STATE OF WISCONSIN
SUPREME COURT

THE SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION,

and

Appeal No. 2015AP1493

AMBAC ASSURANCE CORPORATION,

Plaintiffs-Appellants-Respondents,

v.

COUNTRYWIDE HOME LOANS, INC.,

Defendant-Appellee-Petitioner,

On Petition Seeking Review of Unpublished Decision by the Court of Appeals, District IV, 2015AP001493 (June 23, 2016)

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF COUNTRYWIDE HOME LOANS, INC.'S PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE.. 1

REASONS TO GRANT THE PETITION 1

I. The U.S. Constitution Bars Wisconsin from Exercising General Personal Jurisdiction over Countrywide Merely Because it has a Registered Agent in the state. 2

   A. The court of appeals' decision conflicts with *Daimler*'s Due Process limits on general jurisdiction. 3

   B. The Petition presents the Court with an opportunity to conform Wisconsin law with *Daimler*'s constitutional rule... 7

II. Allowing general jurisdiction on the basis of having a registered agent in the state would harm Wisconsin. 9

CONCLUSION.. 10

CERTIFICATIONS.. 12

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

AstraZeneca AB v. Mylan Pharm., Inc.,
72 F.Supp.3d 549 (D. Del. 2014) 8

Brown v. Lockeed Martin Corp.,
814 F.3d 619 (2d Cir. 2016) 7

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 2, 5

Chatwal Hotels & Resorts LLC v. Dollywood Co.,
90 F.Supp 3d 97 (S.D.N.Y. 2015) 8

Daimler AG v. Bauman,
134 S.Ct. 746 (2014).. passim

Genuine Parts Co. v. Cepec,
137 A.3d 123 (Del. 2016).. 8

Goodyear Dunlop Tires Operations, SA. v. Brown,
131 S.Ct. 2846 (2011).. passim

Hasley v. Black, Sivalls & Bryson, Inc.,
70 Wis. 2d 562 (1975) 7, 8

In re Zofran (Ondansetron) Prods. Liab. Litig.,
2016 WL 2349105 (D. Mass. May 4, 2016).. 7

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) .... passim

Keeley v. Pfizer Inc.,
2015 WL 3999488 (E.D. Mo. July 1, 2015).. 8

TABLE OF AUTHORITIES

Page

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 6

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S.Ct. 2586 (2013)........ 9

Neeley v. Wyeth LLC,
2015 WL 1456984 (E.D. Mo. Mar. 30, 2015)........ 8

Perkins v. Benguet Consol. Mining Co.,
342 U.S. 437 (1952) 6

Punke v. Brodey,
17 Wis. 2d 9 (1962) 7, 8

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 9

Walden v. Fiore,
134 S.Ct. 1115 (2014)........ 10

Wilson v. Humphreys (Cayman) Ltd.,
916 F.2d 1239 (7th Cir. 1990) 9

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 5

Statutes

Wis. Stat. § 180.1507........ 3

Wis. Stat. § 809.62(1r) (a),(d)........ 2, 7

TABLE OF AUTHORITIES

Page

Other Authorities

U.S. Chamber Institute for Legal Reform, 2015 Lawsuit Climate Survey: Ranking the States (September 2015) 9

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 members and indirectly three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country, including Wisconsin. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. The Chamber advocates for the business community in courts across the nation by filing amicus briefs, including in the *Goodyear* and *Daimler* cases that provide the constitutional rules that govern the core jurisdictional issue presented in this case. *See Daimler AG v. Bauman*, 134 S.Ct. 746 (2014); *Goodyear Dunlop Tires Operations, SA. v. Brown*, 131 S.Ct. 2846 (2011).

The Chamber takes no position on the underlying merits of this litigation; its interests are in securing meaningful and clear constitutional standards to limit general personal jurisdiction. Many Chamber members are incorporated and have their principal place of business outside of Wisconsin but are registered to do business in this state. Chamber members therefore have a substantial interest in the rules governing whether, and to what extent, a nonresident corporation may be subjected to general personal jurisdiction by a state's courts. Plaintiffs' effort to expand general jurisdiction in Wisconsin beyond the bounds permitted by the U.S. Constitution would impose substantial costs on Wisconsin's economy, Chamber members, and Wisconsin.

