No. 121281

IN THE SUPREME COURT OF ILLINOIS

ASPEN AMERICAN INSURANCE CO., as subrogee of Eastern Fish Company, *Plaintiff-Appellee,* v. INTERSTATE WAREHOUSING, INC., *Defendant-Appellant.*	On Appeal from the Appellate Court of Illinois for the First Judicial District, No. 1-15-1876 There heard on appeal from the Circuit Court for Cook County No.: 14 L 7376 The Honorable John P. Callahan, Jr. Judge Presiding

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

ARGUMENT

I. Aspen failed to establish a *prima facie* case for exercising general personal jurisdiction over Interstate.

In its brief, Aspen American Insurance Company ("Aspen") repeatedly invokes the Illinois long-arm statute and Illinois cases decided before *Daimler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746 (2014), to argue that "under Illinois law, the *prima facie* case for personal jurisdiction requires plaintiff to show" only "a defendant's continuous and substantial business activity in Illinois." Pl. Br. at 8. Whether Aspen made a *prima facie* showing of general jurisdiction is not merely a question of *Illinois* law, however, but also requires a showing sufficient to satisfy *federal* due process. *Russell v. SNFA*, 2013 IL 113909, ¶29.

Aspen insists that *Daimler* does not alter the due process analysis, and that Illinois courts may continue to exercise general jurisdiction over a corporate defendant upon a showing only that the corporation "has engaged in continuous and substantial business activity within the forum." (Pl. Br. at 10, citing *Russell*, 2013 IL 113909, ¶36.) But the United States Supreme Court held in *Daimler* that predicating general jurisdiction on a corporation's "substantial, continuous and systematic course of business" within a forum state would be "unacceptably grasping." 134 S.Ct. at 760.

In the wake of *Daimler*, a *prima facie* case for general jurisdiction now requires a showing that the corporation is "at home" in the forum—a standard, the Court emphasized, not "synonymous with 'doing business.'" *Id.*, 762 n.20. Typically "at home" in only two "paradigm" forums—the state of incorporation

and principal place of business (*Id.*, at 760)—a corporation will be deemed "at home" in any other forum only in an "exceptional case" (*Id.*, at 761 n. 19).

Aspen would have this Court believe that, rather than representing "some radical change in the law," the United States Supreme Court's decision in *Daimler* represents nothing more than the application of well-established law to a particular set of facts. (Pl. Br. at 8–10.) The Illinois Trial Lawyers Association and American Association for Justice (collectively, "the ITLA amici"), supporting Aspen as amici curiae, likewise describe *Daimler* as involving nothing more than the application of "long-held jurisdictional tenets" to "unique facts." (ITLA Br. at 13.) This would certainly be unusual—"[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Tellingly, Aspen is unable to cite to any court—aside from the appellate court below—which has adopted such a dismissive reading of the United States Supreme Court's decision in *Daimler*. Cf. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (recognizing that *Daimler* "considerably altered the analytic landscape for general jurisdiction"); *Kipp v. Ski Enterprise Corp. of Wisconsin, Inc.*, 783 F.3d 695 (2015)("In recent years, the Supreme Court has clarified and, it is fair to say, raised the bar for this [general] jurisdiction."); *State ex. rel. Norfolk S. Ry. Co. v. Dolan*, 2017 WL 770977, at *7 n.6 (Mo. Feb. 28, 2017) (noting *Daimler*'s "rejection of doing business as a basis for jurisdiction"); *Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, 131-32 (2017) ("We cannot follow

the Court's decision in *Daimler* and give continued effect to the "doing business" cases that plaintiff implicitly urges us to follow"); *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269, 1284 (Utah 2016) ("the Supreme Court in *Daimler* clearly rejected the 'doing business' test "); Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 Hastings L.J. 233, 236 (2014) (observing that *Daimler* "marks a radical departure from decades of case law holding that general jurisdiction was appropriate where a company was doing business in the forum").

A. To establish a *prima facie* case for personal jurisdiction, Aspen was required to show that this is an "exceptional case."

Remarkably, Aspen does not even acknowledge, much less attempt to address, the United States Supreme Court's holding in *Daimler* that "an exceptional case" must be shown before a corporation will be considered "at home" in a forum other than its state of incorporation or principal place of business. *Daimler*, 134 S.Ct. at 761 n.19. Aspen has forfeited any argument that it established an exceptional case.

