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SUPREME COURT OF PENNSYLVANIA

Nos. 37 & 38 MAP 2020

RYAN FELL MORTIMER,
Appellant,
v.
MICHAEL ANDREW McCOOL, RAYMOND CHRISTIAN McCOOL, ESTATE OF RAYMOND R. McCOOL, & McCOOL PROPERTIES, LLC
Appellees.

Brief of Amici Curiae the Chamber of Commerce of the United States of America, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, National Federation of Independent Business, UPMC, the Marcellus Shale Coalition, and the Pennsylvania Manufacturers' Association Supporting Appellees

Appeal from the December 12, 2019 Order of the Superior Court, No. 3583 EDA 2018, affirming the November 30, 2018 Order of the Court of Common Pleas of Chester County, No. 2012-10523-MJ

Robert L. Byer (PA 25447)
Jessica Priselac (PA 208524)
Leah A. Mintz (PA 320732)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, National Federation of Independent Business, UPMC, Marcellus Shale Coalition, and Pennsylvania Manufacturers' Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

PENNSYLVANIA CASES

CASES FROM OTHER JURISDICTIONS

STATUTES

LEGISLATIVE MATERIALS

SECONDARY AUTHORITIES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business advocacy association in Pennsylvania. Thousands of its members throughout the Commonwealth and from every industry sector employ more than 50% of Pennsylvania's private workforce. The PA Chamber's mission is to improve Pennsylvania's business climate for its members.

The Pennsylvania Coalition for Civil Justice Reform is a statewide, bipartisan organization representing businesses, health care and other perspectives. The coalition is dedicated

to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts.

The Pennsylvania Medical Society represents physicians of all specialties and is the largest physician organization in the Commonwealth. The Society regularly participates as amicus curiae in Pennsylvania appellate courts in cases raising important issues affecting health care organizations and their businesses.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Although there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB regularly files amicus curiae briefs in cases that

raise issues of concern to the nation's small business community.

UPMC is a Pennsylvania nonprofit, non-stock corporation. A $21 billion health care provider and insurer, UPMC and its subsidiaries are the Commonwealth's largest nongovernmental employer. UPMC integrates more than 90,000 employees, 40 hospitals, 700 doctors' offices and outpatient sites, and a 3.9 million-member Insurance Services Division. In the most recent fiscal year, UPMC and its subsidiaries contributed $1.4 billion in benefits to the communities it serves.

The Marcellus Shale Coalition ("MSC") represents the interests of producers, midstream, and local support companies that promote the safe and responsible development of natural gas from the Marcellus and Utica geological formations located in the Commonwealth. The Commonwealth produces more natural gas than any state except Texas due predominately to the advent of "unconventional" development from tight shale formations like the Marcellus and Utica. MSC members produce the vast majority of the unconventional natural gas in the Commonwealth. MSC members range from multi-national

corporations to small closely held companies. Many MSC members have multi-state operations conducted through separate corporations or limited liability companies.

Founded in 1909, the Pennsylvania Manufacturers' Association ("PMA") is the statewide non-profit organization representing the manufacturing sector in the state public policy process in Harrisburg.

The U.S. Chamber, PA Chamber, Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, NFIB, UPMC, MSC, and PMA ("Amici") file this brief to assist the Court in evaluating whether to adopt the expansive "enterprise" or "single entity" theories of piercing the corporate veil. These doctrines contravene settled principles of corporate law, and adopting them would thwart the General Assembly's goals of improving the Commonwealth's economic competitiveness and making it an attractive alternative to other states as a place of incorporation. Stare decisis further weighs against changing the current law. The single entity and enterprise theories are also unworkable, which is presumably why the vast majority of states have declined to adopt them. Sound policy considerations favor adhering to longstanding

Pennsylvania law, including the negative effects the adoption of these theories would have on Pennsylvania's economic growth.

No one other than Amici, their members, or their counsel paid for the preparation of this brief or authored this brief, in whole or in part.

ARGUMENT

Pennsylvania law governing when a court may "pierce the corporate veil" to disregard statutory liability protections has been established through decades of precedent and legislative enactments. The fundamental principle of this doctrine is respect for the corporate form: courts presume that separate legal entities should be treated as such and that debts of one entity cannot be imputed to other entities or individuals. This veil may be pierced only in limited circumstances where public policy demands it (*e.g.*, fraud or abuse of the corporate form), and only to impose liability on the shareholders or members hiding behind the sham corporate entity. The plaintiff nevertheless asks this Court to adopt an expansive theory that would pierce the veil between "sister" companies based on an "enterprise" or "single entity" theory so that she

can recover part of her judgment from an independent small business that was not a named defendant in the underlying action. The Court should not take that unprecedented and illogical step.