REASONS TO GRANT THE PETITION

Countrywide's petition presents precisely the sort of issue that deserves this Court's review. It involves a

fundamental question of both state and federal law—the permissible scope of general personal jurisdiction—and the decision below calls into question whether this Court's precedents conflict with controlling opinions of the U.S. Supreme Court. Wisconsin courts' jurisdiction is important not only to the parties in this case, but to thousands of other businesses that do business in Wisconsin, and to the judicial system itself. Review is warranted. *See* Wis. Stat. § 809.62(1r)(a),(d).

I. THE U.S. CONSTITUTION BARS WISCONSIN FROM EXERCISING GENERAL PERSONAL JURISDICTION OVER COUNTRYWIDE MERELY BECAUSE IT HAS A REGISTERED AGENT IN THE STATE.

"The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 131 S.Ct. at 2853. Under the canonical opinion in this area, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a state may exercise personal jurisdiction over an out-of-state defendant "if the defendant has certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler*, 134 S.Ct. at 754. This limitation on courts' authority "protects [the defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *Int'l Shoe*, 326 U.S. at 319).

Applying these Constitutional principles, the Supreme Court has recognized "two categories of United States personal jurisdiction," *Daimler*, 134 S.Ct. at 754. First, central to this case, there is "general or all-purpose jurisdiction." *Goodyear*, 131 S.Ct. at 2851. General jurisdiction exists only "where a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on

causes of action arising from dealings entirely distinct from those activities.'" *Daimler*, 134 S.Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318). The second form of personal jurisdiction, "specific jurisdiction," may be exercised when "the suit aris[es] out of or relate[s] to the defendant's contacts with the forum." *Id*. (quotation omitted).

The court below did not rely on specific jurisdiction; it held instead that Wisconsin courts have general personal jurisdiction over Countrywide. In doing so, it erred in a manner that, if not corrected by this Court, would have unfortunate consequences beyond this particular case.

A. The court of appeals' decision conflicts with *Daimler*'s Due Process limits on general jurisdiction.

Under *Daimler*, a state has general jurisdiction over a corporation in only a narrow set of circumstances. General jurisdiction is limited to a state where the corporation is (1) incorporated, or (2) headquartered, or (3) in the "exceptional" circumstance in which the State has become a "surrogate" for the company's place of incorporation or headquarters. *Daimler*, 134 S.Ct. at 756 & n.8. Under this rule, showing that a company maintains "substantial," "continuous," or "systematic" contacts with the forum state is insufficient to satisfy the requirements for general jurisdiction imposed by the Due Process Clause.

The court below rejected this binding federal precedent and opted to find general jurisdiction based solely on the common business practice of maintaining a registered agent pursuant to Wis. Stat. § 180.1507. Order at p.2. This was precisely the type of expansive assertion of general jurisdiction that the Supreme Court rejected in *Daimler*.

Daimler's holding is unambiguous: general jurisdiction over a corporation is virtually always restricted to

its "place of incorporation and principal place of business." 134 S.Ct. at 760. This limit is necessary because of the profound consequences of general jurisdiction, which empowers a court to adjudicate "any and all claims" against a defendant, "wherever in the world the claims may arise." *Id.* at 751. General jurisdiction for that reason is available only where a defendant "is fairly regarded as at home." *Id.* at 760 (quotation omitted).

Individuals are "at home" in their place of "domicile." *Id.* Corporations may do business in many places, but they are only "at home" in either their place of incorporation or their principal place of business. *Id.* As the Court explained, "[g]eneral jurisdiction … calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n.20. It is not enough for a state court to focus on business activity within the same state, let alone mere registration to do business; the relevant consideration must include the overall activity of the corporation.

The proof is in the *Daimler* Court's reasoning. The question was whether Daimler AG was subject to general jurisdiction in California. The *Daimler* plaintiffs argued general jurisdiction was available based on the contacts between Daimler's subsidiary Mercedes Benz USA ("MBUSA") and California. 134 S.Ct. at 760. MBUSA had a regional headquarters in that State, had multiple other facilities there, was "the largest supplier of luxury vehicles to the California market," and made ten percent of its total nationwide sales of vehicles there. *Id.* at 752.

In rejecting the exercise of general jurisdiction, the Supreme Court did not examine whether these factors amounted to "continuous and systematic contacts"; instead, the Court found them irrelevant. The dispositive consideration was that "neither Daimler nor MBUSA is

incorporated in California, nor does either entity have its principal place of business there." *Daimler*, 134 S.Ct. at 761.

