94–96.

But as the economy and technology continued to evolve, so too did the law of personal jurisdiction. The Supreme Court expanded states' power to assert jurisdiction in the middle of the century with its decision in *International Shoe*. *See Daimler*, 571 U.S. at 128. Discarding and replacing *Pennoyer*'s rigid in-state presence requirement with a more flexible contacts-based approach to establishing presence, *International Shoe* held that the exercise of personal jurisdiction was appropriate when an out-of-state defendant had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

International Shoe reconceptualized what it meant for a corporate defendant to be present in a state—substituting minimum contacts for in-state presence—while leaving the framework for jurisdiction-by-consent in place. *See id.* at 317. In the years after *International Shoe*, courts therefore continued to recognize two distinct paths to personal jurisdiction: consent and minimum contacts.

These two branches of the personal-jurisdiction doctrinal tree remain separate for good reason. Consent can ground jurisdiction—even where minimum contacts alone can't do the job—because personal jurisdiction (unlike subject-matter jurisdiction) "is a waivable right." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Parties waive their rights in litigation all the time, and no less so in the realm of personal jurisdiction. "[T]here are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Burger King*, 471 U.S. at 472 n.14 (quoting *Bauxites*, 456 U.S. at 703). Parties may expressly agree to adjudicate a dispute in a particular court through a forum-selection clause in a contract. *E.g.*, *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964). They may also implicitly consent to jurisdiction through arbitration agreements or by appearing in court. *Bauxites*, 456 U.S. at 703–04. And "constructive consent to personal jurisdiction" may be found through the "*voluntary use of certain state procedures*." *Id.* at 704 (emphasis added).

After *International Shoe*, the Supreme Court split the minimum-contacts branch of the personal-jurisdiction tree into two distinct offshoots. The first is specific, or "case-linked," jurisdiction. *Walden*, 571 U.S. at 283 n.6. The specific-jurisdiction analysis "focuses on the

relationship among the defendant, the forum, and the litigation." *Id.* at 284 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). A court may exercise specific jurisdiction when the suit arises out of or relates to the defendant's contacts with the forum. *Daimler*, 571 U.S. at 127. The second, general jurisdiction, allows a court to hear *any* claim brought against a defendant, even those claims with no connection to the forum. *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, 141 S. Ct. 1017, 1024 (2021).

The Supreme Court has decided only five general-jurisdiction cases since *International Shoe*. All five concern jurisdiction over nonconsenting defendants. First up were *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The rule that emerged from these cases was that general jurisdiction over a nonconsenting defendant was appropriate when the defendant had "continuous and systematic" contacts with the forum. *See Helicopteros*, 466 U.S. at 415–16.

In three decisions handed down in the last decade, the Court refined *Perkins*'s and *Helicopteros*'s continuous-and-systematic-contacts test. In *Goodyear*, North Carolina courts held that three of Goodyear's foreign subsidiaries had the requisite contacts with the state to support general jurisdiction because their tires were placed in the stream of commerce and sold in North Carolina. *See* 564 U.S. at 921–22. The Supreme Court

disagreed. The defendants' "attenuated connections to the State," the Court held, "f[e]ll far short of 'the continuous and systematic general business contacts' necessary" to establish general jurisdiction. *Id.* at 929 (quoting *Helicopteros*, 466 U.S. at 416). The foreign subsidiaries were "in no sense at home in North Carolina." *Id.*

The Court in *Daimler* further refined the continuous-and-systematic-contacts test for general jurisdiction. *Daimler* held that, outside of an exceptional case, for a corporation to be subject to general jurisdiction under this test, its "affiliations with the State must be so continuous and systematic as to render it essentially at home in the forum State." 571 U.S. at 138–39 (cleaned up) (quoting *Goodyear*, 564 U.S. at 919). The paradigm forums for where a corporation is "at home" are its place of incorporation and its principal place of business. *Id.* at 137. Most recently, in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), the Court relied on *Daimler* to hold that BNSF was not subject to general jurisdiction in Montana because it was not incorporated and did not have its principal place of business there. *Id.* at 1559.

Daimler, Goodyear, and *Tyrrell* limited the places where a *nonconsenting* defendant is "at home" and thus subject to general jurisdiction. But they made no foundational changes to the overall structure of personal jurisdiction. Corporate defendants remain subject to general jurisdiction *both* in states that they call home, *and*, since

personal jurisdiction is a waivable right, in states in which they consent to general jurisdiction.

B. Foreign Corporations that Register in Pennsylvania Consent to General Jurisdiction There.

Pennsylvania, like other states, generally requires foreign companies to register to do business there. The state's registration statute provides that foreign corporations "may not do business in [Pennsylvania] until [they] register[]" with the state. 15 Pa. C.S.A. § 411(a). But like many general rules, this one has significant exceptions and limitations that curtail its scope and force.

(1) Pennsylvania's registration statute covers only a small class of businesses and business activities.

To begin, several kinds of companies, including foreign insurance companies and several kinds of financial associations, are exempted from the registration requirement. 15 Pa. C.S.A. §§ 401(b)–(c), 411(a), (g).

Even more significantly, the statute does not reach all forms of corporate activity, and therefore many nonresident companies may operate in Pennsylvania without registering. Corporations must register only if they "do business" in Pennsylvania. 15 Pa. C.S.A. § 411(a). "Doing business" in this context is a technical and defined term. The statute does not bring everything that we might colloquially call "doing business" into its ambit. Far from it. It expressly states that eleven types of actions "do not constitute doing business in this Commonwealth":

> (1) Maintaining, defending, mediating, arbitrating or settling an action or proceeding.
>
> (2) Carrying on any activity concerning its internal affairs, including holding meetings of its interest holders or governors.
>
> (3) Maintaining accounts in financial institutions.
>
> (4) Maintaining offices or agencies for the transfer, exchange and registration of securities of the association or maintaining trustees or depositories with respect to the securities.
>
> (5) Selling through independent contractors.
>
> (6) Soliciting or obtaining orders by any means if the orders require acceptance outside of this Commonwealth before the orders become contracts.
>
> (7) Creating or acquiring indebtedness, mortgages or security interests in property.
>
> (8) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts and holding, protecting or maintaining property so acquired.
>
> (9) Conducting an isolated transaction that is not in the course of similar transactions.
>
> (10) Owning, without more, property.
>
> (11) Doing business in interstate or foreign commerce.

Id. § 403(a).

The Committee comments to § 403 clarify that the "concept of 'doing business' involves regular, repeated, and continuing business contacts of

a local nature." *Id.* Comm. Cmt. (2014). Mindful of the limitations that the Constitution places on states' ability to restrain interstate commerce, the statute applies only to businesses that are not engaged in interstate or foreign commerce[1]: "A foreign association is not 'doing business'…if it is transacting business in interstate commerce." *Id.* And "[d]oing business in interstate or foreign commerce," 15 Pa. C.S.A. § 403(a)(11), is a broad category of activity, encompassing even purely local activity, so long as the activity "has a substantial effect on interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Accordingly, "[a]n association need not register even if it also does work and performs acts within Pennsylvania incidental to the interstate business." 15 Pa. C.S.A. § 403 Comm. Cmt. (2014). "Similarly, an office may be maintained by an association in Pennsylvania without registering if the office's functions relate solely to interstate commerce." *Id.*

The upshot of these statutory provisions is this: a huge swath of what we might normally call "doing business" is exempted from the scope of Pennsylvania's registration statute. For these reasons, many foreign businesses—likely even Wipro, given that it is a global information

[1] *Compare Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33–34 (1974) (state may not require licensure of foreign corporation that engages in only *interstate* commerce), *with Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 282–84 (1961) (state may require licensure when foreign corporation engages in *intrastate* commerce).

technology company—do not need to register with Pennsylvania. They may, of course, choose to register, even if not required to do so.

(2) Pennsylvania's registration statute serves important state interests.

For companies that *do* need to register, the registration process includes filing a registration statement containing information about the company, 15 Pa. C.S.A. § 412(a); maintaining a registered office, *id.* § 411(f); and paying a filing fee of $250, *id.* § 153(a)(2)(i).

Registration and licensing provisions like this one serve important state interests. Pennsylvania "is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Registration protects those interests: "The foreign registration statement provides certain basic information about the foreign association to ensure that citizens of Pennsylvania have access to that information in their dealings with the foreign association." 15 Pa. C.S.A. § 412 Comm. Cmt. (2014). Acquiring this kind of "information…is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State." *Jensen*, 322 U.S. at 210.

(3) Registration comes with tangible benefits for companies.

Registration brings real benefits for nonresident corporations, too. It puts foreign companies on an equal footing with domestic ones: "[A] registered foreign association…shall enjoy the same rights and privileges as a domestic entity." 15 Pa. C.S.A. § 402(d). "Thus the association acquires the privileges of a domestic association vis a vis third parties, even in such an exceptional area as the acquisition of the power of eminent domain." *Id.* Comm. Cmt. (2016) (citing cases).

(4) The penalty for failing to register is slight; covered companies may not take a case to verdict as a plaintiff without completing the registration process.

Although Pennsylvania leaves it up to companies "to determine whether [their] activities require [them] to register,"[2] the state does impose one modest penalty to encourage compliance. Non-exempt companies whose activities constitute "doing business" within the meaning of the statute "may not maintain an action or a proceeding" in Pennsylvania if they fail to register. 15 Pa. C.S.A. § 411(b). This, too, has a technical meaning: an unregistered foreign corporation *can* maintain an action or proceeding as a plaintiff; it simply must register before going

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[2] Pennsylvania Foreign Registration Statement, https://www.dos.pa.gov/BusinessCharities/Business/RegistrationForms/Documents/RegForms/15412%20Foreign%20Registration%20Statement.pdf.

to verdict. *See Drake Mfg. Co. v. Polyflow, Inc.*, 109 A.3d 250, 260 (Pa. Super. 2015).

The inability to litigate cases, as a plaintiff, through a verdict, is the *only* sanction unregistered companies face. Such companies may still operate in Pennsylvania—their acts and contracts remain valid even without registering. 15 Pa. C.S.A. § 411(c). They can defend against lawsuits. *Id.* They can resort to arbitration and have arbitration awards confirmed in court. *See Generational Equity LLC v. Schomaker*, 602 F. App'x 560, 563 (3d Cir. 2015). And a business that *does* register may withdraw its registration at any time. 15 Pa. C.S.A. § 415.

(5) Pennsylvania's registration statute clearly conveys that registration amounts to consent to general jurisdiction in Pennsylvania courts.

A distinctive feature of Pennsylvania's registration scheme is that it attaches clear jurisdictional consequences to companies' decision to register. The state's general-jurisdiction statute provides that "[t]he existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person":

> (2) Corporations.—
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa. C.S.A. § 5301(a)(2). Registration is equivalent to "qualification as a foreign corporation." *See* 15 Pa. C.S.A. § 412(b).

The jurisdictional ramifications of registration are part and parcel of the state's efforts to protect its residents and to regulate companies that do business there. The statute "facilitat[es]…[the] suability" of foreign companies in Pennsylvania, *Sunbury Wire Rope Mfg. Co. v. U.S. Steel Corp.*, 230 F.2d 511, 513 (3d Cir. 1956), thereby providing "individuals and businesses…with a forum to seek redress for possible legal grievances," *Diab v. Brit. Airways, PLC*, No. CV 20-3744, 2020 WL 6870607, at *5 (E.D. Pa. Nov. 23, 2020). *See* 15 Pa. C.S.A. §§ 402 Comm. Cmt. (2016), 412 Comm. Cmt. (2014).

