

FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

DOCKET NO. 2016-____

AMON MERRITT and SANDRA MERRITT,

Plaintiffs-Appellees

v.

TEXACO INC., *ET AL.*,

Defendants-Appellants

A Civil Proceeding

AMICUS CURIAE BRIEF OF
COALITION FOR LITIGATION JUSTICE, INC.,
NATIONAL ASSOCIATION OF MANUFACTURERS,
AMERICAN TORT REFORM ASSOCIATION, AND
NFIB SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF DEFENDANT-APPELLANT
HUNT REFINING COMPANY'S
APPLICATION FOR SUPERVISORY WRIT

On Appeal from the 41st Judicial District Court
Parish of Orleans, State of Louisiana
Docket No. 2015-10509
Honorable Tiffany Gautier Chase, Presiding

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ISSUE PRESENTED

Whether obtaining a certificate of authority and appointing a registered agent in compliance with Louisiana's Foreign Corporation Law constitutes a foreign corporation's consent to all-purpose jurisdiction in Louisiana.

STATEMENT OF INTEREST

Pursuant to Rule 2-12.11 of the Uniform Rules of Louisiana Courts of Appeal, *amici curiae* Coalition for Litigation Justice, Inc., American Tort Reform Association, National Association of Manufacturers, and NFIB Small Business Legal Center seek leave to file the accompanying brief in support of the application for supervisory writ by Defendants-Appellants.¹ As organizations representing a wide range of interstate economic interests, *amici* have an interest in ensuring that Louisiana's civil litigation environment is fair, predictable, and reflects sound policy and legal principles. *Amici* also have a substantial interest in ensuring the predictable and constitutional exercise of jurisdiction by courts.

¹ The Coalition for Litigation Justice, Inc. (the "Coalition") is a nonprofit organization formed in 2000 to address and help resolve problems and issues arising in connection with toxic torts, especially asbestos litigation. During the past fifteen years, the Coalition has filed more than 100 *amicus curiae* briefs in state and federal appellate cases raising important issues that may have a significant impact on the asbestos and toxic tort litigation environment. The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Founded in 1986, *amicus* American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The United States Supreme Court has recognized two categories of personal jurisdiction. Specific jurisdiction empowers courts to decide cases relating to a defendant's in-forum conduct and exists when the suit arises out of or relates to the defendant's contacts with the forum. General jurisdiction exists "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 AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

In *Bauman*, the Court held that, absent exceptional circumstances, general personal jurisdiction over a corporation is available only in the company's state of incorporation or principal place of business. The Court's holding precludes the exercise of general personal jurisdiction over an out-of-state defendant merely because the defendant does business in the state.

Here, however, the trial court exercised general jurisdiction over Defendants-Appellants based solely on their registration to do business and appointment of registered agents in Louisiana. It is important that this Court to correct the error below.

Further, because personal jurisdiction is a threshold issue, a failure to promptly and definitively resolve the issues presented by the Petition will cast uncertainty over many pending cases where jurisdiction rests on the theory that by registering to do business and appointing an agent for service, an out-of-state corporation consents to suit in Louisiana. Particularly because the trial court's decision is at odds with conclusions reached by many other courts, failure to resolve the issue promptly leaves open the question whether the continuing efforts and expenses of the courts and parties in pending cases may ultimately be rendered

for naught when it is later determined that there was no personal jurisdiction over the defendant. A prompt and definitive resolution of the issues presented by the Petition will conserve judicial resources and reduce uncertainty for plaintiffs and defendants alike.

ARGUMENT IN SUPPORT OF WRIT GRANT

I. This Case Presents an Issue of Fundamental Importance Requiring Prompt and Definitive Resolution by this Court.

In *Bauman*, the United States Supreme Court rejected the idea that corporations can constitutionally be subjected to general jurisdiction in every state where they operate. The Court held that general jurisdiction can constitutionally be asserted over an out-of-state corporation only if the corporation's contacts with the forum are so constant and pervasive "as to render [it] essentially at home in the forum state." *Id.* at 751 (citation omitted).

Bauman, and its predecessor, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2486 (2011), marked a major shift in the governing concept of general personal jurisdiction. Those cases dramatically redefined the framework for due process analysis, ushering in dramatic change regarding whether the courts may properly exercise general jurisdiction over corporations headquartered and operating primarily out-of-state.² Only where the claim itself is tied to the forum can the assertion of jurisdiction over out-of-state entities be justified.³ The practical impact of *Bauman* has been great. It has been an important step in halting

² See Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 522-26 (2015) (discussing the "momentous shift" in general personal jurisdiction over corporations brought about by the Supreme Court in *Daimler* and *Goodyear*); see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1357-58 (2015).