The ITLA amici fleetingly acknowledgement that "an exceptional case" is required but, they claim, "*Daimler* made no attempt to define the boundaries of the 'exceptional' case." (ITLA Br. at 13.) From the ITLA amici's perspective, the perfectly ordinary cases once thought to establish personal jurisdiction under the "doing business" test now, apparently, qualify as "exceptional cases" under *Daimler*. Though acknowledging the *Daimler* court's citation to *Perkins v.*

Benguet Consol. Mining Co., 342 U.S. 437 (1952), as an example of an "exceptional case," the ITLA amici quickly brush *Perkins* aside just one case with no significance broader than its particular facts. "Nowhere in *Perkins*," these amici argue, "did the Court limit its ruling to corporations whose presidents are fleeing war and must manage the corporation from a makeshift control center in another state." (ITLA Br. at 14.)

The question here, however, is not whether the *Perkins* court limited its ruling to the extraordinary facts in that case, but what the *Daimler* court intended in citing a case with such extraordinary facts as the sole example of an "exceptional case" identified by the Court. See *Carmouche v. Tamborlee Managemnt, Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015). By citing *Perkins* as exemplifying an "exceptional case," the *Daimler* court indicated that an "exceptional case" will be one involving similarly extraordinary facts.

Indeed, even apart from the Court's identification of *Perkins* as an example of an "exceptional case," the Court identified the state of incorporation and principle place of business as "*paradigm*" bases for the exercise of jurisdiction. A "paradigm" is "an example that serves as a pattern or a model." American Heritage Dictionary 601 (3d ed. 1994). Thus, a corporation is "at home" only in a forum that fits that same pattern as the place of incorporation or principal place of business--a "foreign corporation cannot be subject to general jurisdiction in a forum unless the corporation's activities in the forum closely

approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Carmouche*, 789 F.3d at 1205.

In its opening brief, Interstate Warehousing, Inc. ("Interstate") cited numerous cases nationwide reaching this very conclusion. See, e.g., *Monkton Insurance Services, Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014)(recognizing that it will be "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"); *Kipp*, 783 F.3d at 698 (exceptional case will "require more than the 'substantial, continuous, and systematic course of business' that was once thought to suffice"); *Brown*, 814 F.3d at 629 ("[M]ere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case.'") Tellingly, neither Aspen nor the ITLA amici make any attempt to address these cases or any other addressing general jurisdiction in the wake of *Daimler*.

B. Aspen failed to show that Interstate is "at home" in Illinois.

Aspen made no attempt to argue that this is "an exceptional case" and has otherwise offered remarkably scant argument in support of the proposition that Interstate is "at home" in Illinois. (Pl. Br. at 11-12.) Instead, Aspen devotes the bulk of its argument to the proposition that Interstate was "doing business" in Illinois under pre-*Daimler* authorities. But again, as discussed in Interstate's opening brief and above, in the wake of *Daimler*, it is now clear that federal due process requires more than simply "doing business" before a corporation can be subjected to general personal jurisdiction within a forum. *Id.*, at 762 n.20.

Aspen asserts that Interstate can be deemed "at home" in Illinois because "Interstate Warehousing's facility, employees and operations extend far beyond the activities of [the defendant in] *Helicopteros* [*Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984)] and consistent with the activities of the defendant in *Perkins.*" (Pl. Br. at 11.) But Aspen makes no attempt to further develop or explain this assertion.

To suggest that Interstate's activities within Illinois even remotely approach the forum contacts of the defendant in *Perkins* borders on frivolous. The defendant in *Perkins* moved its entire corporate operations to the state of Ohio, albeit temporarily, during the Japanese occupation of the Philippines during World War II. The corporation's president maintained a corporate office in Ohio at which he kept the company files and from which he supervised "'the necessarily limited wartime activities of the company.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 928 (2011), quoting *Perkins,* 342 U.S. at 447-448. As the United States Supreme Court in *Daimler* emphasized, "'Ohio was the corporation's principal, if temporary, place of business.'" *Id.*, quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 779-780, n.11 (1984).

Here, by contrast, Aspen has shown only that Interstate registered to transact business as a foreign corporation in Illinois, employed one general manager at a Joliet warehouse operated by an Illinois affiliate, and listed that Joliet warehouse along with warehouses in several other states on both its

letterhead and website. Even Aspen does not contend that these contacts are somehow the equivalent of maintaining a principal place of business in Illinois.