The Court supported that bright-line rule with two principal reasons. First, it noted that a corporation's place of incorporation and principal place of business, the two default forums for general jurisdiction, are "affiliations" that "have the virtue of being unique"—"that is, each ordinarily indicates only one place" and that location is "easily ascertainable." *Daimler*, 134 S.Ct. at 760. Because these two locations are easy to ascertain and entirely unique it avoids confusion and "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.*

A broader rule based on normal business activities "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S.Ct. at 761–62 (quoting *Burger King*, 471 U.S. at 472). This "[s]imple jurisdictional rule[]," *id.* at 760 (quotation omitted), provides the "predictability," *Burger King*, 471 U.S. at 471–72, and "foreseeability," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), that is necessary for an assertion of jurisdiction to satisfy the basic due process requirement of "fair play and substantial justice." *Daimler*, 134 S.Ct. at 754.

Second, the Supreme Court reasoned that the "simple rule" reflects the reality that "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role" with respect to out-of-forum defendants. *Id.* at 755 (quoting *Goodyear*, 131 S.Ct. at 2854). As the "Court has increasingly trained on the relationship among the defendant, the forum, and the litigation"—i.e., specific jurisdiction—"general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id.* at 758 (quotation omitted). It "is one thing to hold a corporation answerable for operations in

the forum State, [but] quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n.19.

Daimler offers only a limited exception to the general rule of jurisdiction if a state's relationship with the corporation is "exceptional." *Daimler*, 134 S.Ct. at 761 n.19. The Court gave critical guidance on what constitutes "exceptional" circumstances providing general jurisdiction in a forum outside the bright-line default. That standard is satisfied when the forum has become "a surrogate" for the "place of incorporation or head office." *Id.* at 756 n.8 (quotation omitted). In *Daimler,* the Court cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." 134 S.Ct. at 755–56 (quotation omitted). *Perkins* involved truly "exceptional facts" where the corporate defendant's home forum, the Philippines, was occupied by the Japanese army during World War II, and the company moved its headquarters and corporate records to Ohio. *Id.* at 756 n.8. At the time of suit, Ohio was the company's "principal, if temporary, place of business." *Id.* at 756 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984)).

With such a high bar for "exceptional" circumstances, outside of *Perkins*, the Supreme Court has never again upheld general jurisdiction on this basis; instead, subsequent decisions all have rejected the assertion of general jurisdiction by states outside the corporation's state of incorporation or principal place of business. *See id.* at 756–58 (discussing cases). Mere registration to do business and maintaining a registered agent does not come anywhere close to satisfying this "exceptional" exception. If maintaining a registered agent –a common legal requirement to conduct business—were enough, then states could unilaterally circumvent the federal constitution's due process limitations on general jurisdiction

merely by requiring maintenance of a registered agent as a condition of doing business.

In sum, the expansive general jurisdiction rule endorsed by the court below would expose the Defendant and other companies with national reach (including the Chamber's Members), to lawsuits in Wisconsin from foreign plaintiffs for conduct that all occurred outside Wisconsin.

B. The Petition presents the Court with an opportunity to conform Wisconsin law with *Daimler*'s constitutional rule.

In this case, the court of appeals rejected *Daimler* because it "fails to address head-on the topic of actual-consent-to-personal-jurisdiction as set forth in *Punke* and *Hasley*." Order at p.7. Not so. As outlined above, *Daimler*'s careful delineation of general jurisdiction contradicts any notion that a mere registered agent is sufficient to confer general jurisdiction. To the extent those cases create general jurisdiction based on the presence of a registered agent, they are in conflict with *Daimler*; to the extent the court of appeals below overstates the reach of those cases, it injects serious uncertainty into this fundamental jurisdictional matter, and this Court's review is warranted. See Wis. Stat. § 809.62.

Daimler's holding and rationale cannot be squared with the theory relied on below. *See Brown v. Lockeed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) ("If mere registration and the accompanying appointment of an in-state agent … sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief."); *In re Zofran (Ondansetron) Products Liab. Litig.*, 2016 WL 2349105, at *4 (D. Mass. May 4, 2016) (explaining that interpreting a registration statute to require consent to general jurisdiction "would be inconsistent with the Supreme Court's ruling in

Daimler.")(attached at Appendix); *Keeley v. Pfizer Inc.*, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) ("If following [registration] statutes creates jurisdiction, national companies would be subject to suit all over the country. This result is contrary to the holding in *Daimler*….")(attached at Appendix); *Neeley v. Wyeth LLC*, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015)(attached at Appendix); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F.Supp 3d 97, 105 (S.D.N.Y. 2015); *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F.Supp.3d 549, 557 (D. Del. 2014).