³ Unlike here, there is a policy justification, and a corresponding state interest, to the extent a state requires submission to jurisdiction of its courts for lawsuits *arising from a foreign corporation's activities within the state*. In such instances, the state's courts will be able to exercise specific personal jurisdiction over the foreign corporation arising from those in-state activities. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

forum-shopping practices that have allowed plaintiffs to drag nonresident corporations into forums unconnected to their claims.⁴

The facts of this case bring it squarely within the reach of *Bauman*. Here, a Mississippi resident claims injury in Mississippi as a result of alleged conduct by Defendant Hunt Refining Co., a Delaware corporation headquartered in Alabama, and Defendant Hunt Oil Co., a Delaware corporation headquartered in Texas.

The trial court found that, because foreign corporations operating in Louisiana must register with the state and appoint an agent for service under La. R.S. §13:206, this constituted a type of consent to jurisdiction, or waiver of objections to jurisdiction, that obviated any due process problems.⁵ Under this reasoning, obtaining a certificate of authority to do business in Louisiana meant that Defendants consented to Louisiana's jurisdiction over all claims, regardless of their relation to the forum.

This and similar arguments have been raised in many jurisdictions across the country in an effort to circumvent *Bauman's* limitation on general jurisdiction. Courts have largely rejected these efforts to equate registration with consent.⁶ The Supreme Court of Delaware and the U.S. Court of Appeals for the Second Circuit have ruled on the issue.⁷ Additionally, the Supreme Court of California heard oral arguments on the question in June 2016 in *Bristol-Myers Squibb Co. v. Superior Court*, No. S221038 (Cal. argued June 2, 2016), while the Supreme Court of

⁴ See *Bauman*, 134 S. Ct. at 760-61; see also *Goodyear*, 131 S. Ct. at 2851, 2854, 2857.

⁵ Like other states, Louisiana requires foreign corporations that sell products or services in the state to register to do business and appoint a registered agent for service of process. See *Monestier*, *supra* note 2, at 1363.

⁶ Indeed, as the Supreme Court of Delaware noted, "the majority of federal courts that have considered the issue" have rejected this argument. See *Genuine Parts Co. v. Cepec*, No. 528, 2015, 2016 WL 1569077, at *15 (Del. Apr. 18, 2016).

⁷ In *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the Second Circuit held that compliance with a Connecticut statute which required foreign corporations to register to do business and appoint a registered agent did not amount to consent to general jurisdiction in the state. Similarly, in *Genuine Parts Co. v. Cepec*, the Delaware Supreme Court reversed its own precedent, recognizing that interpreting registration to do business as consent to jurisdiction is no longer tenable following *Bauman*. See 2016 WL 1569077, at *18.

Illinois recently ordered the Illinois Appellate Court to grant an interlocutory appeal on the issue in *Jefferies v. Ford Motor Co.*, 50 N.E.3d 1137 (Ill. 2016).

The Petition should be granted to reverse, or at least consider, the ruling of the trial court. The issue presented requires immediate and definitive resolution because it undoubtedly affects not only this case, but countless others, grounded on similar facts. Because personal jurisdiction is a threshold issue, leaving the issue open adds a layer of potentially crippling uncertainty to cases already pending where personal jurisdiction is grounded only on registration and the appointment of an agent for service. Leaving the consent issue unresolved will affect the day-to-day prosecution of these claims, and may dissuade parties from expending resources litigating or settling their claims.⁸

The need to resolve the issue created by the trial court's decision is important for another equally pressing reason. Front and center in this debate are cases in which the cause of action itself has no relationship with this State. Yet there are financial advantages for attorneys to funnel all their similar cases to their own home forum, regardless of any direct connection of the case with the forum. This is abundantly clear in mass tort litigation, particularly asbestos litigation. Thus, if the trial court's ruling were to become the law, and Louisiana were to sustain jurisdiction in a case like this while many other states disclaim it (as they have), Louisiana could become a magnet for forum shopping in mass tort cases.