The potential impact of adopting the plaintiff's theory is far-reaching and potentially devastating for Pennsylvania businesses of all sizes. Under the enterprise or single entity theories that the plaintiff advocates, business organizations that merely share a common purpose with an affiliated entity could be liable for damages stemming from each other's actions, essentially negating the limited liability nature of most business organizations. The exposure to increased liability—to individuals, parent companies, and other, independent businesses—would encourage existing businesses to relocate from Pennsylvania and deter new businesses from organizing or locating in the Commonwealth. The economic toll on Pennsylvania and its citizens would be severe. This Court should reject the plaintiff's attempt to change existing law governing the limited circumstances in which a litigant may pierce the corporate veil.

I. The current law on piercing the corporate veil is well established, is consistent with the General Assembly's intent, and provides several avenues for preventing injustice.

A. Pennsylvania law simultaneously respects the limited liability nature of most business entities while providing sufficient flexibility to prevent injustice.

The first principle of corporate law is that a corporation or other business association "is normally regarded as a legal entity separate and distinct from its shareholders" or members. *Ashley v. Ashley*, 393 A.2d 637, 641 (Pa. 1978). Strict separation between a corporate entity and its members "serve[s] convenience and justice." *Id*.

Because a corporation or limited liability company ("LLC") is a separate legal entity, its shareholders or members are ordinarily not responsible for its debts. *See Anderson v. Abbott*, 321 U.S. 349, 362 (1944). This limitation of liability "allows individuals to use small fractions of their savings for various purposes, without risking a disastrous loss if any corporation in which they have invested becomes insolvent." Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 262 (1967). By insulating investors from any loss beyond their original investment,

corporations can raise large amounts of capital, *id.* at 260, 262, which historically "revolutionized modern industry," William W. Cook, *"Watered Stock"—Commissions—"Blue Sky Laws"—Stock Without Par Value*, 6 Mich. L. Rev. 583, 584 (1921). Even today, limited liability continues to encourage entrepreneurship for individuals, investment by passive investors, and appropriate risk-taking by corporate managers. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 93-97 (1985). For this reason, "privilege of limited liability," has been called a corporation's or LLC's "most precious characteristic." William W. Cook, *The Principles of Corporation Law* 19 (1925).

In recognition of limited liability's importance, Pennsylvania and most other states have instilled a strong presumption against piercing the corporate veil. *See Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995); *see also Village at Camelback Prop. Owners Ass'n, Inc. v. Carr*, 538 A.2d 528, 533 (Pa. Super. 1988) ("Piercing the corporate veil is admittedly an extraordinary remedy preserved for cases involving exceptional circumstances.").

But the corporate form is not inviolate. Pennsylvania courts have established a flexible standard for disregarding the limited liability protections of business associations when the form is abused. Those courts consistently recognize, however, that "[c]are should be taken on all occasions to avoid making `the entire theory of the corporate entity . . . useless.'" *Wedner v. Unemployment Bd.*, 296 A.2d 792, 795 (Pa. 1972) (alteration in original). To determine whether the corporate form has been abused, courts consider the factors this Court articulated in *Lumax*: whether the entity is undercapitalized; adhered to corporate formalities; substantially intermingled corporate and personal affairs; and used the corporate form to perpetrate a fraud. *Lumax*, 669 A.2d at 895.

While this is an intentionally rigorous standard, it is not insurmountable. For example, in *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200 (Pa. 1976), this Court pierced the veil to make William Newbauer personally liable for the $36,000 debt his company owed to College Watercolor Group because it was "clear that Newbauer used his control of the corporation in an attempt to further his own personal interests." *Id.* at 207. Specifically, Newbauer refused to pay his

company's debts unless College Watercolor Group's president agreed to sell him a controlling interest in that company. *Id.* Veil piercing was warranted because "Newbauer did not keep his personal interests separate from the corporate interests," and instead "used his total control over the corporation in an attempt to gain a personal benefit." *Id.*

Similarly, in *Ashley*, this Court found that commingling personal and company interests justified piercing the corporate veil. *Ashley*, 393 A.2d at 641. A husband and wife disputed the ownership of a company's stock, which the husband had purchased using funds from his company. *Id*. at 638-40. In recognizing the wife's ownership interest in the stock, this Court held that the husband and his company were not entitled to the benefits of the corporate veil because the husband "himself disregarded the fiction that [his company] was an entity separate and distinct from himself." *Id.* at 641. By using company money to fund stock purchases that were issued to himself personally and to purchase the house in which the family lived, the husband pierced the corporate veil separating himself from his company. *Id.*