In their effort to demonstrate that Interstate is "at home" in Illinois, the ITLA amici draws on "facts" outside the record. For example, the ITLA amici claim, without citation, that the Joliet warehouse is one of Interstate's "largest warehousing sites" at 12,077,000 cubic feet. (ITLA Br. at 12.) The record, however, demonstrates that the Joliet warehouse is not operated by Interstate, but by its affiliate Interstate Warehousing of Illinois, LLC. (SR 35). The "12,077,000 cubic feet" figure cited by the ITLA amici appears nowhere in the record, but instead appears to be drawn from an Interstate Warehousing website. How the ITLA amici arrived at the conclusion that this was one of Interstate's largest warehouses is unclear—the website shows that the Joliet warehouse is one of Interstate's *smallest*, not largest, warehousing sites.[1]

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[1] As of April 19, 2017, the website indicates the following warehouse measurements, listed here from largest to smallest:

- Franklin, IN – 31,000,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-indianapolis-franklin-indiana/)
- Murfreesboro, TN 16,041,745 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-nashville-murfreesboro-tennessee/)
- Hamilton, OH – 13,920,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-cincinnati-hamilton-ohio/)
- Indianapolis, IN – 12,875,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-indianapolis-indiana/)

The ITLA amici complain that these facts were "all that [could] be gleaned from the limited information Aspen and the trial court could unearth" (ITLA Br. at 12), persisting in a surprisingly vitriolic theme that Interstate was somehow guilty of gamesmanship because it did not present evidence regarding the scope and volume of its Illinois operations. (ITLA Br. at 6.) Interstate did not (and does not) believe that such evidence was at all necessary to the jurisdictional analysis mandated by *Daimler*, which first and foremost looks to where the defendant is incorporated and maintains its principal place of business. Had Aspen believed otherwise, presumably it would have pursued jurisdictional discovery pursuant to Ill. S. Ct. R. 201(l) and presented such evidence itself. After all, Aspen, not Interstate, bore the burden of establishing a *prima facie* case for jurisdiction.

Interstate, like any corporation, is presumed to be "at home" under *Daimler* in its state of incorporation and principal place of business: here, Indiana. Aspen failed to allege facts or present evidence showing an "exceptional case" that would warrant finding Interstate "at home" in Illinois instead.

- Joliet, IL – 12,077,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-chicago-joliet-illinois/)
- Newport News, VA – 11,300,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-newport-news-virginia/)
- Denver, CO – 6,000,000 cubic feet (https://www.tippmanngroup.com/interstate-warehousing-denver-colorado/)

C. Aspen did not meet its burden of establishing a *prima facie* case.

Continuing to ignore the existence of *Daimler*, Aspen maintains that a *prima facie* case for jurisdiction is established by showing that "the defendant had sufficient minimum contacts with Illinois and that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice"—the canonical test for establishing *specific* jurisdiction under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See *Daimler*, 134 S.Ct. at 754.

Under *Daimler*, a *prima facie* case for general jurisdiction requires a showing that the defendant was "at home" in the forum state. And because the paradigm forums in which a corporation is "at home" are its state of incorporation or principal place of business, a *prima facie* case for the exercise of general personal jurisdiction outside of these forums requires the showing of an exceptional case. Because Aspen did not—and could not—allege that Interstate is either incorporated or has its principal place of business in Illinois and alleged no facts to show that this is an "exceptional case," Aspen failed to make a *prima facie* case for the exercise of general jurisdiction under *Daimler*. Because Aspen never made out a *prima facie* case, the burden never shifted to Interstate to rebut it.

But even if Interstate were required to produce evidence in support of its motion to dismiss, Interstate did all it could possibly be required to do. Once Interstate produced undisputed evidence that it is both incorporated and maintains its principal place of business in Indiana, it conclusively established that the paradigm bases for exercising general jurisdiction do not exist here. Aspen

was then required to demonstrate that this is an "exceptional case" warranting jurisdiction outside of the paradigm forums. Aspen has never attempted to do so.

Aspen and its amici implore this Court to ignore, as did the appellate court below, the clear rules set forth by the United States Supreme Court in *Daimler*. That is simply not an option. The United States Supreme Court has spoken with a clear voice as to the due process limits on general jurisdiction. This Court should heed that voice, reverse the judgments of the appellate court and trial court below, and dismiss the claims against Interstate for lack of personal jurisdiction.

II. The "consent jurisdiction" argument advanced by the ITLA amici is forfeited and unsustainable under Illinois law.

The ITLA amici raise an additional argument, one that Aspen itself has never raised (either below or in this Court): that Aspen did not need to satisfy the "at home" standards for jurisdiction set out in *Daimler* because Interstate "consented" to general jurisdiction in Illinois when it registered to transact business in Illinois as a foreign corporation.