C. This Court Held in *Bane* that Foreign Corporations that Register to Do Business in Pennsylvania Consent to General Jurisdiction There.

Pennsylvania courts and this Court have interpreted Pennsylvania's registration statute to mean just what it says: that Pennsylvania courts may exercise general jurisdiction over a company that has qualified—or registered—under the statute. *See Bane*, 925 F.2d at 640–41; *Webb-Benjamin, LLC v. Int'l Rug Grp., LLC*, 192 A.3d 1133, 1137–39 (Pa. Super. 2018). This Court fully considered and upheld the

constitutionality of the statute in *Bane*, determining that registration constitutes consent to jurisdiction.

Bane, like this case, was brought by an employee against an out-of-state employer in the Eastern District of Pennsylvania. 925 F.2d at 638–39. The district court concluded it had neither specific nor general jurisdiction. *Id.*

This Court reversed. As this Court saw it, the district court "failed to consider the effect of [the defendant's] application for and receipt of authorization to do business in Pennsylvania." *Id.* at 640. Citing Pennsylvania's general-jurisdiction statute—section 5301(a)—the Court observed that "Pennsylvania law explicitly states that the qualification of a foreign corporation to do business" grounds "the assertion of personal jurisdiction." *Id.*

For that reason, this Court in *Bane* expressly declined to decide whether compliance with Pennsylvania's registration statute was sufficient for either specific or general jurisdiction under the minimum-contacts approach to jurisdiction. *Id.* The panel didn't have to make that determination "because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts." *Id.* And "[c]onsent," the Court noted, "is a traditional basis for assertion of jurisdiction"—distinct from jurisdiction based on minimum contacts—"long upheld as constitutional." *Id.* at 641 (citing *Hess v. Pawloski*, 274 U.S. 352, 356–57

(1927), and *Dehne*, 110 F.2d at 458). The defendant's registration therefore established general jurisdiction either as a form of consent under section 5301(a)(2)(ii) or as a qualification to do business under section 5301(a)(2)(i). *Id.*

D. *Daimler* Did Not Sub Silentio Overrule *Bane* and the Supreme Court's Jurisprudence on Consent-based Jurisdiction.

Bane and *Pennsylvania Fire* decide this case: because Wipro registered in Pennsylvania, it is subject to general jurisdiction there. The district court therefore had plenary authority to hear any claim brought against Wipro in Pennsylvania. *Ford Motor Co.*, 141 S. Ct. at 1024.

Wipro resists this conclusion by arguing that *Bane* is no longer good law after the Supreme Court's decision in *Daimler*. That's wrong. *Bane* was—and is—fully consistent with the Supreme Court's cases on personal jurisdiction. Courts—including this panel—must follow *Bane* and the Supreme Court's decisions on registration statutes. Close attention to this Court's decision in *Bane* and the Supreme Court's modern general-jurisdiction jurisprudence shows why *Bane* and *Pennsylvania Fire* remain binding authority.

(1) This panel is bound by this Court's decision in *Bane.*

This panel is bound by *Bane*.

The general rule on precedent in this Court is that no panel can overturn a prior panel's precedential decision. *Pareja v. Attorney Gen. of*

the United States, 615 F.3d 180, 190 (3d Cir. 2010); Third Circuit I.O.P. 9.1. This Court "adhere[s] strictly to that" rule. *In re Grossman's Inc.*, 607 F.3d 114, 117 (3d Cir. 2010) (en banc). "Court en banc consideration" therefore is typically required to overturn a prior precedential decision. Third Circuit I.O.P. 9.1.

But under rare circumstances, "a panel of [the] Court may decline to follow a prior decision of [this] Court without the necessity of an en banc decision." *United States v. Tann,* 577 F.3d 533, 541 (3d Cir. 2009). One such circumstance is "when the prior decision conflicts with a Supreme Court decision." *Id.* For a panel decision to "conflict with" Supreme Court precedent, the former must be "irreconcilable with" the latter, *Smith*, 589 F.3d at 691, or "patently inconsistent with" it, *Cox v. Dravo Corp.*, 517 F.2d 620, 627 (3d. Cir. 1975). But if "there has been no determinative ruling by the Supreme Court on [a] question, [this Court] is bound by" its prior opinions. *Brown v. United States*, 508 F.2d 618, 625 (3d Cir. 1974). Other circuits take the same approach. *See United States v. Vasquez-Ramos*, 531 F.3d 987, 991 (9th Cir. 2008) ("We are bound by circuit precedent unless there has been…a subsequent en banc or Supreme Court decision that is clearly irreconcilable with our prior holding."); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.,* 344 F.3d 1288, 1292 (11th Cir. 2003) ("While an intervening decision of the Supreme Court can overrule a decision of a prior panel of our court, the

Supreme Court decision must be clearly on point."); *United States v. Stone,* 306 F.3d 241, 243 (5th Cir. 2002) ("Absent a clear contrary statement from the Supreme Court or *en banc* reconsideration of the issue, we are bound by [our prior panel decision].").

Those rare circumstances are not present here. *Daimler* does not conflict with *Bane*'s holding that registration constitutes consent to jurisdiction.

Focus first on *Bane*. *Bane* recognized that jurisdiction is appropriate *either* when a party has minimum contacts with the forum *or* when it has consented to suit there. *See* 925 F.2d at 639–41. And it recognized that under *Helicopteros*, a party must have continuous and systematic contacts with the forum for general jurisdiction to be appropriate when the party has not consented. *Id.* at 639–40. *Bane* then expressly declined to rely on the continuous-and-systematic-contacts rule. *Id.* at 640. It didn't need to examine the presence (or absence) of such contacts because the defendant had consented to jurisdiction by

registering with the state. *Id.* That was an independent ground for jurisdiction. *Id.* at 640–41.[3]

Shift now to *Daimler*. That case concerned neither registration statutes nor jurisdiction based on consent. *Daimler* presented the question of "whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary." 571 U.S. at 134. In answering that question, the Court refined the continuous-and-systematic test for general jurisdiction based on minimum contacts, examining whether the party had continuous and systematic contacts that "render [it] essentially at home in the forum State." *Id.* at 139 (brackets in original) (quoting *Goodyear*, 564 U.S. at 919). It then decided that Daimler was not subject to general jurisdiction under this standard. *Id.*

Bane and *Daimler*, then, quite clearly were decided under different tests for general jurisdiction: when there is consent and when there are minimum contacts. The district court recognized that the decisions in *Bane* and *Daimler* were based on different rules for general jurisdiction.

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[3] *Bane* was no anomaly. Courts both before and after *Daimler* have similarly concluded that companies may consent to general jurisdiction through state registration schemes. *E.g.*, *Fulano v. Fanjul Corp.*, 236 A.3d 1, 18–19 (Pa. Super. 2020); *Freedom Transp., Inc. v. Navistar Int'l Corp.*, No. 2:18-CV-02602-JAR-KGG, 2019 WL 4689604, at *20 (D. Kan. Sept. 26, 2019); *Knowlton v. Allied Van Lines, Inc.,* 900 F.2d 1196, 1200 (8th Cir. 1990); *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984).

See App.16–17. But the court still concluded that *Bane* is no longer binding because, in its view, *Daimler* "changed" "the standard for determining general personal jurisdiction." App.17. The district court's analysis embraces an incorrect premise: that *Daimler* discarded consent-based jurisdiction while creating a single rule for general jurisdiction based on where a party is "at home." *Daimler* did no such thing.

Daimler in fact *confirms* that consent to jurisdiction remains an alternative to jurisdiction based on a party's contacts. The *only* mention of consent in *Daimler* is its characterization of *Perkins*—the Court's first post-*International Shoe* case on general jurisdiction—as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum*." 571 U.S. at 129 (quoting *Goodyear*, 564 U.S. at 928) (emphasis added). As courts have noted, *Daimler*'s "recognition of consent, in the absence of further discussion questioning its viability, negates the argument that *Daimler* in some way rendered *Bane* abrogated." *Mendoza v. Electrolux Home Prods., Inc.*, No. 4:15-CV-00371, 2018 WL 3973184, at *4 (M.D. Pa. Aug. 20, 2018). Far from abolishing consent as a ground for personal jurisdiction, *Daimler* reaffirmed that the minimum-contacts test applies to *nonconsenting defendants*. *See Allstate Ins. Co. v. Electrolux Home Prods.*, No. 18-cv-00699, 2018 WL 3707377, at *4 (E.D. Pa. Aug. 3, 2018) (*Daimler*'s reference to consent "implies that the test adopted by

Goodyear and applied by *Daimler* for analyzing general jurisdiction is to be applied in the *absence* of consent."). *Daimler* cannot plausibly be read to have eliminated jurisdiction through consent while establishing a single rule for general jurisdiction. *See Diab*, 2020 WL 6870607, at *5 ("*Daimler* did not christen a new rule on the constitutionality of consent and personal jurisdiction.").

In fact, if *Daimler* were understood to eliminate consent as a basis for jurisdiction, that would work a foundational change to the nature of personal jurisdiction. It would transform "the personal jurisdiction defense from a waivable to a non-waivable right, a characteristic of the defense that was not before the *Daimler* Court and is not explicitly addressed in its opinion." *Acorda Therapeutics, Inc. v. Mylan Pharm.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016). *Daimler* did not take this step either. Like Congress, the Supreme Court does not "hide elephants in mouseholes." *Whitman v. Amer. Trucking Assocs.*, 531 U.S. 457, 468 (2001).

In short, *Daimler* addressed a different issue than the one confronted in *Bane*. And *Daimler*'s resolution of the issue it did consider is not at all inconsistent with *Bane*'s independent determination that a defendant can consent to jurisdiction through registration. There is nothing inconsistent in holding that consent and minimum contacts provide different routes to jurisdiction, and that *Daimler*'s at-home

limitation applies only to general jurisdiction arising out of continuous and systematic contacts with a forum.

District courts in this Circuit weighing *Bane*'s continuing vitality after *Daimler* overwhelmingly agree that *Bane* remains good law. At least 30 courts have considered the issue, and 26 have concluded that *Bane* remains binding authority. *See* Addendum 1 to this brief. Those decisions are correct: *Daimler* and *Bane* chart different paths to jurisdiction, and *Daimler* did not impliedly decide that only one path could be taken.

This Court has reached similar conclusions when asked to depart from prior panel decisions on the ground that a Supreme Court decision conflicted with Third Circuit precedent. *See, e.g.*, *Chester ex rel N.L.R.B. v. Grane Healthcare Co.*, 666 F.3d 87, 94–96 (3d Cir. 2011) (concluding that district court erred in deciding that two Supreme Court cases "presented a conflict with [this Court's…rulings] sufficient to enable [the Court] to reverse nearly forty years of precedent"); *Smith*, 589 F.3d at 691 (determining that the Supreme Court's decision on causation standard in age-discrimination cases did "not conflict" with this Court's application of the *McDonnell Douglas* standard in such cases). As in these cases, nothing in *Daimler* "forbid[s] [this Court's] adherence to" its decision in *Bane*. *Smith*, 589 F.3d at 691.

This Court's precedent in *Bane* remains good law. The district court was wrong to refuse to follow it.

(2) This panel must follow the Supreme Court's decision in *Pennsylvania Fire*.

