APL-2019-00239
Queens County Clerk's Index No. 706909/15
Appellate Division–Second Department Docket Nos. 2016-06194 and 2016-07397

# Court of Appeals

*of the*

# State of New York

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

*Plaintiffs-Appellants,*

– against –

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

*Defendants,*

– and –

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

*Defendants-Respondents.*

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U.S. TIRES AND WHEELS OF QUEENS, LLC,

*Non-Party.*

## BRIEF FOR *AMICI CURIAE* CIVIL PROCEDURE PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS


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## INTEREST OF THE AMICI

Amici curiae are law professors who teach civil procedure, including personal jurisdiction. Their names and law school affiliations are listed in an Addendum to this brief. They have no personal interest of any kind in the outcome of this particular appeal or any other case in which similar issues have been raised. They are filing this brief solely to advise the Court as to their views on the proper analysis of the jurisdictional issue in this case.

Amici believe that, consistent with the United States Constitution and New York's Business Corporation Law, registering to do business in New York constitutes consent to personal jurisdiction in New York courts for claims reasonably related to a registrant's in-state conduct. Accordingly, they urge the Court to reverse the decision of the Appellate Division.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This is a products liability case filed in New York in 2015. Plaintiffs-appellants were injured while passengers in an automobile that was manufactured by defendant-respondent Ford Motor Company and equipped with a tire manufactured by defendant-respondent Goodyear Tire & Rubber Company. The automobile was owned and operated by a resident of the State of New York, and the accident occurred in Virginia in 2012. The automobile was originally sold to a purchaser in Ohio and later resold to a New York resident, who in turn sold it to its current owner in late 2011. The Goodyear tire was installed by a non-party company in Queens, New York; that company is a defendant in a related case. Both Ford and Goodyear have, for many years, been registered to do business in New York and have regularly done business in the State since the 1920s. That business includes, for Ford, the sale of automobiles of the same make and model as the vehicle involved in this accident and, for Goodyear, the sale of the same make of tire involved in this action.

There is no dispute that neither Ford nor Goodyear is "at home" in New York, as the United States Supreme Court uses that term, and hence neither is subject to general jurisdiction in this State for claims that have no relation to New York. Moreover, because the accident in question occurred in Virginia, the New York courts do not have specific jurisdiction over these claims as the Supreme Court presently defines that term. But here, jurisdiction is based on the fact that defendants registered

to do business in New York and thereby consented to jurisdiction for claims reasonably related to that in-state activity. That is a third path to personal jurisdiction, which amici will refer to as "registration jurisdiction." As plaintiffs established, both Ford and Goodyear are now, and have been for many years, registered to do business in New York; for both companies, that business encompasses the sale of the make and model of the vehicle or tire involved in this accident. Under New York law, a foreign corporation that registers to do business in the State appoints the Secretary of State to receive service of process. *See* N.Y. Bus. Corp. Law §§ 1301, 1304(a)(6). That act constitutes consent to be sued in New York under long-established New York law, contrary to what the Appellate Division held.

Amici recognize that the Constitution imposes significant limits on the authority of state courts to exercise jurisdiction over individuals and businesses that are not residents of that state. But precedent confirms that the use of state business registration statutes to obtain personal jurisdiction over parties that regularly transact business in the state comports with the Constitution, provided that the plaintiff's claims are reasonably related to the corporation's in-state activities—as is true here.

***First***, this Court has held that New York law authorizes state courts to exercise personal jurisdiction over non-resident companies that register under the State's business registration statutes. This Court upheld that use in 1916 in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432. Although the Appellate

Division concluded that it could disregard *Bagdon*, only this Court can overrule its own precedent, and there are no grounds for doing so here.

***Second***, the Supreme Court has long recognized that registration jurisdiction is a proper basis for personal jurisdiction and consistent with due process. Nothing in its recent decisions invalidates the longstanding rule under *Bagdon* that a non-resident company can be subject to personal jurisdiction in a state where it has appointed an in-state agent for service of process. Indeed, while the Supreme Court overturned a state court's exercise of general jurisdiction over a non-resident defendant as inconsistent with due process in *BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549 (2017), the Court specifically left open whether the defendant there had consented to personal jurisdiction by registering to do business in the state and conducting very substantial business in that state.

***Third***, the only arguable ground for concluding that New York's registration statute cannot confer personal jurisdiction would be that doing so imposes an unconstitutional condition on doing business in the state or creates an excessive burden on interstate commerce. Those arguments might have some force if the claim here had no connection to New York. For example, if a plaintiff had worked for a defendant in California and was fired from his job there, allowing New York to obtain personal jurisdiction over that claim might create an excessive burden on commerce. But that is not the case here: both defendants regularly sell the products in New York that

allegedly injured these plaintiffs; the Goodyear tire was installed on the Ford vehicle in New York; the owner of the vehicle involved in the accident is a New York resident and he registered the vehicle in New York; and the plaintiffs are New York residents. These contacts more than satisfy the requisite relation between these claims and this State.