Although Aspen cited to the registration statute (805 ILCS 5/13.10) in its opposition to the motion to dismiss before the trial court (SR 42) and in its brief before the appellate court (Pl. App. Br. at 10), it did not do so in service of any sort of "consent" argument. Rather, Aspen took the position below that registration was sufficient to render Aspen "at home" in Illinois under *Daimler*. Because Aspen has never argued (including in its brief before this Court) that

Interstate "consented" to general jurisdiction in Illinois, any such argument is forfeited. *Illinois Farmers Ins. Co. v. Cisco*, 178 Ill. 2d 386, 395 (1997).

Although this Court will sometimes look beyond a party's forfeiture "in the interests of achieving a just result and maintaining a sound and uniform body of precedent," this Court has also emphasized that, under the principle of party presentation, the Court "rel[ies] on the parties to frame the issues for decision" and "normally decide[s] only questions presented by the parties." *Jackson v. Bd. of Election Com'rs of City of Chicago*, 2012 IL 111928, ¶33-34, quoting *People v. Givens*, 237 Ill. 2d 311, 323-24 (2010).

Because the issue of consent-by-registration was never raised by Aspen and was never analyzed by the courts below, this case would not provide an appropriate vehicle for grappling with the "consent" issue.[2] Indeed, the ITLA amici themselves insist that this "particular case does not provide a good vehicle for providing the bench and bar with guidance on the larger issue of personal jurisdiction." (ITLA Br. at 3.)

Even if this Court were inclined to address the issue of consent-by-registration, this Court need look no further than the plain language of the

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[2] The issue of consent-by-registration is presently pending before the Fifth District of the Illinois Appellate Court in *Jeffs v. Ford Motor Company*, No. 5-15-0529, an appeal that is fully briefed and was argued on December 14, 2016.

http://multimedia.illinois.gov/court/AppellateCourt/Audio/2016/5th/121416_5-15-0529.mp3

Business Corporation Act of 1983 to confirm that a corporation does not consent to general jurisdiction merely by registering to transact business in Illinois.

Under § 13.05 of the Business Corporation Act, "a foreign corporation organized for profit, before it transacts business in this State, shall procure authority so to do from the Secretary of State." 805 ILCS 5/13.05. Though requiring a foreign corporation to procure authority from the Secretary of State, the statute lacks any requirement that a foreign corporation consent in advance to the general jurisdiction of Illinois courts. Section 13.15 of the Business Corporation Act sets forth in comprehensive detail the information which a foreign corporation must provide when applying for authority to transact business in Illinois. 805 ILCS 5/13.15. Again, there is no requirement that the foreign corporation consent to general, all-purpose jurisdiction.

That the Business Corporation Act does not even mention personal jurisdiction, much less require foreign corporations to consent to general jurisdiction, belies the ITLA amici's consent-by-registration theory. *Surita v. AM Gen. LLC*, 15 C 7164, 2015 WL 12826471, at *3 (N.D. Ill. Nov. 4, 2015) ("the Illinois Business Corporation Act of 1983, 805 ILCS 5/13.05, ...does not contain a provision with jurisdictional consent language"). Accord *Dolan*, 2017 WL 770977, at *8 (finding no consent under Missouri law where "[t]he plain language of Missouri's registration statutes does not mention consent to personal jurisdiction for unrelated claims, nor does it purport to provide an independent basis for jurisdiction over foreign corporations that register in Missouri");

Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016) (finding no consent under Delaware law where "[n]othing in the registration statutes explicitly says that a foreign corporation registering thereby consents to the personal jurisdiction of this state.").

The ITLA amici hang their hat on statutory language providing that foreign corporations "enjoy the same, but no greater, rights and privileges as a domestic corporation" and "shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character." 805 ILCS 5/13.10. Aspen cited this language below as establishing that "Interstate is a resident of Illinois." (SR 42.) The ITLA amici argue that this establishes general jurisdiction because, they claim, "an Illinois domestic corporation [has a duty] to defend lawsuits in which it is named in Illinois." (ITLA Br. at 9.) But a "duty" is simply, "[a] legal obligation that is owed or due to another." DUTY, Black's Law Dictionary (10th ed. 2014). Personal jurisdiction, is not a duty owed by one party to another but, rather, "refers to the court's power 'to bring a person into its adjudicative process.'" *People v. Castleberry*, 2015 IL 116916, ¶ 12, quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002).