⁸ Indeed, the possibility – or likelihood – that Louisiana courts will ultimately find that registration and appointment does not confer jurisdiction creates the possibility that the continuing, daily efforts of litigants and trial courts to prosecute and administer cases will be rendered moot by a subsequent finding that the court lacked personal jurisdiction over the defendants from the very beginning.

II. Louisiana’s Foreign Corporation Law and Long-Arm Statute Should Not Be Interpreted To Mean That Foreign Corporations Consent to General Jurisdiction When They Register to Do Business and Appoint a Registered Agent in the State.

The trial court erred in concluding that by registering and appointing an agent for service in the State, a foreign corporation thereby consents to *general* jurisdiction. Nothing in the relevant statutes describes or requires such consent. Nothing in these statutes expressly advises an out-of-state corporation that by registering or appointing an agent for service it was agreeing to submit to *general jurisdiction* in the courts of Louisiana for all purposes. Also, requiring such a waiver of the right to raise due process objections to jurisdiction, as a condition of being allowed to do business in the state, would give rise to substantial constitutional questions.⁹ Faced with a statute that could be interpreted two ways, for one of which the “constitutionality is suspect,” the trial court had a duty to adopt the interpretation that “obviates a definitive ruling on the constitutionality of the [statute].”¹⁰

Louisiana’s Foreign Corporation law is set forth in La. R.S. §12:301 - 12:321. Under Louisiana law, “[n]o foreign corporation ... shall have the right to transact business in this state until it shall have procured a certificate of authority to do so.”¹¹ Similarly, all out-of-state corporations conducting business in Louisiana must “have and continuously maintain” a registered agent and a registered office in the state.¹² Obtaining a certificate of authority to do business, and maintaining a registered agent, is a mandatory condition of doing business in the forum.¹³

⁹ See *Lockheed Martin Corp.*, 814 F.3d at 641 (state’s “coercive power” is “limited by the Due Process clause” even “when exercised pursuant to a corporation’s purported ‘consent’”).

¹⁰ *Abate v. Healthcare Int’l, Inc.*, 560 So. 2d 812, 819 (La. 1990).

¹¹ La. R.S. §12:301.

¹² *Id.* at §12:308.

¹³ See *Id.* at §12:315 (b).

Section §12:306 provides that in addition to authorizing the company to transact business in Louisiana, the certificate of authority also entitles the foreign corporation to enjoy “the same, but no greater, rights and privileges” as a domestic entity.¹⁴ Section 12:306 also provides that an authorized foreign corporation is “subject to the same duties, restrictions, penalties and liabilities” as a domestic entity.¹⁵

Plaintiffs have seized upon this last section to argue that by registering to do business, out-of-state corporations consent to suit on all claims. Plaintiffs simply assert that submission to *general jurisdiction* in Louisiana courts is a “duty” or “liability” imposed on all domestic entities, to which out-of-state corporations become “subject” pursuant to §12:306.¹⁶

Thus far, however, plaintiffs have been unable to cite to any case law or statute which supports the idea that amenability to jurisdiction is a “duty or liability” within the meaning of §12:306. Indeed, personal jurisdiction is not a duty or liability, but a fundamental aspect of the individual liberty interests guaranteed by the Due Process Clause.¹⁷ And no matter how it is defined for state law purposes, it is an aspect of liberty that is bounded by the Federal Constitution. Thus, while La. R.S. §12:306 advises foreign corporations that they will be subject to the same “duties, restrictions, penalties and liabilities” as a domestic corporation, the most reasonable interpretation of this language is that foreign corporations are subject to the same taxes and regulations as a domestic entity, not that they have waived their rights to due process.

¹⁴ *Id.* at §12:306.

¹⁵ *Id.*

¹⁶ See Pl.’s May 17, 2016, Omnibus Response in Opposition, at 6-7.

¹⁷ See, e.g., *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 319 (1945) (commenting on the role of the Due Process Clause in ensuring the fair exercise of jurisdiction).

Plaintiffs also cite a portion of the Louisiana long-arm statute, La. R.S. §13:3206, which defines a “nonresident” as:

[A]n individual, his executor, administrator, or other legal representative, who at the time of the filing of the suit is not domiciled in this state, or a partnership, association, or any other legal or commercial entity, other than a corporation, not then domiciled in this state, or a corporation or limited liability company which is not organized under the laws of, and is not then licensed to do business in, this state.¹⁸

Plaintiffs argue that this section indicates that Louisiana does not consider authorized foreign corporations “nonresidents,” and therefore, they must be subject to general jurisdiction like any other domestic entity. The trial court seems to have accepted this theory.