Finally, in *Fletcher-Harlee Corp. v. Szymanski*, 936 A.2d 87 (Pa. Super. 2007), the Superior Court held that veil piercing was appropriate because the company subject to an outstanding judgment, Delmarva Concrete, Inc., never had any assets or owned any equipment. *Id.* at 97, 99. Delmarva's sole shareholder, Szymanski, did not keep separate financial records for his companies and sometimes deposited checks meant for one business into the accounts for another or into his personal accounts. *Id.* at 97, 99. Veil piercing was warranted because "Szymanski made little effort to ensure that the interests of Delmarva diverged from his personal interests and the interests of his other businesses." *Id.* at 101.

As these cases demonstrate, "courts are basically concerned . . . with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder." *Village at Camelback*, 538 A.2d at 533. The equities require courts to look at whether the corporate form was abused.

Importantly, it has never been sufficient, for purposes of piercing the veil, that a corporate entity cannot pay its debts or has been rendered insolvent by a judgment. *See* 1 Fletcher Cyc.

Corp. § 41 (2019 Update) (earlier edition cited with approval in *Wedner*, 296 A.2d at 794) ("Organizing a corporation for the purpose of avoiding personal liability, however, does not alone justify piercing the corporate veil."). "Indeed, a corporation" or other limited liability business "may be formed for the sole purpose of avoiding personal liability." *Id.* Interpreting the veil-piercing doctrine to allow for recovery from personal or a parent company's assets whenever another company's assets are exhausted defeats the very purpose of creating limited liability entities and would render a nullity the Court's caution "to avoid making the entire theory of the corporate entity . . . useless." *Wedner*, 296 A.2d at 795 (alteration in original); *see also Ashley*, 393 A.2d at 641 (explaining that a business form "will be disregarded whenever justice or public policy demand and when the rights of innocent parties are not prejudiced *nor the theory of the corporate entity rendered useless*" (emphasis added)).

Pennsylvania's corporate veil-piercing doctrine likewise has never been applied to allow the type of relief the plaintiff seeks here—*i.e.*, to disregard the legal separateness of two purported "sister" companies, also referred to as triangular or

lateral veil piercing. Under *Lumax*, the court determines whether the business entity whose "veil" a litigant seeks to pierce is essentially a sham for the operations of a sole or dominant shareholder or member. For that reason, the scope for piercing the veil is limited to assessing liability against a corporation's *shareholders* or the LLC's *members*. *See Mark Hershey Farms, Inc. v. Robinson*, 171 A.3d 810, 816 (Pa. Super. 2017) ("[W]hen it is appropriate to pierce the corporate veil, it is the shareholder, and not some other entity, who is held liable."); *Village at Camelback*, 538 A.2d at 532 (explaining that only shareholders may be liable for the acts of a corporation when piercing the corporate veil). Pennsylvania law does not allow a plaintiff to recover from the assets of another corporation or LLC simply because the insolvent entity and other businesses have common shareholders or members or a similar business purpose. In those circumstances, there has been no abuse of the corporate form.

B. Current law advances the General Assembly's goals in enacting the Business Corporation Law and Uniform Limited Liability Company Act.

Veil-piercing law in Pennsylvania—which recognizes the strong presumption against piercing the veil but allows for

such an extraordinary remedy when warranted—comports with the General Assembly's intent in passing the Business Corporation Law of 1988 ("BCL"), 15 Pa.C.S. §§ 1101-9507, the Limited Liability Company Law of 1994, 15 Pa.C.S. §§ 8901-8993 (repealed) ("the 1994 LLC Law"), and the Uniform Limited Liability Company Act of 2016 ("LLC Act"), 15 Pa.C.S. §§ 8811-8898. These statutes' provisions regarding limited liability suggest that the General Assembly meant to encourage business development in the Commonwealth and did not intend for courts to disregard an entity's form unless members or shareholders were intentionally misusing it.

The BCL's legislative history reflects an intent to maintain and strengthen corporate protections in order to incentivize businesses to incorporate in Pennsylvania instead of Delaware. Before the passage of the BCL, Pennsylvania, like many states, was concerned about "the trend of some Pennsylvania businesses that were incorporating or re-incorporating in Delaware." Francis G. X. Pileggi, *Brief Comparison of the Recently Enacted Pennsylvania Business Corporation Law with Delaware Corporate Law*, 8 Del. Law. No. 2 at 15, 15 (1990). The BCL was intended, in part, to "make Pennsylvania a more hospitable

home for corporate charters." Vincent F. Garrity, Jr., *Some Distinctive Features of the New Pennsylvania Business Corporation Law*, 45 Bus. Law. 57, 83 (1989). And as part of the revisions, the General Assembly reenacted liability protections for shareholders dictating that "[a] shareholder of a business corporation shall not be liable, solely by reason of being a shareholder, under an order of a court or in any other manner for a debt, obligation or liability of the corporation of any kind or for the acts of any shareholder or representative of the corporation." 15 Pa.C.S. § 1526(a); *see also* Source Note to 15 Pa.C.S. § 1526(a) (explaining that current language was derived from Act of May 5, 1933, P.L. 364, No. 106, § 609).