Finally, it is worth noting that the question before the Court has substantial practical implications. If this suit had been brought in Virginia (where the accident occurred), respondents likely would have claimed that the Virginia courts lacked specific jurisdiction—exactly the position that Ford has taken in two consolidated cases now pending before the Supreme Court, where Ford contests the exercise of specific jurisdiction by courts of states where accidents occurred, on the ground that the vehicles were not first sold (by Ford) in the forum state or to the current owners.[1] If they were to take the same position in this case, then according to Ford and Goodyear, this case could only have been brought in their states of incorporation (Delaware for Ford and Ohio for Goodyear) or where they have their principal places of business (Michigan and Ohio, respectively).

Nor could plaintiffs have sued both these defendants together in any state besides New York. Ford notes that the vehicle in question here was assembled in

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[1] *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, No. 19-368; *Ford Motor Co. v. Bandemar*, No. 19-369 (U.S. argued Oct. 7, 2020).

Missouri but does not state where it was designed, other than to exclude New York. The Goodyear tire at issue was designed in Ohio and manufactured in Tennessee. Therefore, even if plaintiffs could also sue where the vehicle or the tire was made (or designed), under respondents' theory of personal jurisdiction, there is no state in which Ford and Goodyear could both be sued. And here, that constraint would be especially burdensome, since plaintiffs also have a related case against the tire installer, which does business only in New York and can only be sued here. Respondents, corporate giants who regularly do business in the State and can zealously defend against this lawsuit (as they have), do not need to be protected from answering for their actions in a New York court at the expense of leaving plaintiffs with no forum where they can sue all potentially liable parties, thereby undermining New York's ability to enforce its consumer protection and products liability laws.

## ARGUMENT

### I. SECTIONS 1301 AND 1304 OF NEW YORK'S BUSINESS CORPORATION LAW CONFER PERSONAL JURISDICTION OVER THE CLAIMS IN THIS CASE

While respondents argue that the New York Business Corporation Law should not be read to confer jurisdiction in this case, this Court is the final authority as to the meaning of New York law, and it held otherwise in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). In a unanimous opinion by Judge Cardozo, this Court rejected the same statutory argument that respondents make

here, and the following year, in another opinion by Judge Cardozo relying on *Bagdon*, this Court explicitly held that jurisdiction may be obtained through registration to do business in the state, when the registrant has, in fact, done business in the state, even when the claim did not arise from an activity that occurred within the State. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 268 (1917). No decision of this Court since then has called into question that interpretation of New York law. Amici do not rely on *Tauza*'s more sweeping statement that consent by registration extends to causes of action entirely unrelated to a registrant's business in New York. Instead, amici argue only that registration jurisdiction may constitutionally extend to causes of action reasonably related to a registrant's in-state activities.

Despite this unbroken line of authority, in the nine pages that respondents devote to urging a different conclusion, they barely mention *Bagdon* and then attempt to distinguish it because it "did not interpret the Business Corporation Law, which was enacted some 55 years later." Respondents' Br. at 16 (citing N.Y. Laws 1961, ch. 855). What they fail to note is that the 1961 Business Corporation Law simply recodified the law construed in *Bagdon*, on which the citizens of New York and the thousands of non-resident businesses that are registered pursuant to it have relied for over a century. Nor was the proposition at issue in 1916—whether a non-resident corporation's registration properly confers jurisdiction by consent in the state—new

when this Court decided *Bagdon*. Almost forty years earlier, the U.S. Supreme Court had reached the same conclusion in *Ex Parte Schollenberger*:

> So, as in this case, if the legislature of a State requires a foreign corporation to consent to be "found" within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the court will not ordinarily look.

96 U.S. 369, 377 (1877); *see also Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898) (upholding jurisdiction over a foreign corporation registered to do business, and doing business, in New York, even without a statute).

Moreover, the Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp.* specifically upheld the propriety of using registration under New York's corporation law to sustain the trial court's jurisdiction. 308 U.S. 165, 174–175 (1939). The Court recognized that "designat[ing a person] upon whom a summons may be served within the State of New York," as required by New York statute, constituted "actual consent by [a corporation] to be sued in the courts of New York," and held that "[a] statute calling for such a designation is constitutional, and the designation of the agent a voluntary act." *Id.* at 175 (citations and internal quotation marks omitted).