No published decision by any Illinois court has ever held that registration to transact business as a foreign corporation constitutes consent to general jurisdiction. Indeed, if registration to transact business constituted consent to general jurisdiction, then the long-standing distinction under the Illinois long-arm

statute between "doing business" and the "transaction of business" would be rendered all but meaningless. Compare 735 ILCS 5/2-209(a)(1) (providing for specific jurisdiction related to acts arising from the "transaction of any business") with 735 ILCS 5/2-209(b)(4) (providing for general jurisdiction over corporation "doing business" in Illinois). Accord *Brown*, 814 F.3d at 636 (long-arm statute would be unnecessary as to registered corporations "if the mere maintenance of a registered agent to accept service... effected an agreement to submit to general jurisdiction").

The amici look to *Hannibal & St. Joseph R.R. Co. v. Crane*, 102 Ill. 249, 255 (1882)—a case decided over 130 years before Daimler—as authority for the proposition that registration to transact business in Illinois subjects a foreign corporation to general jurisdiction in this state. But in *Hannibal*, this Court was called upon "to determine whether a corporation of another State, doing business and having property in this State, may be garnisheed for a debt it owes to a resident of the State of its domicil, in the courts of this State." *Id.*, at 252. That is, this Court addressed jurisdiction over a foreign garnishee in a proceeding *in rem*—a proceeding that required that the property to be garnished be located in Illinois. See *Oppenheim v. Circuit Court of Eleventh Judicial Circuit*, 91 Ill. 2d 336, 343 (1982). Nothing in *Hannibal* suggests that mere registration to transact business in Illinois constitutes consent to jurisdiction.

The ITLA amici's reliance on *Walrus Mfg. Co. v. New Amsterdam Cas. Co.*, 184 F. Supp. 214, 218 (S.D. Ill. 1960), a decision out of the federal district

court for the Southern District of Illinois, is likewise misplaced. *Walrus* addressed a provision of the Illinois Insurance Code which "required foreign incorporated *insurance and surety companies* to consent in writing to be sued in Illinois as a prerequisite to issuing a certificate of authority to do business in this State." *Id.*, (emphasis added).

Walrus did not address the Business Corporation Act nor suggest that foreign corporations were required under that statute to consent to general jurisdiction when registering to transact business in Illinois. In fact, the district court for the Southern District of Illinois has far more recently addressed the Business Corporation Act and concluded that a foreign corporation does not consent to general jurisdiction in Illinois by registering, as statutorily required, to transact business in Illinois. *Perez v. Air & Liquid Sys. Corp.*, 2016 WL 7049153, at *9 (S.D. Ill. Dec. 2, 2016).

Here, if registration under the Business Corporation Act were construed as consent to general jurisdiction, the result would be irreconcilable with *Daimler*. As the Delaware Supreme Court recently observed in addressing this same issue, "Every state in the union, and the District of Columbia, has enacted a registration statute that requires foreign corporations to register to do business and appoint an in-state agent for service of process." *Cepec*, 137 A.3d at 143; accord *Perez*, 2016 WL 7049153 at *6. *Daimler's* holding that a corporation cannot be subject to general jurisdiction in every state in which it actually *does* business would make little sense if a corporation were subject to general

jurisdiction in every state in which it merely *registers* (as required by law) to do business. *See Brown*, 814 F.3d at 640 (if such a view of consent were adopted, "*Daimler's* ruling would be robbed of meaning by a back-door thief").

The ITLA amici insist that the United States Supreme Court's century-old decision in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 96 (1917), compels a finding of consent-by-registration. Decided in an era marked by the territorial approach of *Pennoyer v. Neff*, 95 U.S. 714 (1878), the United States Supreme Court held in *Pennsylvania Fire* that, by appointing a statutorily mandated agent for service of process, the defendant was deemed to have consented to be sued in Missouri. *Id.*, at 96. Such consent, the Court noted, was "a mere fiction." *Id.*

Even before *Daimler*, however, the United States Supreme Court made clear that the "patchwork of legal and factual fictions" that dominated jurisdictional analyses under *Pennoyer's* territorial approach to jurisdiction have since given way to the a jurisdictional approach focused on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977); *Id.*, at 219 (Brennan, J. concurring in part and dissenting in part). As a result, the United States Supreme Court in *Daimler* admonished that cases "decided in the era dominated by *Pennoyer's* territorial thinking... should not attract heavy reliance today." 134 S.Ct. at 761 n.18. That admonishment embraces *Pennsylvania Fire*. *Brown*, 814 F.3d at 639.