The same is true for the law governing LLCs, which was first enacted in 1994 and then revised in 2016. In the 1994 LLC Law, the General Assembly expressly insulated an LLC's members from personal liability unless the certificate of organization provided otherwise. 15 Pa.C.S. § 8922(a). The 1994 LLC Law also restricted courts' ability to remove the limited liability shield with regard to creditors, even if an LLC inadvertently failed to comply with some legal formalities.

Mark C. Larson, *Piercing the Veil of Pennsylvania Limited Liability Companies*, 75 Pa. B. Ass'n Q. 124, 128-29 (2004).

When the General Assembly overhauled the law governing LLCs in 2016, it expressly sought to "eliminate existing obstacles to the growth of Pennsylvania businesses." Rep. Adam Harris & Rep. W. Curtis Thomas, H. Co-Sponsorship Memoranda, HB 1398, 2015-16 Reg. Sess. (Pa. 2015). To that end, the LLC Act bolstered and clarified the form of LLCs, including the protections against member liability. *Id.*; *see* 15 Pa.C.S. § 8834(a).[1] The General Assembly explained that, when a court evaluates whether to pierce the veil, the court

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[1] Section 8834 of Title 15 states:

> A debt, obligation or other liability of [an LLC] is solely the debt, obligation or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt obligation or other liability of the company solely by reason of acting as a member or manager. This subsection applies regardless of:
>
> (1) whether the company has a single member or multiple members; and
>
> (2) the dissolution, winding up or termination of the company.

should disregard the factor relating to observing formalities because "the informality of organization and operation [of LLCs] is both common and desired." Committee Comment to 15 Pa.C.S. § 8106. Thus, in the absence of other intentional acts to abuse the law, the General Assembly presumed that courts would honor the limited liability nature of LLCs and not expand liability beyond the duties and obligations clearly outlined in the LLC Act.

The plain language of the statutes demonstrates that the General Assembly intended to preserve the traditional veil-piercing law in the Commonwealth. While more expansive concepts of veil piercing, such as the enterprise theory the plaintiff advocates here, have been around since at least the 1940s, *see* Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines*, 34 B.C. Int'l & Comp. L. Rev. 329, 388 (2011), the General Assembly has never adopted them. The Court should not effectively rewrite these laws to expand the scope of veil piercing to "sister" or "affiliated" entities or to allow vertical veil piercing solely because of similarity of membership or levels of control.

C. The current standard for piercing the corporate veil complements other avenues for combatting abuse of the corporate form.

Overruling decades of precedent and rewriting the law on corporate veil piercing is particularly inappropriate because Pennsylvania law already has robust protections for plaintiffs in cases where there have been illegal or fraudulent attempts to evade judgments. As this case demonstrates, the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa.C.S. §§ 5105-5110, provides an avenue for relief when assets are transferred from one business entity to another simply to avoid tort liability. Indeed, when 340 Associates LLC, a defendant here, transferred its liquor license to 334 Kayla, Inc., in order to escape liability for the plaintiff's judgment, the Superior Court unwound the transaction and granted the plaintiff relief. *Fell v. 340 Assocs., LLC*, 124 A.3d 75, 84 (Pa. Super. 2015).

Courts are also able to impose constructive trusts "to prevent the unjust enrichment of one party." *Moreland v. Metrovich*, 375 A.2d 772, 776 (Pa. 1977). "Traditionally, constructive trusts have been imposed where a party acquires legal title to property by violating some express or implied duty owed to another." *Koffman v. Smith*, 682 A.2d 1282, 1291

(Pa. Super. 1996). Thus, when property is fraudulently conveyed in order to avoid future judgments, a court can impose a constructive trust on the property in favor of a creditor. *Id.*