Nothing in the text of §13:3206 confers jurisdiction over *any* individual or entity. Rather, the statute merely defines “nonresident” as used elsewhere in the code.¹⁹ Additionally, while §13:3201 discusses jurisdiction over “nonresidents,” it does not describe the extent to which courts can exercise jurisdiction over *licensed* foreign corporations. Similarly, while §13:3206 of the long-arm statute excludes authorized foreign corporations from the definition of “nonresidents,” nothing in any part of this section indicates that obtaining a certificate of authority would result in a waiver of due process rights.

In short, nothing in the Louisiana Code expressly or impliedly requires consent to jurisdiction as a condition of doing business. Similarly, nothing in the “Application for Authority to Transact Business in Louisiana” or the attached

¹⁸ See La. R.S. §13:3206.

¹⁹ *Id.*

“Important Notice” from the Secretary of State indicates that the foreign corporation is consenting to general jurisdiction in Louisiana.²⁰

Neither does the appointment of an agent for service of process constitute such consent: An agent for service makes it easier to serve the foreign corporation when jurisdiction is proper under the Code and the Constitution. Appointment of an agent to receive service does not make jurisdiction always proper.

Plaintiffs should not, therefore, be able to avoid the holding of *Bauman* by citing a theory of waiver or consent arising from registration to do business. No such consent was extracted.

III. Conditioning a Foreign Corporation’s Right to Do Business Upon Its Submitting to General Jurisdiction Would Violate the U.S. Constitution.

One additional reason to construe the Code not to encapsulate a consent to jurisdiction is because it avoids the serious constitutional question that would arise, after *Bauman*, from requiring foreign corporations to surrender their Constitutional right to due process in exchange for exercising their Constitutional right to engage in interstate commerce or to access Louisiana courts. If the Court sustains the trial court’s ruling and finds that the Code did coerce consent to jurisdiction, it will have to reach and resolve the constitutional issue – and most likely find the Code provisions unconstitutional. Faced with a statute that could be interpreted two ways, one of which is “constitutionality is suspect,” the best course of action is to adopt the interpretation that “obviates a definitive ruling on the constitutionality of the [statute].”²¹

²⁰ Copies of this form and the attached notice are available at <http://www.sos.la.gov/BusinessServices/PublishedDocuments/326ApplicationofForeignCorporationforCertificateofAuthority.pdf>.

²¹ *Abate*, 560 So. 2d at 819; *see also State v. Rochon*, 2011-0009, p. 23 (La. 10/25/11), 75 So. 3d 876, 889 (“[A] court may avoid constitutional problems by adopting a narrowing construction of the statute as long as that interpretation remains consistent with the overall purpose behind the legislation”) (citation omitted).

A. The Foreign Corporation Law Coerces Consent to Registration and Appointment of an Agent.

Louisiana's Foreign Corporation law states that "[n]o foreign corporation ... shall have the right to transact business in this state until it shall have procured a certificate of authority to do so."²² If a foreign corporation violates this section by conducting business without obtaining a certificate of authority, it will be subject to a series of penalties and fines pursuant to §§12:314 and 12:315. Section 12:315 imposes fines of up to \$1000 on the corporation, and up to \$500 on each of the corporation's officers and directors. Notably, §12:315 also contemplates up to four months imprisonment for each officer or director of an unauthorized corporation *in lieu* of the individual fine.²³ And finally – and perhaps even more importantly – §12:314(a) prevents an unauthorized foreign corporation from seeking relief through the courts of the state if it has not registered to do business.

In light of all this, it is clear that obtaining a certificate of authority to do business in Louisiana and appointing an agent for service is no mere suggestion, but rather a mandatory condition of doing business in the forum. If registering implies consent to jurisdiction, then Louisiana is coercing that consent. Such an approach is contrary to the plain meaning of the Court's holding in *Bauman*, and violates the unconstitutional conditions doctrine. It is also inconsistent with the approach adopted by the majority of jurisdictions, and would have a number of negative policy implications for Louisiana and its citizens.

B. It Is Unconstitutional to Require Foreign Corporations to Consent to General Jurisdiction as a Condition of Doing Business

The unconstitutional conditions doctrine reflects the principle that "the government 'may not deny a benefit to a person because he exercises a

²² See La. R.S. §12:301. Similarly, all foreign corporations conducting business in Louisiana must "have and continuously maintain" a registered agent and a registered office in the state. *Id.* at §12:308.