Bane isn't the only barrier to Wipro's preferred result. On-point Supreme Court precedent also stands in its way.

Supreme Court decisions are binding on this Court. *See United States v. Mitlo*, 714 F.2d 294, 298 (3d Cir. 1983). And when the Supreme Court has spoken on an issue, this Court must listen, even when the Supreme Court's decision seems to rest on unsteady ground: "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This Court has "always sought to adhere strictly to that counsel." *United States v. Singletary*, 268 F.3d 196, 204–05 (3d Cir. 2001).

Adhering to that counsel in this case requires following *Pennsylvania Fire* and its progeny and finding jurisdiction here. In *Pennsylvania Fire*, the Supreme Court held that registration can confer general jurisdiction through consent. *See* 243 U.S. at 94–96. The Court has neither explicitly nor implicitly overruled *Pennsylvania Fire*. *See Acorda Therapeutics*, 817 F.3d at 768–69 (O'Malley, J., concurring).

Neither *International Shoe* nor the five general-jurisdiction cases the Court has decided since then involved a registration statute or consent-based jurisdiction. Each of these cases concerns when courts can exercise jurisdiction over a *nonconsenting* defendant corporation.

Daimler and the Court's other recent general-jurisdiction cases did not address jurisdiction based on registration statutes. "There is no discussion of registration statutes in *Daimler* and no citation to *Schollenberger, Pennsylvania Fire*, or the cases post-dating those two." *Acorda Therapeutics*, 817 F.3d at 769 (O'Malley, J., concurring). In fact, the Court did not even have occasion to pass judgment on such statutes in *Goodyear* or *Daimler*. In *Goodyear*, the Court observed that Goodyear USA was registered to do business in North Carolina and did not contest the courts' jurisdiction over it, while its foreign subsidiaries were *not* registered in North Carolina and *did* contest jurisdiction. 564 U.S. at 921. In *Daimler*, "the Court had no occasion to consider the rule it laid down in *Pennsylvania Fire* because California—the state where the action at issue was pending—had interpreted its registration statute as one that did not, by compliance with it, give rise to consent to personal jurisdiction." *Acorda Therapeutics*, 817 F.3d at 769 (O'Malley, J., concurring). In *Tyrrell*, by contrast, the plaintiffs *did* contend that the defendant was subject to general jurisdiction in Montana because it had registered there. *See* Brief for Respondents, at 16, 50–51, *BNSF Ry. Co.*

v. Tyrrell, 137 S. Ct. 1549 (2017). But the Supreme Court *expressly declined* to reach that contention because the Montana Supreme Court did not address it. 137 S. Ct. at 1559.

It's equally clear that *Daimler* and the Court's other modern general-jurisdiction cases are not about general jurisdiction premised on consent. In *Tyrrell*, for instance, after concluding that the defendant was not at home in Montana and therefore not subject to general jurisdiction under *Daimler*, the Court remanded so that the Montana Supreme Court could consider whether, as the plaintiffs argued, the defendant had *consented* to general personal jurisdiction *by registering to do business* in Montana. 137 S. Ct. at 1559. That step would have been wholly unnecessary if the Supreme Court had abrogated its prior holdings about jurisdiction by consent through registration.

The Court's decisions in other personal-jurisdiction cases reinforce the conclusion that parties may consent to general jurisdiction. In *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)—a specific-jurisdiction case decided the same day as *Goodyear*—the Court recognized that "consent" can "support [the] exercise of…general jurisdiction." *Id.* at 880–81. And part of the reason that the Court did not have jurisdiction in *Shaffner v. Heitner*, 433 U.S. 186 (1977), was that Delaware had "not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." *Id.* at 216.

Justice Gorsuch's statement in his concurrence in *Ford* about the status of the Court's jurisdiction-by-consent doctrine bolsters the conclusion that parties may consent to general jurisdiction. Justice Gorsuch explained that "[i]t is unclear what remains of the" doctrine, and that some courts consider it to be a relic of the past while others believe it remains alive and well. 141 S. Ct. at 1037 n.3 (Gorsuch, J., concurring). There would be no need to make such a tentative statement about the doctrine and to document lower court disagreement if *Daimler* had abolished it. At *worst*, then, it is an open question whether *Pennsylvania Fire* and the Court's consent doctrine continue to have force. But that is a question the Supreme Court must answer, not this Court: "Although the Supreme Court is free to revisit [*Pennsylvania Fire*] if it so desires, [lower courts] are not. [*Pennsylvania Fire*] is binding precedent unless and until it is abrogated by the Supreme Court." *Lewis v. Alexander*, 685 F.3d 325, 346 n.20 (3d Cir. 2012).

The upshot is straightforward: the Supreme Court has not overruled its case law approving of general personal jurisdiction by consent, including consent through registration. The Court has consistently distinguished between jurisdiction based on consent and jurisdiction based on minimum contacts. And the Court's post-*International Shoe* general-jurisdiction cases have neither addressed registration statutes nor revisited *Pennsylvania Fire* and its progeny.

Simply put, there is no sound basis to conclude that the Court has sub silentio overruled *Pennsylvania Fire* and other cases holding that parties may consent to general jurisdiction through registration.

For all these reasons, this Court remains bound by *Bane* and *Pennsylvania Fire*. Because Wipro consented to general jurisdiction by registering to do business in Pennsylvania, the district court erred in holding that it lacked jurisdiction over Wipro.

III. PENNSYLVANIA'S REGISTRATION STATUTE IS CONSTITUTIONAL EVEN IF *BANE* IS NO LONGER BINDING.

If this Court does reexamine whether Pennsylvania's registration statute is constitutional, the answer is clear: Pennsylvania's registration statute is constitutional. Companies like Wipro voluntarily and knowingly consent to jurisdiction by registering.

The district court concluded that the statute is "inconsistent with due process" because it "[r]equir[es] an entity to choose between being subject to unlimited general personal jurisdiction or not doing business in a state." App.17. And that, the court held, "is simply not a voluntary choice." *Id.*

That conclusion is mistaken. State statutes are entitled to a presumption of constitutionality. *See Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127, 135 (3d Cir. 2000). The district court

turned that presumption on its head in declaring Pennsylvania's registration statute unconstitutional.

Companies may consent to relinquish, or waive, constitutional rights, so long as they do so knowingly and voluntarily. *See Erie Telecommc'ns, Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988); *see also Wellness Int'l Network v. Sharif*, 575 U.S. 665, 685 (2015) (consent must be knowing and voluntary). There is no per se rule against waiver of constitutional rights. *See Erie Telecommcn's*, 853 F.2d at 1099. People and companies do it in and out of court every day. *See, e.g.*, *Patterson v. Illinois*, 487 U.S. 285 (1988) (right to counsel); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (warrantless search); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (due-process rights). Nor is there any "talismanic definition of 'voluntariness.'" *Schneckloth*, 412 U.S. at 224. This Court must consider the totality of the circumstances surrounding the party's choice. *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009). Whether a party has voluntarily consented "depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct'" of the party. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

There is no question that Wipro knowingly agreed to general jurisdiction. The statute makes the link between registration and

jurisdiction clear. 15 Pa. C.S.A. § 411(a); 42 Pa. C.S.A. § 5301(a)(2). The "statute speaks with unusual clarity on the consequences of registering to do business in Pennsylvania." *Aetna Inc. v. Kurtzman Carson Consultants, LLC*, No. 18-470, 2019 WL 1440046, at *6 (E.D. Pa. Mar. 29, 2019); *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 296 (M.D. Pa. 2018) (noting that Pennsylvania is the only state that spells out the jurisdictional consequences of registration). And if that weren't enough, this Court's decision in *Bane* provides clear notice that registration constitutes consent to general jurisdiction. 925 F.2d at 641 (stating that statute gave defendant notice of jurisdiction).

So too did Wipro voluntarily consent to jurisdiction. Begin with the district court's assumption that Pennsylvania requires registration so long as *any* foreign company conducts *any* business in the state. *See* App.17. As explained above, that's incorrect. Many companies are exempt, 15 Pa. C.S.A. §§ 401(b)–(c), 411(a), (g); and so are many forms of corporate activity, *id.* § 403(a). Only certain companies not doing business in interstate or foreign commerce must register, and Pennsylvania leaves it up to companies to decide whether their activities are exempt. *Id*. Many businesses, Wipro likely among them, therefore do not need to register.

For those that do register, it can hardly be said that they do so involuntarily, as a matter of law. It helps to have some context here. In

the nineteenth century, Pennsylvania and other states enacted onerous laws imposing significant penalties on companies that failed to register as foreign corporations. In Pennsylvania, for instance, it was unlawful "for any corporation to do *any* business in the Commonwealth" unless it registered with the state, and any agent of a corporation that failed to register was "guilty of a misdemeanor." Frank Marshall Eastman, *A Treatise on the Law Relating to Private Corporations in Pennsylvania*, 642 (2d ed. 1908) (citing Sec. 1, Act April 22, 1874, P. L. 108) (emphasis added).

The Supreme Court did not permit draconian laws like that to stand. In *Barron v. Burnside*, 121 U.S. 186 (1887), for instance, the Court struck down an Iowa law that similarly criminalized acting as an agent for an unregistered foreign company. *Id.* In the wake of *Barron* and other similar cases, states modernized and moderated their laws governing out-of-state corporations. Many, like Pennsylvania, adopted so-called "door closing statutes," in which companies that fail to register cannot resort to that state's courts. 15 Pa. C.S.A. § 411(b). That penalty is just fine so long as it is not applied to foreign companies present in the state but only doing business in interstate or foreign commerce. *See Aldens, Inc. v. Packel*, 524 F.2d 38, 49–50 (3d Cir. 1975); *Allenberg Cotton*, 419 U.S. at 33–34; *Eli Lilly*, 366 U.S. at 282–84. That is why Pennsylvania expressly exempts interstate and foreign business and many other

corporate activities from registration. 15 Pa. C.S.A. § 403(a). Pennsylvania's law was carefully constructed to tread lightly and to survive constitutional scrutiny.

This history illuminates the fundamental point: foreign corporations do not enjoy an unassailable right to do business in Pennsylvania free from obligations. Registering to do business in Pennsylvania is a choice—a bargain contemplating that the benefits outweigh the costs. Registration brings foreign corporations substantial benefits: registered companies "enjoy the same rights and privileges as a domestic entity." 15 Pa. C.S.A. § 402(d). But being treated on par with domestic companies also comes with burdens, including being subject to general jurisdiction, just like domestic companies. *Id.*

A company deciding whether to make this bargain does not have a gun to its head. It could simply choose not to do business in Pennsylvania. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (noting that a company with clear notice of being subject to suit in a state can "sever[] its connection with the State" "if the risks [of litigation] are too great"). Or it could choose to limit its operations to activities not covered by the registration statute, *e.g.*, foreign and interstate commerce. Or not least, it could choose to do business in Pennsylvania and forgo registration until it calculated that reaching a verdict as a plaintiff was a benefit that outweighed the costs of registration. All of these are

choices, not commands. That a choice involves balancing some measure of benefits and burdens does not make the choice involuntary.

The district court erred in holding that Wipro's consent to general jurisdiction was involuntary. The court decided this as a matter of law, effectively creating a per se rule that a foreign company could not consent to jurisdiction through registration. But there is no per se bar to waiving constitutional rights. *See Erie Telecommc'ns*, 853 F.2d at 1094, 1099; *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 543 (3d Cir. 2017) (in a facial constitutional challenge, the complaining party must show "no set of circumstances exists under which the [law] would be valid" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). And there certainly is no such rule for personal jurisdiction, which has always been understood as "a waivable right." *Burger King*, 471 U.S. at 472 n.14. The district court's decision would make the right non-waivable, but that has never been the law.