Such was the case in *Koffman*, where defendants Smith and Kingsley dissolved their partnership in Carolina Wholesale Furniture when a lawsuit was filed against them. *Id.* at 1285. As part of the dissolution, Smith and his wife received all the company's assets for $1.00, and Kingsley and his wife received a $200,000 note secured by a second mortgage. *Id.* The trial court imposed a constructive trust on Smith's and Kingsley's assets, and the Superior Court affirmed, because the record demonstrated that the Smiths and Kingsleys were not bona fide purchasers of Carolina Wholesale Furniture's assets. *Id.* at 1291. The court therefore ordered Smith and Kingsley to "hold the stock, the note, the mortgage and all other property of Carolina Wholesale Furniture in constructive trust for the benefit of Mr. Koffman." *Id.*

As these cases demonstrate, Pennsylvania courts have ample tools for preventing members of business entities from improperly absconding with business assets to avoid

judgments. Changing the law to make it easier to pierce the veil of entities that are affiliated by some level of common ownership or business purpose is unnecessary.

II. Several factors counsel against changing existing law to adopt the enterprise or single entity theories of corporate veil piercing.

Despite decades of precedent, legislative intent, and the availability of existing remedies, the plaintiff asks this Court to abandon established law in favor of adopting the "enterprise" or "single entity" theories of corporate veil piercing. This Court should reject the plaintiff's invitation to abandon stare decisis by implementing an unworkable rule that contravenes longstanding public policy and would make Pennsylvania a disfavored outlier.

A. Stare decisis weighs against making significant changes to a settled framework on which businesses have long relied.

As this Court has recognized, "stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Freed v.*

Geisinger Med. Ctr., 971 A.2d 1202, 1211-12 (Pa. 2009) (quotation omitted).

Abandoning stare decisis and changing the law are particularly inappropriate where, as here, the public has relied on the longstanding law. *See Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006). For generations, businesses in Pennsylvania have relied on robust liability shields that prevent veil-piercing in all but the most extraordinary circumstances involving abuse. Indeed, business owners have long used the corporate form and the protections that come with it to reduce the risk of becoming personally liable for the debts of a corporation or LLC. Similarly, larger entities use parent and subsidiary organizations to prevent debts from one small area of business from destroying the entire company. Changing the law now would upend settled expectations about the circumstances that could justify imposing liability on shareholders or members of a limited liability entity.

"[S]tare decisis has 'special force'" in this context because it involves protections afforded to businesses by statute—in particular, the limitations of liability in the BCL and LLC Act. *Shambach v. Bickhart*, 845 A.2d 793, 807 (Pa. 2004) (Saylor, J.,

concurring); *see supra* § I.B. Where statutes are involved, "stare decisis does implicate greater sanctity because the legislature can prospectively amend the statute if it disagrees with a court's interpretation." *Commonwealth v. Doughty*, 126 A.3d 951, 955 (Pa. 2015); *see also Shambach*, 845 A.2d at 807 (Saylor, J., concurring) ("[S]tare decisis has 'special force' in matters of statutory, as opposed to constitutional, construction, because in the statutory arena the legislative body is free to correct any errant interpretation of its intentions[.]").

Although departure from stare decisis may be appropriate where the previous rule is unworkable, *see Commonwealth v. Persichini*, 737 A.2d 1208, 1212 (Pa. 1999) (Castille, C.J., in support of affirmance) (cited with approval in *Freed*, 971 A.2d at 1212), that principle does not justify abandoning the current veil-piercing framework. As discussed above in Section I, that framework is both workable and flexible enough to prevent injustice. By contrast, as discussed below, the plaintiff's proposed standard would spawn confusion.

B. The plaintiff's theories are unworkable and would sow unnecessary confusion in Pennsylvania.

Unlike the existing law on corporate veil piercing, the "enterprise" or "single entity" theories have not developed into

workable standards that can be consistently applied by the courts. Although the Superior Court described these theories as applying when "two or more corporations share common ownership and are, in reality, operating as a corporate combine," *Miners, Inc. v. Alpine Equip. Corp.*, 722 A.2d 691, 695 (Pa. Super. 1988), the specific elements of an enterprise or single entity theory of corporate veil piercing are still in flux. Indeed, the few states that have explained or adopted the theories have never used the same formulation of a test for piercing the corporate veil. This amorphous standard not only is incompatible with current Pennsylvania law governing corporate entities, but it would also precipitate unpredictability and confusion.

In *Miners*, for example, the Superior Court noted that Pennsylvania has not adopted the "single entity" theory but described the doctrine as allowing corporate veil piercing because of "identity of ownership, unified administrative control, similar or supplementary business functions, involuntary creditors, and insolvency of the corporation against which the claim lies." *Id.*

Other states have used different formulations. Alabama uses a non-exhaustive list of eleven different factors to evaluate whether to pierce the corporate veil, including whether the "parent corporation owns all or most of the capital stock of the subsidiary," the "parent and subsidiary corporations have common directors or officers," the "parent corporation finances the subsidiary," the subsidiary does business with entities other than the parent corporation, and documents demonstrate that the parent corporation calls the subsidiary "a department or division." *Hill v. Fairfield Nursing & Rehab. Ctr., LLC*, 134 So.3d 396, 408 (Ala. 2013). No one factor is dispositive. *Id.* at 409.