Respondents focus a great deal on other courts' interpretations of the laws of other states, particularly the Second Circuit's interpretation of Connecticut law in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), but that effort misses

the mark. This Court, not a federal court, is the final authority on the meaning of New York law. Moreover, the Connecticut statute at issue in *Brown* differs from New York's registration statute, as the Second Circuit noted; New York's statute "has been definitively construed" to confer personal jurisdiction over companies registered to do business in the State for claims reasonably related to their in-State activities. *Id.* at 641. More instructive is *Gucci America, Inc. v. Li*, where the Second Circuit ruled that, although general jurisdiction was lacking, "[t]he district court may consider whether [the defendant] has consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process." 768 F.3d 122, 136 n.15 (2d Cir. 2014). The court drew favorably on *Bagdon* and distinguished the Supreme Court's opinion in *Daimler AG v. Bauman*, explaining that "general jurisdiction defines the scope of a court's jurisdiction when an entity 'has *not consented* to suit in the forum.'" *Id.* (emphasis added) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 129 (2014)).

Nor is the Second Circuit's recent opinion in *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492 (2d Cir. 2020), to the contrary. In *Chen*, the Second Circuit rejected the proposition that registering to do business in New York conveyed *general* jurisdiction, but it did not address whether it might convey the more limited form of registration jurisdiction that amici propose here, and that courts have long

recognized, as discussed *infra,* Section II. As *Chen* acknowledged, "New York's highest court has yet to definitively weigh in" post-*Daimler,* and the Second Circuit was attempting "to carefully predict how the state's highest court would resolve the uncertainty or ambiguity." *Id.* at 498–99 (quoting *Geron v. Seyfarth Shaw LLP* (*In re Thelen LLP*), 736 F.3d 213, 219 (2d Cir. 2013)).[2]

Respondents did not petition this Court asking it to overrule *Bagdon*, and there would be no basis for doing so if they had. Of course, BCL §§ 1301 and 1304, as interpreted by *Bagdon*, are subject to the U.S. Constitution, but that avenue does not help respondents either.

## II. THE SUPREME COURT HAS RECOGNIZED THE CONSTITUTIONALITY OF REGISTRATION JURISDICTION, AND RECENT CASE LAW IS NOT TO THE CONTRARY

### A. Registration Jurisdiction Is Well-Established

An unbroken line of Supreme Court precedent recognizes the exercise of registration jurisdiction, albeit without using that term, as consistent with the Due Process Clause. In addition to the cases cited above, in *Pennoyer v. Neff,* the Supreme Court made clear that, in certain circumstances, non-residents could be required "to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted . . . and provide . . . that judgments rendered upon

[2] *Chen* is also distinguishable on its facts. There, the question was whether the court had jurisdiction over claims by non-New York plaintiffs who had purchased the defendant's products outside New York, and the claims bore no other connection to the State. 954 F.3d at 497.

such service may . . . be binding upon the non-residents both within and without the State." 95 U.S. 714, 735 (1877). And since *International Shoe*, 326 U.S. 310 (1945), the Supreme Court has repeatedly recognized consent as a basis for personal jurisdiction, noting that "there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)). Indeed, "the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." *Ins. Corp. of Ir.*, 456 U.S. at 704 (citing *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938); *Chi. Life Ins. Co. v. Cherry*, 244 U.S. 25, 29–30 (1917)). The case for jurisdiction is even stronger here because respondents gave "actual consent . . . to be sued in the courts of New York," *Neirbo*, 308 U.S. at 175, when they expressly appointed agents for service of process in New York, and they are being sued on claims that are closely related to their New York business of regularly selling the products at issue in this case in this State.

To be sure, *Shaffer v. Heitner*, 433 U.S. 186 (1977), put an end to quasi-in rem jurisdiction, but the opinion also repudiated respondents' contention that *International Shoe* cut back on all methods of obtaining personal jurisdiction over non-residents: "The immediate effect of this departure from Pennoyer's conceptual

apparatus was to *increase* the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Id.* at 204 (emphasis added). Respondents argue that *International Shoe* actually cut back on the proper scope of personal jurisdiction permitted in earlier cases, including *Pennoyer*, and made it harder for states to obtain personal jurisdiction over defendants such as respondents that are doing systematic and continuous business in their states. That position is untenable because it focuses only on the Court's observation in *International Shoe* that some forms of consent (but not actual registration) were legal fictions. It fails to acknowledge the Court's conclusion in *International Shoe* that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." 326 U.S. at 318. Moreover, *Burnham v. Superior Court of California* makes clear that the true impact of *International Shoe* on prior cases is to clarify the basis of prior decisions, not to reverse those upholding jurisdiction: "Our opinion in *International Shoe* cast those fictions aside and made explicit the underlying basis of these decisions: Due process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*." 495 U.S. 604, 618 (1990) (plurality opinion) (emphasis in original).