Whether a party voluntarily consented to waive a right requires close attention to the facts of the case, "including the background, experience, and conduct" of the party. *Edwards*, 451 U.S. at 482 (quoting *Johnson*, 304 U.S. at 464). And the facts of this case show that Wipro, a sophisticated multi-national company, made a voluntary decision to register to do business in Pennsylvania—*even when* it likely did not have to—and to accept the benefits and burdens that came with that choice.

Cf. Town of Newton v. Rumery, 480 U.S. 386, 393–94 (1987) (holding that sophisticated businessman, represented by counsel, made a voluntary decision to waive right to file Section 1983 suit).

Here, too, the Supreme Court's precedents have long embraced the conclusion that due-process rights bound up with personal jurisdiction can be waived through a voluntary bargain. Part of the justification for the Court's decision in *Pennsylvania Fire* was that the defendant's decision to obtain a license to do business with the state and comply with state procedures—and thereby expose itself to jurisdiction—was "voluntary." 243 U.S. at 96. The Court reaffirmed in *Neirbo* that designating an agent for service of process as part of the state registration process is "a voluntary act." 308 U.S. at 175 (quoting *Pennsylvania Fire,* 243 U.S. at 96). The Court has never deviated from these holdings. To the contrary, the Court "has upheld state procedures"—like those mentioned in *Pennsylvania Fire, Neirbo*, and this case—"which find constructive consent to the personal jurisdiction of the state court in the *voluntary use of certain state procedures*." *Bauxites*, 456 U.S. at 704 (emphasis added). And voluntarily using certain state procedures is just what Wipro did here.

Pennsylvania's statutory regime is constitutional. The district court erred in concluding otherwise.

IV. FEDERAL COURTS MAY EXERCISE PERSONAL JURISDICTION OVER DEFENDANT-EMPLOYERS WITH RESPECT TO AN FLSA COLLECTIVE ACTION AS A WHOLE EVEN WHEN OPT-IN PLAINTIFFS WORKED FOR THE EMPLOYER OUTSIDE THE FORUM STATE.

The district court erred twice by deciding that *Bane* is no longer good law and that Pennsylvania's statutory regime is unconstitutional. The court erred a third time by concluding that *Bristol-Myers* prohibited it from exercising specific jurisdiction over Wipro as to the claims of potential opt-in plaintiffs who worked for Wipro outside Pennsylvania. Nothing in *Bristol-Myers* requires this outcome.[4]

A. Personal Jurisdiction and Rule 4.

Constraints on state and federal courts' authority derive from different constitutional sources: the Fourteenth Amendment's Due Process Clause applies to state court proceedings, while the Due Process Clause of the Fifth Amendment applies to federal courts. This distinction is significant. The Fourteenth Amendment requires minimum contacts with *the state*. *See Bane*, 925 F.2d at 639–41. The Fifth Amendment, by contrast, permits federal courts to exercise jurisdiction if the party has minimum contacts with the *United States as a whole*. *In re Auto.*

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[4] Ruffing has catalogued courts' decisions on this issue in the second addendum to this brief. Although district courts have split roughly evenly, both circuit courts to consider the issue have ruled in favor of employers—though not unanimously. *Canaday v. The Anthem Cos., Inc.*, 9 F.4th 392 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865–66 (8th Cir. 2021). The First Circuit is considering the issue but hasn't yet issued an opinion. *Waters v. Day & Zimmerman NPS, Inc.*, No. 20-1831 (1st Cir.).

Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004). Ruffing and potential opt-in plaintiffs all worked for Wipro in the United States. Nothing in the *Constitution*, then, bars this Court from exercising jurisdiction over Ruffing's nationwide collective action.

The district court purported to find a *subconstitutional* restraint in Rule 4. App.8. Under Rule 4, "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant" if either of two things is true, Fed. R. Civ. P. 4(k)(1): The defendant "is subject to the jurisdiction of a court of general jurisdiction where the district court is located," or when it is "authorized by a federal statute," *id.* 4(k)(1)(A), (C). Rule 4(k)(1)(A) and 4(k)(1)(C) have different jurisdictional consequences. Because 4(k)(1)(A) ties jurisdiction to state-law rules, and because jurisdiction in state courts is limited by the Fourteenth Amendment, when service is made under that rule, a federal court's authority reaches no farther than what the Fourteenth Amendment would permit were the case brought in state court. *See Daimler*, 571 U.S. at 125. When Rule 4(k)(1)(C) applies, by contrast, courts may exercise jurisdiction to the full extent of the Fifth Amendment. *See Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 24 (S.D.N.Y. 1991).

Rule 4 is no barrier to jurisdiction here for three reasons. First, under the FLSA, when the named plaintiff serves process and establishes personal jurisdiction, similarly situated opt-in plaintiffs may join the

case without additional process or jurisdictional analysis under Rule 4. Second, if opt-ins are subject to Rule 4 at all, the better reading is to tie their jurisdictional status to Rule 4(k)(1)(C). This Court would unquestionably have jurisdiction under that rule. Third, even if each opt-in plaintiff must satisfy Rule 4(k)(1)(A)'s personal-jurisdiction requirements, they can do so.

B. *Bristol-Myers* Is Consistent With This Analysis.

Nothing in *Bristol-Myers* is at odds with this analysis.

In *Bristol-Myers*, a group of 678 plaintiffs filed eight separate complaints in California state court against the pharmaceutical company. 137 S. Ct. at 1778. The plaintiffs brought claims under California law regarding alleged injuries that they suffered from taking the drug Plavix. *Id.* Their claims were consolidated before a single district court judge. *Id.* Eighty-six plaintiffs resided in California; the rest lived elsewhere. *Id.* These nonresident plaintiffs alleged no meaningful connection to the state of California. *Id. Bristol-Myers* was not a class or collective action. Instead, the out-of-state residents' proposed basis for jurisdiction centered on the similarity of their claims to those of the California residents. *Id.* at 1779.

Engaging in a "straightforward application…of settled principles of personal jurisdiction," the Court held that California courts did not have specific personal jurisdiction over Bristol-Myers with respect to the

nonresident plaintiffs' claims. *Id.* at 1783. The Court reaffirmed that, under the Fourteenth Amendment's due-process inquiry, specific jurisdiction requires an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id.* at 1781 (quoting *Goodyear*, 564 U.S. at 919). That connection was absent, the Court reasoned, because the "nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id.*

The Court's analysis, while "straightforward," was far from mechanical. The Court reaffirmed that "[i]n determining whether personal jurisdiction is present, a court must consider a variety of interests." *Id.* at 1780. In *Bristol-Myers*, those interests included principles of federalism that would be violated by forcing the defendant to "submit[] to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* The Court thus adopted a flexible approach to the jurisdictional analysis but found the federalism interests "decisive" in that case. *Id.*

C. *Bristol-Myers* Does Not Affect Personal Jurisdiction in Federal Courts in FLSA Collective Actions.

Implicit in the district court's decision is the notion that *Bristol-Myers* established a categorical rule that each claimant—and therefore each opt-in plaintiff, in the case of the FLSA—must demonstrate that the

court has jurisdiction over each claim against the defendant. Nothing in the Fifth or Fourteenth Amendment requires such a rule. Instead, Courts have long adopted a more flexible analysis, recognizing that jurisdictional rules work differently in different areas of the law. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020). *Bristol-Myers* did not purport to change that.

Historically, there are at least three instances in which courts may assert specific jurisdiction over an entire case even though not every claim arises from or relates to the defendant's forum activities: representative actions, multidistrict litigation, and pendent personal jurisdiction.

The first is when, as here, Congress has authorized representative litigation. Even after the Court's decision in *Bristol-Myers*, courts have concluded that they may exercise jurisdiction over out-of-state class members' claims in Rule 23 class actions. *See Lyngaas v. Curaden AG*, 992 F.3d 412, 433 (6th Cir. 2021); *Mussat*, 953 F.3d at 447. Only the claims of the class representative matter for jurisdictional purposes: "Long-standing precedent shows that courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions, and the personal-jurisdiction analysis has focused on the defendant, the forum, and the *named plaintiff*, who is the putative class representative." *Lyngaas*, 992 F.3d at 433. This is true even though the

text of Rule 23 says nothing about personal jurisdiction. *See* Fed. R. Civ. P. 23.

The FLSA is on even better footing in this regard than Rule 23 class actions. Rule 23 is a procedural device applicable to any group of claims meeting the rule's requirements. With the FLSA, by contrast, Congress chose both the representative form and the jurisdictional rules for it: collective actions in which only the named plaintiff counts for jurisdictional purposes. When Congress added the FLSA's opt-in provision in 1947, it "codified the existing rules governing" so-called "spurious class actions"—opt-in representative actions recognized by the contemporaneous version of Rule 23. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 257 (3d Cir. 2012); 7 W. Rubenstein, Newberg on Class Actions § 23.36 (5th ed. 2011). Opt-in plaintiffs in such class actions were not required to independently satisfy the prerequisites of federal jurisdiction. *See* 2 J. Moore & J. Friedman, Moore's Federal Practice § 23.04 (1938), 2241–42. The FLSA's opt-in provision accordingly incorporated this jurisdictional rule. *See Knepper*, 675 F.3d at 257; *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (when Congress legislates in view of "another legal source," the new provision "brings the old soil with it" (citation omitted)). This is no small matter: because there is no *constitutional* bar to federal court jurisdiction in a case like this, what Congress says about jurisdiction controls.

Multidistrict litigation ("MDL") is a second area in which courts can exercise specific jurisdiction over claims with no relation to the state in which the court sits. MDL cases account for more than 50 percent of the federal civil caseload. In multidistrict litigation, cases filed across the country that share any common issue of law or fact are transferred to a single district court. *See* 28 U.S.C. § 1407. Often huge swaths of these cases lack any connection to the forum in which the transferee court sits.

That poses no jurisdictional problem, either. "Transfers under Section 1407 are…not encumbered by considerations of in personam jurisdiction." *See Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010) (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976)). That's because courts read the MDL statute to "authoriz[e] the federal courts to exercise nationwide personal jurisdiction"—even though § 1407 nowhere mentions personal jurisdiction. *Id.* (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987)). *Bristol-Myers* did not change the equation. *In re Delta Dental Antitrust Litig.*, 509 F. Supp.3d 1377, 1380 (J.P.M.L. 2020) ("We are not persuaded that *Bristol-Myers* necessitates unraveling more than forty years of MDL jurisprudence.").

A third example in which courts may assert jurisdiction over an entire case, even when jurisdiction over some of the claims would otherwise be lacking, is the doctrine of pendent personal jurisdiction.

Under that rule, a court can maintain "jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative fact with a claim in the same suit over which the court does have personal jurisdiction." *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *see* 4A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1069.7 (3d ed. 2010) (explaining that pendent personal jurisdiction applies when claims "arise from the same common nucleus of operative fact…[and] involve the same constitutional case"). This Circuit, like most others, has adopted the doctrine. *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555–56 (3d Cir. 1973). And it, like other courts, has continued to rely on it after *Bristol-Myers*. *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105, 123 (3d Cir. 2020).