²³ See §12:315 (b).

constitutional right.”²⁴ As one scholar noted, “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of [a] constitutional right[].”²⁵ There are various tests for analyzing unconstitutional conditions questions, but most scholars agree that the “coercive effects” test would apply to the consent-by-registration general jurisdiction question.²⁶ Under the coercive effect test, the unconstitutional conditions doctrine is violated if an entity is required to sacrifice one constitutional right for another when exercising a privilege or benefit.

This brief in support of the petition does not present the occasion to exhaustively detail the law on unconstitutional conditions. Suffice it to say that before *Bauman*, there was no basis to suggest that, by requiring a company to consent to jurisdiction as a condition of doing business, a State was requiring that out-of-state company to forego protections it would otherwise have under the Due Process Clause. This is because, before *Bauman*, “doing business” in a state was itself arguably sufficient to subject an out-of-state company to jurisdiction in the state. Therefore, by requiring consent, and appointment of an agent, the state would not be asking for much more than what the state already had: general personal jurisdiction arising from the corporation’s decision to engage in business in the state. Thus, no constitutional issue was presented. *Bauman* changed all that.

²⁴ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (citation omitted) (collecting cases); see also, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421-22 (1989) (“Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”).

²⁵ See Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6-7 (1988).

²⁶ See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 60 (2001) (asserting that “coercion analysis provides the only sound explanation and justification” for finding state laws which require foreign corporations to waive their right to federal court removal in diversity cases to be unconstitutional conditions); see also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1304 (1984).

Because of the important due process interests at stake, foreign corporations cannot be compelled to surrender their constitutional due process rights as a condition for being allowed to exercise (1) their constitutional rights to conduct interstate business; and (2) their constitutional rights to access Louisiana's courts. Each element of that choice involves important constitutional rights.

(1) Due Process. *Bauman* made clear that under the Due Process Clause, corporations are only amenable to general jurisdiction in those states where they are "at home."²⁷ The right not to be called into courts without a legal or constitutional basis is an important right; it is at the core of due process. By requiring a corporation to, in effect, surrender that right as a condition of doing business, the state would improperly and unfairly burden that right.

To be sure, a state may create reasonable conditions where the state has an important interest to uphold – as where the cause of action against the defendant actually arises in the state. But a state has *no bona fide* interest in subjecting an out-of-state corporation to general jurisdiction (and especially, as here, where the litigation has no connection to the state). Any contrary ruling would eviscerate the Supreme Court's holding in *Bauman* and amount to unconstitutional coercion.

(2) Commerce Clause. Modern jurisprudence firmly recognizes that a company headquartered in one state, has a constitutional right to do business in another state. That right may not be improperly impaired.²⁸ The ability to engage in interstate commerce is a core constitutional right that binds the Nation

²⁷ *Bauman*, 134 S. Ct. at 751.

²⁸ See *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) ("To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States.") (citing *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891)).

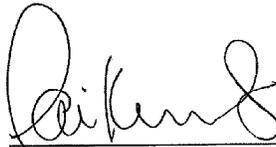
together.²⁹ And since the state has no legitimate interest in requiring every out-of-state corporation to submit to general jurisdiction, any such condition is improper.

(3) Access to Courts. As observed above, the Code allows only a registered foreign corporation access to the state courts.³⁰ Yet, this could leave companies doing business in the state without an effective remedy, denying them equal protection of the law, and denying them their First Amendment right to be heard in the courts. Thus, by putting a foreign corporation to the choice of surrendering to general jurisdiction, or surrendering its access to the state courts, the state would be imposing an unconstitutional condition.

CONCLUSION

For these reasons, this Court should grant the Defendants-Appellants Application for Writ of Supervisory Review and reverse the trial court's ruling that registration to do business amounts to consent to general jurisdiction under Louisiana law.

Respectfully submitted,



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Dated: July 15, 2016

²⁹ We recognize that the parallel rights under the privileges and immunities clause are not guaranteed to corporations, only to "citizens." See U.S. CONST. art. IV, §2.

³⁰ See La. R.S. §12:314(a).

CERTIFICATE OF SERVICE

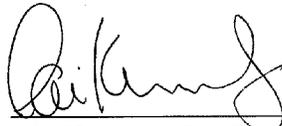
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