Courts in Indiana consider even more factors, engaging in "a highly fact-sensitive inquiry" to determine whether to pierce the corporate veil under an enterprise theory of liability. *Reed v. Reid*, 980 N.E.2d 277, 303 (Ind. 2012). In every veil-piercing case, Indiana courts examine eight factors, which include: "(1) undercapitalization of the corporation, (2) the absence of corporate records, [and] (3) fraudulent representations by corporation shareholders or directors." *Id.* at 301-02. When multiple corporations are involved, courts consider four additional factors, including whether "similar corporate names

were used," the "business purposes of the [organizations] were similar," and the corporations used the same physical offices. *Id.* at 302 (alteration in original). When a plaintiff seeks to hold multiple businesses liable as a "single business enterprise," courts look to even more factors such as "the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public." *Id.*

Louisiana uses a similarly long and complex list of *eighteen* factors that courts evaluate when deciding whether to pierce the corporate veil under a "single business enterprise" theory. *See Green v. Champion Ins. Co.*, 577 So.2d 249, 257-58 (La. Ct. App. 1991). These factors include "identity or substantial identity of ownership," unified administrative control, one corporation financing another corporation, common employees, and disregard of corporate formalities. *Id.* As in other states, Louisiana's list of eighteen factors is not exhaustive, and no one factor is dispositive. *Id.* at 258.

As one scholar has put it, states like Indiana, Alabama, and Louisiana have succumbed to a "sad tendency of the common law method—that judges generate lists of factors to meet a particular policy aim, and then later judges apply the

lists either without remembering the original policy aim or perhaps to implement a different policy." Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economic, Democracy and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 Nw. L. Rev. 405, 414 (2006). The result is a "lamentable" practice "of substituting lists of factors for serious purposive analysis of when the veil should be pierced." *Id.* at 426.

Indeed, cases listing upwards of eighteen factors, which are not exhaustive and under which no one factor is determinative, offer little to no guidance to lower courts trying to apply the test. The cases often turn on the weight of the evidence and the credibility of witnesses, as assessed by a trial court, and seldom offer detailed analysis that can be used to analogize to other situations. The result is a lack of any workable standard for courts to employ. It is thus no surprise that most jurisdictions reject the "single entity" or "enterprise" theories. *See infra* § II.C.

Moreover, adopting the single entity or enterprise theories is incompatible with Pennsylvania corporate law. As

Professor Presser noted, under the factors expounded by the courts in Louisiana, for example, "the only requirement seems to be one of 'control': The 'abuse' requirement appears to have been dropped." *Id.* at 427. Yet, the "problem with disregarding the 'abuse' element . . . is that such control will always be potentially present in the case of shareholders or parents." *Id.* The single entity or enterprise theories, therefore, become "handy, always available means of doing away with limited shareholder liability." *Id.* This would be a dramatic departure from Pennsylvania's "general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception." *Wedner*, 296 A.2d at 795.

Adopting a single entity or enterprise test for piercing the corporate veil would also open the door to endless litigation about how and in what circumstances to apply the test. For example, courts would have to determine if the test applies only to corporate entities formed under Pennsylvania law, or whether the new standards would also apply to foreign entities with a presence in the Commonwealth. If the new test were to apply to foreign corporations, courts would then have to consider complicated choice of law questions, including the

impact of the Full Faith and Credit Clause of the United States Constitution if a court were to hold that Pennsylvania law controlled.

Beyond these threshold issues, Pennsylvania courts would have to craft their own list of factors to consider when deciding whether to pierce the corporate veil. If cases from other jurisdictions are any guide, this list of factors may contain ten to twenty items and still not be exhaustive. Courts in Pennsylvania would also have to determine which factors are most important, if not controlling, and how to weigh different factors if they point toward different outcomes. And because these issues are highly case-specific, a court could not easily transfer the reasoning of one case into another.

Questions also would arise about whether the same test or list of factors applies to all business forms, or whether different tests are required for corporations, LLCs, limited liability partnerships, or any other form. Even if the same factors are involved for all business entities, courts will have to consider whether they should be weighed differently. For instance, strict adherence to formalities might be required in cases involving corporations, but may be less important in

cases involving LLCs given their relative informality. *See* Committee Comment to 15 Pa.C.S. § 8106. The panoply of unsettled legal questions cautions against adopting an untested and aberrational theory that has developed from a small minority of jurisdictions.