Bristol-Myers did not overturn these longstanding precedents establishing jurisdiction in these types of cases. There was no rule before *Bristol-Myers*, and there is no rule after it, that each claimant must establish personal jurisdiction over each claim.

D. Opt-In Plaintiffs Are Not Required to Establish Personal Jurisdiction Under Rule 4.

The district court imported its flawed theory of personal jurisdiction into Rule 4, holding that each opt-in plaintiff must establish jurisdiction under Rule 4(k)(1)(A). App.8, 19–20. This interpretation of Rule 4 relies

on mistaken and atextual assumptions about *when* Rule 4(k)(1)(A) applies. Nothing in the text of Rule 4 requires opt-in plaintiffs to separately establish personal jurisdiction.

For FLSA collective actions, *only named plaintiffs* must comply with Rule 4 and establish jurisdiction under it because they are the only ones who serve process. Opt-in plaintiffs do not serve the complaint. *See Brown v. Dunbar & Sullivan Dredging Co.*, 189 F.2d 871, 874–75 (2d Cir. 1951). They file notices of consent. 29 U.S.C. § 216(b). These are "written notice[s]" under Rule 5(a)(1)(E), which must be served consistent with the service requirements of Rule 5 rather than those of Rule 4. *See* Rule 5(b). That's why "[i]n an FLSA collective action…there has never been a requirement that each individual opt-in plaintiff…achieve individual service of process upon the defendant." *Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 3:19-cv-01099, 2020 WL 2473717, at *15 (M.D. Tenn. May 13, 2020). Rules 4 and 5 impose no such obligation.

It's true that opt-ins are parties, *see* 29 U.S.C. § 216(b), but party status doesn't necessarily carry jurisdictional baggage, and it doesn't do so here. There is no textual basis for the district court's assumption that Rule 4 requires anyone who is labeled a party to establish personal jurisdiction through service of process. Rule 4 provides that "[s]erving a summons…establishes personal jurisdiction over a defendant." Fed. R. Civ. P. 4(k). Nowhere does it say that a party must establish personal

jurisdiction when he *doesn't* have to serve a complaint. As the Supreme Court has observed, "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *See Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). And the context and history of the FLSA make clear that opt-in plaintiffs do not factor into the court's jurisdictional analysis even though they are considered parties. *See Knepper*, 675 F.3d at 257.

There's another reason for rejecting the district court's assumption that each opt-in plaintiff must establish personal jurisdiction under Rule 4(k)(1)(A): it does not square with rulemaking authority under the Rules Enabling Act, 28 U.S.C. § 2072. The Act delegates to the courts only the power to prescribe "general rules of practice and procedure." *Id.* § 2072(a). That delegation embraces the authority to establish procedural rules that affect matters outside practice and procedure so long as the rules "really regulate[] procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). But it does not give courts the power to govern jurisdiction and substantive matters directly. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. Rev. 654, 672 (2019).

These principles dictate what may and may not be accomplished through Rule 4. Rule 4(k) can regulate the territorial reach of federal courts when issuing a summons even though service of that summons

establishes personal jurisdiction. *See Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444–46 (1946). That's because the rule "really regulates" service of process and incidentally affects jurisdiction. *Sibbach*, 312 U.S. at 14. But Rule 4 cannot, consistent with the Rules Enabling Act, be read to directly regulate personal jurisdiction when *no service of process* is required from opt-in plaintiffs. Under that reading, what Rule 4 would really—and only—regulate is personal jurisdiction, not procedure at all.

E. Even If Opt-In Plaintiffs Must Establish Personal Jurisdiction Under Rule 4, They May Do So Under Rule 4(k)(1)(C).

Even making the generous assumption that *each opt-in plaintiff* must satisfy Rule 4(k)'s personal-jurisdiction requirements, it does not follow that the requirements they must satisfy are those of Rule 4(k)(1)(A). If opt-ins are subject to Rule 4 at all, the far better reading is to tie their jurisdictional status to Rule 4(k)(1)(C). Under that rule, "[s]erving a summons or filing a waiver of service establishes personal jurisdiction…when authorized by a federal statute."

That rule is satisfied here. Ruffing filed his complaint both on his own behalf and on behalf of a collective of similarly situated employees. App.56. He then filed a waiver of service for himself and the collective that he represented. ECF No. 5. That satisfies Rule 4(k)(1)(C)'s service-of-process requirement. And as explained above, Congress authorized courts to take jurisdiction over opt-in plaintiffs through the FLSA's

collective-action mechanism, which requires them to serve notices of consent under Rule 5, not complaints under Rule 4. 29 U.S.C. § 216(b). That satisfies Rule 4(k)(1)(C)'s requirement that Congress must authorize jurisdiction through a federal statute.

The district court's notion that Rule 4(k)(1)(A), rather than Rule 4(k)(1)(C), applies to the opt-ins' claims relies on an unwarranted assumption: that Rule 4(k)(1)(C) applies *only* when Congress has explicitly authorized nationwide service of process in the underlying statute. *See* App.8, 17. There is no textual basis for that contention. Rule 4(k)(1)(C) says nothing about nationwide service of process. Under the rule, a court may assert jurisdiction so long as there is congressional authorization for it. The FLSA provides such authorization.

F. Opt-in Plaintiffs in FLSA Collective Actions Can Establish Personal Jurisdiction Under the Fourteenth Amendment.

Finally, even if each opt-in plaintiff must satisfy Rule 4(k)(1)(A)'s personal-jurisdiction requirements, Wipro's argument that out-of-state opt-in plaintiffs cannot establish personal jurisdiction does not follow.

First, the absence of any meaningful federalism concerns would permit a state court (and therefore also a federal court) to adjudicate a collective action that includes out-of-state opt-in plaintiffs. *Bristol-Myers*' plaintiff-by-plaintiff mode of analysis stemmed from the federalism concerns that animated the decision. *See* 137 S. Ct. at 1780–81. Personal-

injury tort cases are paradigmatically creatures of state law. When, as in *Bristol-Myers*, one state's courts presume to resolve state-law tort claims for plaintiffs injured across the country, interstate-federalism concerns loom especially large. But the federalism concerns that proved decisive in *Bristol-Myers* are "wholly inapplicable" to cases arising under the FLSA. *Hager v. Omnicare, Inc.*, No. 5:19-cv-00484, 2020 WL 5806627, at *6 (S.D. W. Va. Sept. 29, 2020).

Second, the claims of opt-in plaintiffs relate to Wipro's unlawful employment practices in Pennsylvania, thereby satisfying the requirements of the Due Process Clause of the Fourteenth Amendment.

In light of the FLSA's unique collective-action procedure, the claims of any out-of-state opt-in plaintiffs "relate[] to the defendant's contacts with the forum." *Nicastro*, 564 U.S. at 881. With respect to the level of relatedness required, *Bristol-Myers* reaffirmed that "a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction." 137 S. Ct. at 1781 (quoting *Walden*, 571 U.S. at 286). But unlike the out-of-state plaintiffs in *Bristol-Myers*, opt-in plaintiffs who worked for Wipro outside Pennsylvania can point to far more than Wipro's "relationship with a third party." *Id.* Congress has the power to "define[]…legal relationships." *Goldstein v. California*, 412 U.S. 546, 570 n.28 (1973). Congress has done so here by authorizing similarly situated employees to band together in a single collective action, with one

employee representing the rest. 29 U.S.C. § 216(b). Given that congressional judgment, there is "an affiliation between the forum and the underlying controversy." *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919).

Opt-in plaintiffs can also establish personal jurisdiction under the doctrine of pendent personal jurisdiction. Collective actions are single, unified cases with a common nucleus of operative fact. Only "similarly situated" employees, after all, may proceed in a collective action. 29 U.S.C. § 216(b). And the FLSA's repeated use of the singular term "action" demonstrates Congress's understanding that the named plaintiff's and opt-ins plaintiffs' claims jointly constitute a single constitutional case. *Id.* Pendent personal jurisdiction over the opt-in plaintiffs' claims is therefore appropriate here. *See Laurel Gardens*, 948 F.3d at 123.

For these reasons, there is no sound basis to extend *Bristol-Myers* to FLSA collective actions.

CONCLUSION

The district court's judgment should be reversed.

Dated: October 27, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,994 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

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Dated: October 27, 2021

s/ Adam W. Hansen
Adam W. Hansen

ADDENDUM 1: PENNSYLVANIA DISTRICT COURT DECISIONS ABOUT WHETHER *BANE* REMAINS CONTROLLING AUTHORITY

Case Citation	*Bane* remains controlling authority
Bogle v. JD Techs., Inc., No. 21-CV-00319-MJH, 2021 WL 3021974 (W.D. Pa. July 16, 2021), *vacated in part*, 2021 WL 3472151 (Aug. 6, 2021)	Yes
Data v. A.O. Smith Corp., No. 19-CV-879, 2021 WL 1566336 (W.D. Pa. Feb. 11, 2021), *report & recommendation adopted in relevant part by*, *Data v. Pa. Power Co.*, 2021 WL 1115876 (Mar. 24, 2021)	Yes
Rehman v. Etihad Airways, No. 19-653, 2019 WL 12095413 (Nov. 14, 2019), *report and recommendation adopted,* 2021 WL 780302 (Mar. 1, 2021)	Yes
Tupitza v. Texas Roadhouse Mgmt. Corp., No. 20-CV-2, 2020 WL 7586889 (W.D. Pa. Dec. 17, 2020)	Yes
Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607 (E.D. Pa. Nov. 23, 2020)	Yes
Replica Auto Body Panels & Auto Sales Inc. v. inTech Trailers Inc., 454 F. Supp. 3d 458 (M.D. Pa. 2020)	Yes
Kraus v. Alcatel-Lucent, 441 F. Supp. 3d 68 (E.D. Pa. 2020)	Yes
Winters v. Akzo Nobel Surface Chemistry, No. 19-5398, 2020 WL 2474428 (E.D. Pa. May 13, 2020)	Yes
Smith v. NMC Wollard, Inc., No. 19-5101, 2020 WL 1975074 (E.D. Pa. April 24, 2020)	Yes
Berk v. Equifax, Inc., No. 19-4629, 2020 WL 868128 (E.D. Pa. Feb. 21, 2020)	Yes

Sciortino v. Jarden, Inc., 395 F. Supp. 3d 429 (E.D. Pa. 2019)	Yes
Healthcare Servs. Grp., Inc. v. Moreta, No. 19-2260, 2019 WL 6117353 (E.D. Pa. Nov. 15, 2019)	Yes
Williams v. Takeda Pharm. Am., Inc., No. 18-4774, 2019 WL 2615947 (E.D. Pa. June 26, 2019)	Yes
Aetna Inc. v. Kurtzman Carson Consultants, LLC, Civ. A. No. 18-470, 2019 WL 1440046 (E.D. Pa. Mar. 29, 2019)	Yes
Gorton v. Air & Liquid Sys. Corp., Civ. A. No. 1:17-1110, 2019 WL 757945 (M.D. Pa. Feb. 20, 2019)	Yes
Youse v. Johnson & Johnson, No. 18-cv-3578, 2019 WL 233884 (E.D. Pa. Jan. 16, 2019)	Yes
Behrens v. Arconic, Inc., 429 F. Supp.3d 43 (E.D. Pa. 2019)	Yes
Gorton v. Air & Liquid Sys. Corp., 303 F. Supp. 3d 278 (M.D. Pa. 2018)	Yes
Shipman v. Aquatherm L.P., No. CV 17-5416, 2018 WL 6300478 (E.D. Pa. Nov. 28, 2018)	Yes
Aetna Inc. v. Mednax, Inc., No. CV 18-2217, 2018 WL 5264310 (E.D. Pa. Oct. 23, 2018)	Yes
Mendoza v. Electrolux Home Prods., Inc., No. 15-cv-00371, 2018 WL 3973184 (M.D. Pa. Aug. 20, 2018)	Yes
Allstate Ins. Co. v. Electrolux Home Prods., No. 18-cv-00699, 2018 WL 3707377 (E.D. Pa. Aug. 3, 2018)	Yes
Pager v. Metropolitan Edison, No. 17-cv-00934, 2018 WL 491014 (M.D. Pa. Jan. 19, 2018)	Yes
Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., No. 16-665, 2017 WL 3129147 (E.D. Pa. July 24, 2017)	Yes