If indeed Wisconsin law has been to the contrary, it should be overruled. Alternatively, the Court could recognize that the court of appeals read *Punke* and *Hasley* more broadly than necessary. Neither case actually holds that mere registration creates general jurisdiction. *Punke v. Brodey* includes no federal constitutional analysis and makes no distinction between specific or general jurisdiction (and the former would more likely fit given the property forming the source of dispute was in Wisconsin). 17 Wis. 2d 9, 13-14, 115 N.W. 2d 601 (1962). Whatever *Punke* says about creating jurisdiction by service on an agent, it would be dicta since the court, in fact, rejected the claim of jurisdiction. *Id.* at 14, 16.

Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 235 N.W. 2d 446 (1975), likewise does need not hold that registration is sufficient to confer general jurisdiction. In dicta, the case did list appointment of an agent for service as a relevant consideration under *International Shoe*. *Id.* at 582. But registration was not at issue in *Hasley*, and the passing description should not be interpreted as holding that mere registration, certainly after *Daimler*, is enough to create general jurisdiction. There is no need to interpret Wisconsin law as requiring consent to general jurisdiction based on mere registration. *See Genuine Parts Co. v. Cepec*, 137 A. 3d 123, 126, 137-47 (Del 2016) (Del. Apr. 18, 2016) (interpreting Delaware registration statute to avoid conflict with *Daimler*).

The use of business registration to confer general jurisdiction would have additional grave Constitutional implications. The United States Supreme Court has long recognized that a state may not "require[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2596 (2013) (quotation omitted); *see also Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (it would be "constitutionally suspect" to subject a corporation to general jurisdiction as a consequence of registering to do business in the state).

This Court should grant the petition to ensure that Wisconsin law does not conflict with these constitutional principles.

II. ALLOWING GENERAL JURISDICTION ON THE BASIS OF HAVING A REGISTERED AGENT IN THE STATE WOULD HARM WISCONSIN.

The court of appeals' expansion of general jurisdiction beyond the bounds permitted by *Daimler* is not only unconstitutional, but also bad policy. Such a broad assertion of general jurisdiction would impose substantial costs on Wisconsin's economy and Wisconsin's courts.

First, if out-of-state companies doing business in Wisconsin were subject to general jurisdiction in this State for claims that arise anywhere in the world, many companies will simply choose not to invest here. Surveys consistently show the litigation environment is an important factor in key business decisions. *See, e.g.*, U.S. Chamber Institute for Legal Reform, 2015 Lawsuit Climate Survey: Ranking the States (September 2015), at 3–4, *available at* http://goo.gl/vsIfx1. This is especially true of non-U.S. companies. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (recognizing with an expansive rule, "[o]verseas

firms … could be deterred from doing business here"). Expanding the reach of personal jurisdiction, such that these companies may be sued in Wisconsin on any claim arising anywhere in the country, will provide a substantial incentive for these and other companies to locate their operations elsewhere.

Second, Plaintiffs' effort to permit the assertion of general jurisdiction over companies doing business in the State would have a predictable effect on the State's judiciary: courts would be burdened with cases that have nothing to do with Wisconsin and are filed here as the result of forum-shopping. Of course, out-of-state companies are subject to *specific* jurisdiction when their "suit-related conduct … create[s] a substantial connection with the forum State." *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014). But the lower court did not rely on that doctrine, and unjustified expansion of general jurisdiction is not necessary to ensure that nonresident corporations may be held accountable for their in-forum conduct. Plaintiffs' expansive theory of general jurisdiction will significantly burden Wisconsin without providing any benefits to our State.

CONCLUSION

This Court's review is necessary to in order to clarify the reach of Wisconsin's courts in light of the clear articulation of limited general jurisdiction in the Supreme Court's 2014 *Daimler* case. The issue is important not just in this case, but to courts, business, and individuals who will face the same threshold legal question in the future.

The petition should be granted.

Dated August 8, 2016

Respectfully submitted,

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CERTIFICATIONS

A. Certification as to Form and Length: I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,907 words. It is produced with a minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and a maximum of 60 characters per line of body text.

B. Certificate of Compliance with Wis. Stat. § 809.19(12). I hereby certify that, in accordance with Wis. Stat. § 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, in a text-searchable PDF format that is identical in content and format to the printed form of the brief filed on this date. I will electronically file a copy should the Court grant the Motion for Leave.

C. Certificate of Service. I hereby certify that one copy of this brief, including the Appendix, this Certification as well as one copy of the motion for leave to file this brief, has been served on all opposing parties by U.S. Mail to their counsel of record:

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