C. The vast majority of states has not adopted the enterprise or single entity theories.

If the Court were to adopt the enterprise or single entity theories of piercing the corporate veil, Pennsylvania would become an outlier. Indeed, to date, only a handful of state Supreme Courts has adopted the single entity or enterprise theories.[2] Significantly, none of them is typically in competition

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[2] *See Hill v. Fairfield Nursing & Rehab. Ctr., LLC*, 134 So. 3d 396 (Ala. 2013); *Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc.*, 447 A.2d 406 (Conn. 1982); *Reed v. Reid*, 980 N.E.2d 277 (Ind. 2012); *Brown v. ANA Ins. Grp.*, 994 So. 2d 1265 (La. 2008); *Glenn v. Wagner*, 329 S.E.2d 326 (N.C. 1985); *Pertuis v. Front Roe Rests., Inc.*, 817 S.E.2d 273 (S.C. 2018); *Dailey v. Ayers Land Dev., LLC*, 241 W.Va. 404 (W.Va. 2019).

The plaintiff lists Texas as a state supporting this Court's adoption of a single entity theory of corporate veil piercing. (Pl.'s Br. at 35.) But the case the plaintiff cites unequivocally overruled the line of cases adopting a single entity theory. *SSP Partners v. Gladstone Invs. (USA) Corp.*, 275 S.W.3d 444, 456 (Tex.

with Pennsylvania. In a case similar to this one, a New Jersey court expressly noted that "the single business enterprise or single entity rule has not been adopted in this state." *Verni ex rel. Burstein v. Harry M. Stevens, Inc.*, 903 A.2d 475, 497 (N.J. Super. App. Div. 2006).

New York recognizes the single business entity theory only for purposes of determining personal jurisdiction. *See Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99-10496, 2002 WL 14363, at *6-7 (S.D.N.Y. Jan. 3, 2002). The standard for imposing liability, however, follows traditional veil-piercing doctrine, rather than a single entity or enterprise theory. *Id.* at *18-19.

Delaware courts likewise recognize that "mere control and even total ownership of one corporation by another is not sufficient to warrant the disregard of a separate corporate entity." *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, C.A. No. 7471-VCP, 2013 WL 5621678, at *27 (Del. Ch. Sept. 30, 2013). Instead, "a plaintiff must show that the interests of justice require it because matters like fraud, public wrong, or contravention of law are involved." *Id*.

2008). The law in Texas comports with the traditional veil-piercing doctrine that governs most of the country.

Ohio follows a comparable rule, allowing for veil piercing only when the plaintiff "demonstrate[s] that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538, 545 (Ohio 2008).

Pennsylvania would become an outlier, both among its neighbors and nationally, if it were to adopt a single entity or enterprise theory of piercing the corporate veil. This Court should not take that dramatic step.

III. Adopting the single entity or enterprise theory would wreak havoc among businesses in Pennsylvania and impede economic growth.

Upending decades of settled case law, disregarding the intent of the General Assembly, and adopting the enterprise or single entity theories of liability would harm Pennsylvania's business community. Businesses, like society in general, thrive when the laws governing their conduct are clearly defined at the outset. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). When the rules

governing their conduct are well established, businesses can conform their conduct to those rules in the most economically and competitively advantageous way possible. When businesses are successful, their employees benefit, and the economy as a whole thrives. But when the law is unsettled, the opposite is true: businesses and the entire economy suffer.

In a recent survey, a national sample of in-house general counsel, senior litigators, and other senior executives were asked how likely "it is that the litigation environment in a state could affect an important business decision at [his or her] company, such as where to locate or do business." U.S. Chamber Institute for Legal Reform, 2019 Lawsuit Climate Survey: Ranking the States, 3 (Sept. 2019).[3] An overwhelming 89% percent answered that the litigation environment was either somewhat likely or very likely to impact these important decisions. This is a significant increase from 85% in 2017, 75% in 2015 and 70% in 2012. *Id.*; *see also* U.S. Chamber Institute for

[3] Available at: https://www.instituteforlegalreform.com/uploads/sites/1/2019_Lawsuit_Climate_Survey_-_Ranking_the_States.pdf.