Hegna v. Smitty's Supply, Inc., No. 16-3613, 2017 WL 2563231 (E.D. Pa. June 13, 2017)	Yes
Bors v. Johnson & Johnson, 208 F. Supp. 3d 648 (E.D. Pa. 2016)	Yes
Ruffing v. Wipro Ltd., No. 20-5545, 2021 WL 1175190 (E.D. Pa. March 29, 2021)	No
Reynolds v. Turning Point Holding Co., LLC, No. 19-cv-01935-JDW, 2020 WL 953279 (E.D. Pa. Feb. 26, 2020)	No
Fend v. Allen-Bradley Co., No. 17-CV-01701, 2019 WL 6242119 (E.D. Pa. Nov. 20, 2019)	No
Sullivan v. A.W. Chesterton, Inc. (In re Asbestos Prods. Liability Litig.), 384 F. Supp. 3d 532 (E.D. Pa. 2019)	No

ADDENDUM 2: DISTRICT AND CIRCUIT COURT DECISIONS ADDRESSING WHETHER *BRISTOL-MYERS* PROHIBITS FEDERAL COURTS FROM EXERCISING JURISDICTION OVER AN FLSA COLLECTIVE ACTION

Case Citation	Prevailing Party
Canaday v. The Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021)	Defendant
Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861 (8th Cir. 2021)	Defendant
Bone v. XTO Energy, Inc., No. 2:20-CV-00697, 2021 WL 4307130 (D.N.M. Sept. 22, 2021)	Defendant
Parker v. IAS Logistics DFW, LLC, No. 20 C 5103, 2021 WL 4125106 (N.D. Ill. Sept. 9, 2021)	Defendant
Carlson v. United Natural Foods, Inc., No. C20-5476, 2021 WL 3616786 (W.D. Wash. Aug. 14, 2021)	Defendant
Butler v. Adient US, LLC, No. 3:20 CV 2365, 2021 WL 2856592 (N.D. Ohio July 8, 2021)	Defendant
Arends v. Select Med. Corp., No. 20-11381, 2021 WL 4452275 (C.D. Cal. July 7, 2021)	Plaintiffs
Myres v. Hopebridge, LLC, No. 2:20-CV-5390, 2021 WL 2659955 (S.D. Ohio June 29, 2021)	Plaintiffs
Perez v. Escobar Construction, Inc., No. 20 Civ. 8010, 2021 WL 2012300 (S.D.N.Y. May 20, 2021)	Defendant
Harapeti v. CBS Television Stations, Inc., No. 20-CV-20961, 2021 WL 1854141 (S.D. Fla. May 10, 2021)	Plaintiffs
Martinez v. Tyson Foods, Inc., No. 4:20-cv-00528, 2021 WL 1289898 (N.D. Tex. Apr. 7, 2021)	Defendant

Ruffing v. Wipro Ltd., No. 20-5545, 2021 WL 1175190 (E.D. Pa. Mar. 29, 2021)	Defendant
Goldowsky v. Exeter Fin. Corp., No. 15-CV-632A(F), 2021 WL 695063 (W.D.N.Y. Feb. 23, 2021)	Defendant
Fischer v. Fed. Express Corp., No. 5:19-cv-04924, 2020 WL 7640881 (E.D. Pa. Dec. 23, 2020)	Defendant
Hodapp v. Regions Bank, No. 4:18CV1389, 2020 WL 7480562 (E.D. Mo. Dec. 18, 2020)	Defendant
Altenhofen v. Energy Transfer Partners, No. 20-200, 2020 WL 7336082 (W.D. Pa. December 14, 2020)	Plaintiffs
Hutt v. Greenix Pest Control, LLC, No. 2:20-cv-1108, 2020 WL 6892013 (S.D. Ohio Nov. 24, 2020)	Defendant
Greinstein v. Fieldcore Servs. Sols., LLC, No. 2:18-CV-208, 2020 WL 6821005 (N.D. Tex. Nov. 20, 2020)	Defendant
Hager v. Omnicare, Inc., No. 5:19-cv-00484, 2020 WL 5806627 (S.D. W. Va. Sept. 29, 2020)	Plaintiffs
Weirbach v. The Cellular Connection, LLC, No. 5:19-cv-05310, 2020 WL 4674127 (E.D. Pa. Aug. 12, 2020)	Defendant
Chavez v. Stellar Managment Grp. VII, LLC, No. 19-cv-01353-JCS, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020)	Plaintiffs
McNutt v. Swift Transp. Co. of Arizona, LLC, No. C18-5668, 2020 WL 3819239 (W.D. Wash. July 7, 2020)	Defendant
O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591 (S.D. W.Va. 2020)	Plaintiffs
Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455 (D. Mass. 2020)	Plaintiffs

Hammond v. Floor & Decor Outlets of Am., Inc., No. 3:19-cv-01099, 2020 WL 2473717 (M.D. Tenn. May 13, 2020)	Plaintiffs
Aiuto v. Publix Super Mkts., Inc., No. 1:19-cv-04803, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020)	Plaintiffs
White v. Steak N Shake, Inc., No. 4:20 CV 323 CDP, 2020 WL 1703938 (E.D. Mo. Apr. 8, 2020)	Defendant
Camp v. Bimbo Bakeries USA, Inc., No. 18-cv-378-SM, 2020 WL 1692532 (D.N.H. Apr. 7, 2020)	Defendant
Warren v. MBI Energy Servs., Inc., No. 19-0800, 2020 WL 937420 (D. Colo. Feb. 23, 2020)	Plaintiffs
Vallone v. The CJS Sols. Grp., LLC, No. 19-1532, 2020 WL 568889 (D. Minn. Feb. 5, 2020)	Defendant
Turner v. Concentrix Servs., Inc., No. 1:18-1702, 2020 WL 544705 (W.D. Ark. Feb. 3, 2020)	Plaintiffs
Canaday v. The Anthem Cos., 439 F. Supp. 3d. 1042 (W.D. Tenn. 2020) *report and recommendation adopted*, 441 F. Supp. 3d 644 (W.D. Tenn. 2020)	Defendant
Fritz v. Corizon Health, Inc., No. 6:19-CV-03365-SRB, 2020 WL 9215899 (W.D. Mo. Jan. 31, 2020)	Plaintiffs
Hunt v. Interactive Med. Specialists, Inc., No. 1:19CV13, 2019 WL 6528594 (N.D. W. Va. Dec. 4, 2019)	Plaintiffs
Pettenato v. Beacon Health Options, Inc., No. 19-1646, 2019 WL 5587335 (S.D.N.Y. Oct. 25, 2019)	Defendant
Meo v. Lane Bryant, Inc., No. CV 18-6360 (JMA) (AKT), 2019 WL 5157024 (E.D.N.Y. Sept. 30, 2019)	Plaintiffs
Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029-ADB, 2019 WL 4769101 (D. Mass. Sept. 30, 2019)	Defendant

Mason v. Lumber Liquidators, Inc., No. 17-CV-4780 (MKB) (RLM), 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019)	Plaintiffs
Turner v. UtiliQuest, LLC, No. 3:18-cv-00294, 2019 WL 7461197 (M.D. Tenn. July 16, 2019)	Defendant
Rafferty v. Denny's, Inc., No. 5:18-cv-2409, 2019 WL 2924998 (N.D. Ohio July 8, 2019)	Defendant
Saenz v. Old Dominion Freight Line, Inc., No. 1:18-cv-4718-TCB, 2019 WL 6622840 (N.D. Ga. June 7, 2019)	Plaintiffs
Gibbs v. MLK Express Servs., LLC, No. 2:18-cv-434, 2019 WL 1980123 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, rejected in part*, 2019 WL 2635746 (M.D. Fla. June 27, 2019)	Plaintiffs
Maclin v. Reliable Reports of Tex., Inc., 314 F. Supp. 3d 845 (N.D. Ohio 2018)	Defendant
Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43 (D. Mass. 2018)	Defendant
Garcia v. Peterson, 319 F. Supp. 3d 863 (S.D. Tex. 2018)	Plaintiffs
Seiffert v. Qwest Corp., No. CV-18-70-GF-BMM, 2018 WL 6590836 (D. Mont. Dec. 14, 2018)	Plaintiffs
Swamy v. Title Source, Inc., No. C 17-01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017)	Plaintiffs
Thomas v. Kellogg Co., No. C13-5136RBL, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017)	Plaintiffs

CERTIFICATE OF THIRD CIRCUIT BAR MEMBERSHIP

I hereby certify that at least one of the attorneys whose names appear on the brief is a member of the bar of this Court.

Dated: October 27, 2021

s/ Adam W. Hansen
Adam W. Hansen

Case No. 21-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID RUFFING,

Appellant,

v.

WIPRO, LTD.,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (Case No. 2:20-cv-05545-HB)
The Honorable Harvey Bartle III

APPELLANT'S APPENDIX VOLUME 1 of 2 (pp. 1–26)

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CERTIFICATE OF SERVICE..

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CCO-076

No. 21-8024

DAVID RUFFING, on behalf of himself and those similarly situated,
Petitioner

v.

WIPRO LIMITED

(E.D. Pa. No. 2-20-cv-05545)

Present: RESTREPO, MATEY and SCIRICA, Circuit Judges

1. Permission by Petitioner to Appeal under 28 U.S.C. Section 1292(b) by Petitioner David Ruffing;

2. Addendum to Petition for Permission to Appeal;

3. Response.

Respectfully,
Clerk/pdb

ORDER

The foregoing petition to appeal under 28 U.S.C. Section 1292(b) is GRANTED.

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: July 29, 2021
PDB/cc: All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUFFING	:	CIVIL ACTION
	:	
v.	:	
	:	
WIPRO LIMITED	:	NO. 20-5545
	:	
	:	

ORDER

AND NOW, this 29th day of March, 2021, for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that:

(1) The motion of defendant Wipro Limited to dismiss Counts I and II of plaintiff’s amended complaint for lack of personal jurisdiction is GRANTED to the extent that plaintiff seeks to bring a collective action under the Fair Labor Standards Act (“FLSA”) on behalf of individuals not employed by defendant in Pennsylvania.

(2) The motion of defendant to dismiss Count II of plaintiff’s amended complaint for failure to state a claim under the FLSA is DENIED.

(3) The motion of defendant to dismiss plaintiff’s class allegations under the Pennsylvania Wage Payment and Collection Law is DENIED without prejudice.

(4) The motion of defendant to dismiss Count V for failure to exhaust administrative remedies under the Pennsylvania Human Relations Act is GRANTED without prejudice.