To be sure, both Illinois law and federal due process recognize that parties may *voluntarily* consent to jurisdiction in a forum. See, e.g., *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (forum selection clause); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (appearance in court); *In re M.W.*, 232 Ill. 2d 408, 426 (2009) (respondent or defendant may consent to personal jurisdiction by appearance). But recognizing that parties may voluntarily consent to a court's jurisdiction over them is very different from compelling a nonresident corporation to "consent" to general jurisdiction in order to transact business in Illinois. Even if the Business Corporation Act provided for express consent to general jurisdiction as a condition of registering to do business in Illinois, such a requirement would be constitutionally impermissible.

First, compelling corporations to consent to general jurisdiction as a condition of doing business would violate the "unconstitutional conditions" doctrine. That doctrine provides that a state may not "requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013), quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)). Requiring a corporation to surrender due process protections limiting general jurisdiction, as outlined in *Daimler*, as a condition of transacting business in Illinois runs afoul of the unconstitutional conditions doctrine.

Compulsory consent to general jurisdiction in Illinois as a condition of transacting business here would also violate the Commerce Clause of the United States Constitution. "Where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be... a discrimination that renders the regulation invalid." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988).

The Commerce Clause bars states from discriminating against out-of-state businesses by treating in-state and out-of-state economic interests differently in a way "that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Env. Quality*, 511 U.S. 93, 99 (1994). Here, compulsory consent to general jurisdiction would discriminate in just that way. The burdens of general jurisdiction in an Illinois forum would necessarily be far more burdensome for out-of-state corporations than it is for in-state corporations "at home" in Illinois. See *Davis v. Farmers' Co-op Equity Co.*, 262 U.S. 312, 315 (1923). ("common knowledge" that "litigation in states and jurisdictions remote from that in which the cause of action arose... causes, directly and indirectly, heavy expense" to the defendant).

Compulsory consent to jurisdiction would also be unconstitutional because "the burden imposed on interstate commerce... exceeds any local interest that the State might advance." *Bendix*, 486 U.S. at 891. In fact, the Supreme Court held exactly that in *Davis*, where it held that a Minnesota law construed as requiring out-of-state railroads doing business in the state to submit

to general jurisdiction in Minnesota was "obnoxious to the commerce clause." 262 U.S. at 315. Construing registration under the Business Corporation Act as implied consent to general jurisdiction in Illinois as a condition of transacting business here would be no less constitutionally obnoxious.

In short, under the ITLA amici's "consent" theory, it would no longer matter at all whether a corporation is "at home" in a given forum, nor even whether the corporation has actually transacted any business in the state. So long as a foreign corporation complied with Illinois law by registering to transact business in this state, the corporation would be deemed to have consented to general, all-purpose jurisdiction with respect to claims bearing no connection whatsoever with the Illinois forum. *Daimler* would be stripped of all meaning.

While the ITLA amici certainly desire a result that renders *Daimler* irrelevant, such a result would be wholly at odds with the development of modern jurisdictional jurisprudence from *International Shoe* through *Daimler*. This Court should decline to reach such a dramatic result based on an argument raised for the first time before this Court, particularly where the argument is raised only by amici curiae. If this Court does reach the ITLA's "consent" argument, it should reject that theory outright.

CONCLUSION

For the foregoing reasons defendant-appellant Interstate Warehousing, Inc. respectfully requests that this court find that plaintiff-appellee Aspen American Insurance Co. failed to show that Interstate is subject to personal

jurisdiction in Illinois. Interstate asks this Court to reverse the judgments of the appellate court and trial court below, and dismiss the claims against Interstate for lack of personal jurisdiction.

Respectfully submitted,

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Dated April 26, 2017

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 20 pages.

/s/ Kimberly A. Jansen

CERTIFICATE OF SERVICE

I, Kimberly A. Jansen, one of the attorneys for Defendant-Appellant Interstate Warehousing, Inc., certify that I: (1) electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Illinois Supreme Court on April 26, 2017, by using the Illinois Supreme Court electronic filing service; and (2) have served counsel of record for plaintiff and for each of the amicus curiae by sending a copy thereof on April 26, 2017, to the email addresses below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

***** **Electronically Filed** *****

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/s/ Kimberly A. Jansen

04/26/2017

Supreme Court Clerk

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