Legal Reform, 2017 Lawsuit Climate Survey: Ranking the States, 3 (Sept. 2017).[4]

If the Court were to adopt the single entity or enterprise theories of veil piercing, it would throw the corporate law of the Commonwealth into upheaval, impeding Pennsylvania's ability to attract new and innovative businesses. For example, over the past 17 years Pennsylvania has seen its share of national venture capital decline from nearly 4% to less than 1%, and it currently lags behind other states in the number of utility patents that it produces relative to its share of the population—both hallmarks of the innovation economy.[5] A drastic change in Pennsylvania's corporate legal framework, as proposed by the plaintiff, would only exacerbate this problem.

Indeed, an uncertain legal framework that favors expanding liability among affiliated businesses may cause

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[4] Available at: https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf

[5] Robert Maxim & Mark Muro, *Ideas for Pennsylvania Innovation* 16-18 (Brookings Institution Aug. 2019), available at: https://www.brookings.edu/wp-content/uploads/2019/08/2019.08.13_BrookingsMetro_Pennsylvania-Innovation-Economy_Maxim-Muro.pdf

entrepreneurs to doubt whether the corporate form of entities created to protect their intellectual property will be respected. A serial entrepreneur may be hesitant to try her latest idea for fear that the limited liability protections previously afforded to her successful companies would be disregarded and that her assets and those of her existing companies would be wiped out if her newest venture is unsuccessful. A venture capital firm may worry that its portfolio of companies would be deemed "affiliated" businesses and their corporate form disregarded simply because of the firm's overlapping ownership interest in its portfolio companies. And existing corporations may be wary of participating in joint ventures that otherwise would encourage innovation and diversify risk.

The resulting uncertainty if the single entity or enterprise theory is adopted would perhaps be most devastating for the Commonwealth's small businesses and the residents they employ. These businesses are more likely to have a single or small number of shareholders or members, who may also control other corporations or LLCs. Under the single entity theory, courts would easily be able to do away with any liability protections the law is supposed to afford these small

business owners. Indeed, this case is a perfect example, where a family owned a liquor license under one LLC and a property under a different LLC. (Superior Court Opinion at 2-3.) This type of arrangement is fairly common, especially in Pennsylvania's small business community. Expanding the scope of veil piercing to businesses that merely have some level of overlapping ownership and then making it easier for litigants to pierce the veil would create disincentives for existing family businesses to expand or to invest in new business lines. These businesses may fear that an LLC formed for the purpose of building a new business line may fail, and creditors would be able to pierce the veil of the family's existing business to pay the new LLC's debts.

Changing the corporate laws to remove liability protections for individuals and affiliated business entities would also hurt businesses like small medical practices. Physician groups may own and operate a medical practice and also own their premises or other assets through a separate corporation or LLC. If this Court adopted the plaintiff's theories, a medical malpractice judgment against one physician in the group could bankrupt the corporations or LLCs that own

the real property of the physician group, even where the other members the group were not liable for malpractice. This could be devastating for the doctors, their staffs, and their patients.

Larger health systems could also be adversely affected by a change in the veil-piercing doctrine. Health systems are often comprised of numerous hospitals, medical practices, and outpatient centers. If the plaintiff's theory were adopted, a judgment against one of the system's hospitals that renders the hospital insolvent could negatively impact its "sister" hospitals in communities that are hundreds of miles apart, to the detriment of Pennsylvania's economy and the health of its citizens.

Faced with such uncertainty and the potential for massive corporate and personal losses, fewer businesses would be willing to incorporate or organize in Pennsylvania. And those who are already organized under Pennsylvania law may be tempted to leave for more protective states like Delaware. Pennsylvania would suffer from decreased investment in these businesses, both large and small. The Commonwealth's tax revenues would also decline, resulting in decreased funding for essential services. The economic toll would be felt at every

level. This Court should therefore continue to apply traditional veil-piercing law and should decline to adopt the single entity or enterprise theories of piercing the corporate veil.

CONCLUSION

This Court should affirm.

September 8, 2020

Respectfully submitted,

/s/ Robert L. Byer

Robert L. Byer (PA 25447)
Jessica Priselac (PA 208524)
Leah A. Mintz (PA 320732)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, National Federation of Independent Business, UPMC, Marcellus Shale Coalition, and Pennsylvania Manufacturers' Association

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief complies with the word count limits in Pa.R.A.P. 531(b)(3) because it contains 6,694 words.

/s/ Robert L. Byer
Robert L. Byer (PA 25447)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, National Federation of Independent Business, UPMC, Marcellus Shale Coalition, and Pennsylvania Manufacturers' Association

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently from non-confidential information and documents.

/s/ Robert L. Byer
Robert L. Byer (PA 25447)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Pennsylvania Chamber of Business and Industry, Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Medical Society, National Federation of Independent Business, UPMC, Marcellus Shale Coalition, and Pennsylvania Manufacturers' Association

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