BY THE COURT:

/s/ Harvey Bartle III

______________________________ J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUFFING	:	CIVIL ACTION
	:	
v.	:	
	:	
WIPRO LIMITED	:	NO. 20-5545

MEMORANDUM

Bartle, J. March 29, 2021

Plaintiff David Ruffing has sued defendant Wipro Limited for violations of: (1) the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 et seq.; (2) the Pennsylvania Wage Payment and Collection Law ("PWPCL"), 43 Pa. Cons. Stat. §§ 260.1 et seq.; (3) the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. §§ 951 et seq.; (4) the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq.; and (5) the Civil Rights Act of 1866 ("CRA"), 42 U.S.C. §§ 2000e et seq. Plaintiff brings a collective action under the FLSA and a putative class action under the PWPCL on behalf of himself and other similarly situated individuals who are or were employed by defendant as non-exempt data center employees in the three years prior to the filing of this action.

Defendant moves to dismiss for lack of personal jurisdiction the FLSA claims in Counts I and II of the amended complaint insofar as those claims include employees of defendant

who work or worked outside of Pennsylvania. Defendant also seeks dismissal of: (1) Count II for failure to state a cognizable FLSA claim; (2) the class claims under the PWPCL in Count III for failure to plead impracticability of joinder and numerosity; and (3) Count V for failure to exhaust administrative remedies under the PHRA.

I

The following facts pleaded in the amended complaint are taken in the light most favorable to plaintiff. He is a sixty-one year-old white male residing in Pennsylvania. Defendant is an Indian information technology corporation with its principal place of business in Bangalore, India. Defendant employs over 180,000 individuals worldwide and does business in West Norriton, Pennsylvania where plaintiff worked until 2019.

Plaintiff was employed as a Senior Operations Analyst for Quest Diagnostics for thirty years with high performance reviews. In October 2013, Quest "outsourced" its West Norriton data center to defendant. He remained as a Senior Operations Analyst employed by defendant and continued to receive excellent performance reviews. His rate of pay was $37.57 per hour, plus overtime, which totaled approximately $100,000 per year.

Plaintiff avers he and other employees routinely worked in excess of forty hours a week to operate the data center and had contracts with defendant to be paid at specified

hourly rates including federally-mandated overtime. Defendant implemented a cumbersome manual timekeeping system to track overtime hours which required employees to request pre-approval from management before working overtime and then to log that time into a system in one-hour increments. This system was not conducive to these requirements when employees had to stay late unexpectedly without the ability to request pre-approval or when they worked overtime that was shorter than a one-hour shift. In addition, defendant frequently paid employees late for overtime work.

In 2019 plaintiff complained in writing to management and the payroll department about the failure to pay employees for overtime in a timely manner. Defendant changed the method for recording overtime work and accused plaintiff of not working the hours he had recorded. An investigation showed no evidence to support defendant's accusation. Plaintiff continued working overtime but went uncompensated for this work.

Shortly after plaintiff complained about the overtime system, defendant hired a non-white employee in his twenties and assigned him to plaintiff's shift for plaintiff to train. Once the new employee was trained, defendant terminated plaintiff's employment in August 2019 without any explanation and replaced him with the new employee. Plaintiff avers that weeks after he was fired he asked his former manager the reason for his

termination. His manager informed him that defendant only wants to hire young people.

Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). On August 7, 2020, the EEOC issued plaintiff a notice of his right to sue. He filed his Charge of Discrimination with the PHRC in June 2020 and has not yet received a right to sue letter.[1]

II

Defendant first moves to dismiss the FLSA claims for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure to the extent the claims are asserted on behalf of employees of defendant who work or worked outside of Pennsylvania. When personal jurisdiction is challenged, the plaintiff bears the burden of showing that personal jurisdiction exists. Marten v. Godwin, 499 F.3d 290, 295-96 (3d Cir. 2007). At this stage the plaintiff must establish only "a prima facie case of personal jurisdiction" and is entitled to have his allegations taken as true and all factual disputes drawn in his favor. Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d

1. Plaintiff states the undisputed facts concerning the date of the filing of the PHRC complaint and the failure to receive a right to sue letter in his opposition to defendant's motion to dismiss.

Cir. 2004). Nonetheless, the plaintiff must allege "specific facts" rather than vague or conclusory assertions. Marten, 499 F.3d at 298.

Rule 4(k) of the Federal Rules of Civil Procedure sets forth the territorial limits for effective service. It provides in relevant part:

> (1) Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> > (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.[2]

Since no other provision of Rule 4(k) is applicable, service in an action under the FLSA and thus personal jurisdiction of this court can extend no further than the permissible limits of personal jurisdiction of the state where this court sits. See Daimler AG v. Bauman, 571 U.S. 117, 125 (2014). As the Supreme Court has stated, "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction." Id.

The law of Pennsylvania, the forum state, provides for personal jurisdiction coextensive with that allowed by the Due

2. Rule 4(k)(1)(C) provides that service of a summons establishes personal jurisdiction "when authorized by a federal statute." The FLSA does not reference service of process. See Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 551 (E.D. Pa. 2020). Thus, the court must look to Rule 4(k)(1)(A).

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Process Clause of the United States Constitution. 42 Pa. Cons. Stat. Ann. § 5322(b). Thus, the court must determine the extent to which the Due Process Clause of the Fourteenth Amendment would allow Pennsylvania courts to exercise personal jurisdiction in this action.

Under the Due Process Clause of the Fourteenth Amendment, a state court may exercise personal jurisdiction only over defendants who have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Due process gives rise to two recognized categories of personal jurisdiction: general jurisdiction, or "all-purpose" jurisdiction, and specific jurisdiction, or "case-linked" jurisdiction. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1779-80 (2017).

"A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State." Id. at 1780. The Supreme Court has held that "the paradigm forum for the exercise of general jurisdiction" over a corporation is "one in which the corporation is fairly regarded as at home." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011). A corporation is at home in the state where it was incorporated,

has its principal place of business, or, "in an exceptional case," where its operations "may be so substantial and of such a nature as to render the corporation at home in that State." Daimler, 571 U.S. at 137, 139 n.19.

Specific jurisdiction, on the other hand, exists when the suit arises out of or relates "to the defendant's contacts with the forum." Bristol-Myers Squibb, 137 S. Ct. at 1780. The Supreme Court explained that "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" Id. (quoting Goodyear, 564 U.S. at 919).

The FLSA sets forth minimum wage requirements and maximum hour limitations for work as well as provisions for overtime pay. 29 U.S.C. §§ 206, 207. To enforce these rights under the FLSA, an employee may bring an action against his employer "in behalf of himself . . . and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party." 29 U.S.C. § 216(b). Unlike class actions brought under Rule 23 of the Federal Rules of Civil Procedure, a person seeking to participate in a FLSA collective action must affirmatively opt-in through written consent. Halle v. W. Penn

Allegheny Health Sys. Inc., 842 F.3d 215, 224-25 (3d Cir. 2016). There is no opt-out procedure.

The mere act of filing a complaint in a FLSA collective action "does not automatically give rise to the kind of aggregate litigation provided for in Rule 23" since it relies on "the affirmative participation of opt-in plaintiffs." Id. at 224. The requirement for potential plaintiffs to opt-in "is the most conspicuous difference between the FLSA collective action device and a class action under Rule 23." Id. at 225. Those who opt-in to the FLSA collective action become actual parties to the litigation unlike class members in a Rule 23 action.[3] Id.

Defendant argues that any claims on behalf of employees who do not work or did not work in Pennsylvania should be dismissed because general personal jurisdiction does not exist. It stresses that it is not incorporated in the Commonwealth, does not have its principal place of business here, and does not meet the high bar as an "exceptional case."

3. Plaintiff argues that it is premature to deal with personal jurisdiction of non-Pennsylvania persons who have not yet opted in. The court is not persuaded. The issue of personal jurisdiction is properly raised at this stage before defendant files an answer. As stated in Rule 12(b), "[a] motion asserting any of these defenses [including a motion for lack of personal jurisdiction] must be made before pleading if a responsive pleading is allowed." See Vallone v. CJS Solutions Grp., LLC, 437 F. Supp. 3d 687, 690-91 (D. Minn. 2020).

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Plaintiff does not challenge these facts. Instead, he counters that defendant has registered to do business in Pennsylvania and has thus consented under Pennsylvania law to the exercise of general personal jurisdiction over all claims against it. Section 5301 of title 42 of the Pennsylvania Consolidated Statutes states that registration as a foreign corporation "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction." 42 Pa. Cons. Stat. Ann. § 5301(a). The crucial question is whether defendant's registration to do business in Pennsylvania passes muster under due process so as to subject it to suit in this court for FLSA claims of individuals who are not or were not employed by defendant in Pennsylvania and thus suffered no loss here.

Plaintiff relies on the decision of our Court of Appeals in Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991). There the plaintiff brought suit in the Eastern District of Pennsylvania against his former employer for firing him in violation of the ADEA. None of the defendant's conduct in question occurred in Pennsylvania, and Pennsylvania was not its state of incorporation or the location of its principal place of business. It merely sold products in the Commonwealth, and its employees occasionally travelled to the state on business. The Court of Appeals held that "Pennsylvania law explicitly states

that the qualification of a foreign corporation to do business is sufficient contact to serve as the basis for the assertion of personal jurisdiction." Id. at 640. It explained that registering to do business in Pennsylvania "carries with it consent to be sued in Pennsylvania courts." Id.

A seismic change has taken place in the world of personal jurisdiction in the thirty years since Bane was decided. In 2014 the Supreme Court issued a landmark decision on general personal jurisdiction in Daimler AG v. Bauman. 571 U.S. at 121. That action asserting claims under both federal and state law had been brought in a federal district court in California. Like Pennsylvania, California has a statute extending personal jurisdiction as far as allowed under the Constitution. The Court held that except in very narrow circumstances the Due Process Clause of the Fourteenth Amendment precludes a district court from exercising general personal jurisdiction over a foreign corporation for both federal and state law claims where the underlying events occurred entirely outside the forum state.

The Court reiterated its 2011 holding in Goodyear Dunlop Tires Operations, S.A. v. Brown that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." Id. at 137; see also Goodyear, 564 U.S. at 929. As noted above, a defendant is only subject to

a court's general personal jurisdiction in those states in which it is "at home," which, for a corporation, is the state of incorporation or its principal place of business, unless there are exceptional circumstances where the corporation's operations are "so substantial and of such a nature as to render the corporation at home in that State." Id. at 139, 139 n.19.

The sole example of an "exceptional case" cited by the Court was Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). Perkins involved a suit filed in an Ohio state court against a Filipino-based company which had ceased operations in the Philippines during the Japanese occupation during World War II, and at the time the suit was filed, the head of the company was directing all of the company's activities from Ohio. The conduct involved in the lawsuit did not relate to the company's activities in Ohio. The Court found that Ohio could be considered the company's "surrogate for the place of incorporation or head office." Daimler, 571 U.S. at 130 n.8. Perkins is not applicable here.

In the wake of Daimler, the question remains whether Bane continues to be controlling law. Our Court of Appeals has not spoken on the issue of Pennsylvania's consent law since Bane, and district courts in this circuit are divided.[4]

4. A number of other courts in this district have continued to follow Bane. See e.g., Kraus v. Alcatel-Lucent, 441 F. Supp. 3d

This court finds persuasive Judge Robreno's decision in Sullivan v. A.W. Chesterton, Inc., 384 F. Supp. 3d 532 (E.D. Pa. 2019), a personal injury action brought in the Eastern District of Pennsylvania on behalf of a decedent against various defendants for his exposure to asbestos. The plaintiff alleged that the exposure took place aboard a Naval ship outside of Pennsylvania. One defendant moved for dismissal for lack of personal jurisdiction since it was incorporated and had its principal place of business in Virginia. Plaintiff argued that defendant had consented to jurisdiction under Pennsylvania law because it was registered to do business there. Sullivan held that the Pennsylvania law offended due process. It concluded that Bane was irreconcilable with Daimler and should not be followed. It reasoned that since the statutory scheme is mandatory in order to conduct business in Pennsylvania defendant's consent was not voluntary and was therefore "not true consent at all." Id. at 542.

This court recognizes, as does Sullivan, that district courts are bound to follow precedent of the Court of Appeals unless a later Supreme Court decision supersedes it. Our Court of Appeals explained in Planned Parenthood of Southeastern

68 (E.D. Pa. 2020); Sciortino v. Jarden, Inc., 395 F. Supp. 3d 429 (E.D. Pa. 2019); Aetna Inc. v. Kurtzman Carson Consultants, LLC, 2019 WL 1440046 (E.D. Pa. March 29, 2019).

Pennsylvania v. Casey that "[a]s a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test." 947 F.2d 682, 691-92 (3d Cir. 1991). However, when the Supreme Court replaces a constitutional standard under which a previous decision was rendered, "decisions reached under the old standard are not binding." Id. at 697-98. It reiterated "a change in the legal test or standard governing a particular area is a change binding on lower courts that makes results reached under a repudiated legal standard no longer binding." Id. at 698.

The Supreme Court in Daimler limited the contours of general personal jurisdiction under the Due Process Clause of the Fourteenth Amendment over a foreign defendant to "a limited set of affiliations with a forum" so that a defendant is only subject to suit based on general jurisdiction in those states in which it is at home. Daimler, 571 U.S. at 137. Except for "an exceptional case," not relevant here, a defendant is at home only where it is incorporated or has its principal place of business. Id. at 139. Daimler repudiated the rule that general personal jurisdiction existed whenever a corporation's contacts with a state were "continuous and systematic." See Int'l Shoe, 326 U.S. at. 317. That was the standard for general personal jurisdiction that Bane recognized, although Bane did not rule based on that standard in light of the Pennsylvania consent

statute. As the standard for determining general personal jurisdiction has changed since Bane was decided, we agree that Bane is no longer binding on this court.

Daimler, it is true, did not deal with the issue of a state "consent" statute such as exists in Pennsylvania. Nonetheless, in our view the validity of such a statute would totally undermine Daimler. The Supreme Court's decision limiting general personal jurisdiction would become virtually meaningless if a state can mandate the exercise of general personal jurisdiction over every entity doing business within its borders simply because the entity has registered to do business there. Parties, of course, may agree to a forum selection clause in a contract or waive the defense of personal jurisdiction. See Ins. Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-07 (1982). These acts of course are voluntary. That is not what happened here. Requiring an entity to choose between being subject to unlimited general personal jurisdiction or not doing business in a state is simply not a voluntary choice and is inconsistent with due process. See Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016).

This court is also mindful of the international ramifications of exercising general personal jurisdiction over the defendant, which is an Indian corporation with its principal

place of business in that country. The Supreme Court noted in Daimler that "the transnational context of this dispute bears attention" and that the Court of Appeals for the Ninth Circuit failed to heed "the risks to international comity" by subjecting a foreign corporation to its "expansive view of general jurisdiction." Id. at 140-41.

The Supreme Court noted in Bristol-Myers Squibb Co. v. Superior Court of California that restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States" and that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[5] 137 S. Ct. at 1780-81. Personal jurisdiction is not a matter of convenience of the parties or a matter of judicial economy. As the Supreme Court has stated, "'the primary concern' is 'the burden on the defendant.'" Id. at 1780 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

5. Bristol-Myers Squibb was an appeal from the California Supreme Court and thus discussed the limitations of the Fourteenth Amendment on personal jurisdiction in the context of a state's courts. 137 S. Ct. at 1779. The Supreme Court in Daimler, however, also applied the principles of the Due Process Clause of the Fourteenth Amendment to a federal district court in limiting the district court's general personal jurisdiction. 571 U.S. at 120-21.

Accordingly, this court finds that it lacks general personal jurisdiction to the extent that plaintiff brings claims under the FLSA on behalf of any persons not employed and thus not harmed by defendant in Pennsylvania.

III

Plaintiff further argues that the limitations of Bristol-Myers Squibb on specific personal jurisdiction should not apply to the FLSA because the FLSA is a class action in which the named plaintiff is representing all those who are similarly situated, regardless of where their losses took place. This argument is without merit. As noted above, the FLSA is not a class action as understood under Rule 23. Under the FLSA, individuals must opt-in to the lawsuit to participate, and when they do so, they become named party plaintiffs and are bound by the outcome. Halle, 842 F.3d at 225; Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544 (E.D. Pa. 2020).

We see no reason why the due process analysis in Bristol-Myers Squibb for personal jurisdiction should not apply to the FLSA. Contrary to plaintiff's position, collective actions will not be curtailed so long as there is compliance with due process. It must be remembered that limits on personal jurisdiction are designed primarily to protect defendants and not to promote the convenience of plaintiffs. Bristol-Myers Squibb, 137 S. Ct. at 1779.

Moreover, the FLSA does not include any provision for nationwide service of process unlike, for example, the Clayton Act. See 15 U.S.C. § 22. As the district court noted in Weirbach v. Cellular Connection, LLC, "Congress did not intend to subject employers to nationwide collection actions wherever they had employees" as it had provided under other statutes. 478 F. Supp. 3d at 551-52. In light of the due process limitations on personal jurisdiction set forth in Daimler and subsequently in Bristol-Myers Squibb, we agree with Weirbach that due process prohibits the exercise of specific personal jurisdiction over defendant to resolve claims of its employees who suffered harm outside of Pennsylvania.

IV

Defendant seeks to dismiss Count II of plaintiff's amended complaint for violation of the FLSA for "failure to pay wages." Defendant argues that Count I of the amended complaint already provides a separate cause of action for alleged overtime violations while Count II impermissibly seeks wages for "gap time." The Court of Appeals has explained that gap time

> refers to time that is not covered by the overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the minimum wage provisions because, even though it is uncompensated, the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked.

Davis v. Abington Memorial Hosp., 765 F.3d 236, 243 (3d Cir. 2014). "Courts widely agree that there is no cause of action under the FLSA for 'pure' gap time wages – that is, wages for unpaid work during pay periods without overtime" since the FLSA "requires payment of minimum wages and overtime wages only." Id. at 244. Plaintiff counters in his opposition to defendant's motion that he has not brought any claim for non-overtime "gap time" and that his claims solely relate to unpaid overtime compensation and untimely payment of overtime compensation.

The law within this Circuit requires a plaintiff to "sufficiently allege forty hours of work in a given workweek as well as some uncompensated time in excess of the forty hours." Id. at 241-42. Plaintiff has pleaded that it was routine for him and other similarly situated plaintiffs "to work in excess of forty hours in a workweek" and that defendant's timekeeping system "unlawfully reduc[ed] the amount of overtime wages it paid to its employees" for "time spent working in excess of forty hours in a workweek."

Plaintiff has sufficiently alleged violations of the FLSA regarding overtime pay. In Count II of the amended complaint, plaintiff seeks unpaid back wages pursuant to his entitlement and that of other similarly situated individuals to time-and-a-half for overtime hours worked in excess of forty hours in a week. Thus, the court will deny defendant's motion

to dismiss Count II for failure to state a claim and will allow this claim to proceed as plaintiff is not seeking gap time pay.

V

In addition, defendant urges this court to dismiss plaintiff's class claims under the PWPCL in Count III for failure to plead impracticability of joinder and numerosity under Rule 23. Plaintiff responds that he is not required to plead the exact number of class members, which is information solely in defendant's possession, and that he is entitled to pre-certification discovery.

A class may not be certified unless the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are satisfied. One of the prerequisites is that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

The court must conduct a "rigorous analysis," including considering all relevant evidence and arguments presented, when deciding whether to certify a class. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315-16 (3d Cir. 2008). The court also possesses "broad discretion to control proceedings and frame issues for consideration under Rule 23." Id. at 310. "In most cases, some level of discovery is essential to such an evaluation." Landsman & Funk PC v. Skinder-Strauss Assocs., 640 F.3d 72, 93 (3d Cir. 2011).

The dismissal of plaintiff's class allegations is premature at this early stage without any discovery. Whether plaintiff may maintain a class action under the PWPCL must await another day. Accordingly, this court will deny without prejudice defendant's motion to dismiss the putative class claims under the PWPCL.

VI

Finally, defendant moves to dismiss plaintiff's claim under the PHRA because one year has not yet elapsed since he filed a Charge of Discrimination with the PHRC. The PHRC has exclusive jurisdiction over a claim for one year, and a complainant may not file an action in court until one year has passed since filing with the PHRC. Burgh v. Borough Council of Montrose, 251 F.3d 465, 471 (3d Cir. 2001). Plaintiff concedes that he filed the Charge of Discrimination with the PHRC in June 2020. Count V will be dismissed without prejudice for failure to exhaust administrative remedies.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUFFING	:	CIVIL ACTION
v.	:	
WIPRO LIMITED	:	NO. 20-5545

ORDER

AND NOW, this 21st day of April, 2021, it is hereby ORDERED that:

(1) The unopposed motion of plaintiff to certify for interlocutory appeal (Doc. #18) is GRANTED;

(2) This Court's Order dated March 29, 2021 (Doc. #14) is AMENDED, pursuant to 28 U.S.C. § 1292(b), to state that said order involves the following controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation:

(a) Whether the March 29, 2021 Order, as explained in the accompanying Memorandum (Doc. #13) correctly decided that under Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017), and Daimler AG v. Bauman, 571 U.S. 117 (2014), this Court does not have

personal jurisdiction over any plaintiffs under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., who were not employed in Pennsylvania; and (b) Whether the March 29, 2021 Order, as explained in the accompanying Memorandum, correctly decided that the Pennsylvania statute, 42 Pa. Cons. Stat. Ann. § 5301(a), is unconstitutional under the Due Process Clause of the Constitution insofar as the statute provides for general personal jurisdiction over the defendant corporation simply because it is registered to do business in Pennsylvania even though the corporation is not incorporated in Pennsylvania, does not have its principal place of business there, and would not otherwise be subject to the general personal jurisdiction of the Commonwealth and whether the March 29, 2021 Order, as explained in the accompanying Memorandum, correctly decided that Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991), is no longer controlling on the issue of personal jurisdiction as a result of subsequent Supreme Court decisions.

BY THE COURT:

/s/ Harvey Bartle III

________________________________ J.

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October, 2021, I caused the foregoing brief and appendix to be filed electronically with the Court, where they are available for viewing and downloading from the Court's CM/ECF system, and that such electronic filing automatically generates a Notice of Docket Activity constituting service. I certify that all participants in the case are registered CM/ECF filing users and that service will be accomplished by the CM/ECF system. The CM/ECF system generated a Notice of Docket Activity sent to the following counsel for Defendant-Appellee Wipro Ltd.:

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