Holding that due process voids consent in all cases, as respondents broadly suggest, would contravene many Supreme Court decisions and require that major areas of the law that rely on variants of consent as a basis for jurisdiction be recast.

For example, the contract provision at issue in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), required a passenger who was injured on a cruise ship in Pacific waters to sue only in Florida. If respondents' agreement to register in New York did not allow this suit in New York courts, the contract in *Shute* would have been per se invalid. Yet the Court upheld that forum selection provision after holding that the chosen forum was reasonable, *id.* at 591–93, which is an important element of the concept of registration jurisdiction advanced by amici. Similarly, the Court's consistent interpretations of the Federal Arbitration Act, which applies only when both parties "consent" to arbitration, could not stand in cases like *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In that case, the plaintiffs "consented" to arbitration only after having purchased the product at issue and the "consent" was given at a time that failed to provide reasonable notice that the consumers had waived their constitutional rights to sue in court, before a jury of their peers, and so they had no opportunity to object.[3]

### B. *Daimler* Does Not Disturb the Viability of Registration Jurisdiction

Respondents' second argument—that recent Supreme Court decisions, in particular *Daimler*, preclude any use of registration as a basis for personal jurisdiction—cannot overcome an unbroken line of cases upholding registration as a basis for

[3] Br. of Appellees, *Concepcion v. AT&T Mobility LLC*, No. 08-56394, 2009 WL 2494187 (9th Cir. filed Mar. 9, 2009) (Statement of Facts).

jurisdiction in a wide variety of contexts. There is no mention of registration statements in *Daimler*. *Daimler* considered only general jurisdiction, which "defines the scope of a court's jurisdiction when an entity 'has *not consented* to suit in the forum.'" *Gucci*, 768 F.3d at 136 n.15 (emphasis added) (quoting *Daimler*, 571 U.S. at 129). It did not resolve the separate question of whether consent to jurisdiction via a business registration statute comports with due process.

Amici do not ask this Court to hold that registering to do business in New York *alone* exposes corporations to the *general* jurisdiction of New York courts and allows them to be sued in New York on claims unrelated to their in-state activities. For example, in amici's view, a California resident who worked for a Ford plant in California could not sue for wrongful termination in New York. Nor could a plaintiff sue Ford in New York when injured out-of-state by a military vehicle that Ford does not design, manufacture, or market in New York. And under amici's approach, the New York registration law would not allow the non-New York plaintiffs in *Chen* to sue Dunkin' Brands in New York when they consumed the Dunkin' products in other states. That is because, consistent with *Daimler*, registration to do business in the forum state by itself does not make a corporation amenable to suit on every type of claim in the state in which it has registered to do business and benefit from the forum's market. As *Daimler* observed, it is "one thing to hold a corporation answerable for operations in the forum State . . . quite another to expose it to suit on claims

having no connection whatever to the forum State." 571 U.S. at 139 n.19 (citation omitted). But *Daimler* did not consider and did not hold that due process prohibits registration jurisdiction when the claims at issue are reasonably related to the defendant's in-state activities—in this case, the substantial connections between the business that both defendants do in the State and the automobile and tire that allegedly caused the injuries and deaths at issue here.

The absence of any conflict between *Daimler*'s interpretation of the Due Process Clause, on the one hand, and New York's exercise of jurisdiction in this case, on the other, is confirmed by the fact that the Supreme Court expressly left open that very question in its only opportunity since *Daimler* to confront consent by registration. In *BNSF Railway Co. v. Tyrell*, a non-resident of Montana sued the non-resident railroad for injuries sustained in the State of Washington. 137 S. Ct. 1549 (2017). The Montana courts held that they had personal jurisdiction over the railroad, which had registered to do business in the state and in fact engaged in substantial and regular business there. The Supreme Court unanimously ruled against the plaintiff, finding that "*absent consent,*" there was neither general nor specific jurisdiction. *Id.* at 1556 (emphasis added); *cf. Daimler*, 571 U.S. at 129 (noting that its analysis of general jurisdiction applies when an entity "has not consented to suit in the forum" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011))).

However, the Court in *BNSF* expressly left open on remand the argument made by the plaintiffs here: that the railroad's registration with the state sufficed to obtain personal jurisdiction over it. 137 S. Ct. at 1559 (leaving open question of jurisdiction by consent); Tyrell/Nelson's Consolidated Answering Brief, *BNSF*, No. 16-405, 2015 WL 5517415, at *11–16 (U.S. filed Mar. 2017) (arguing that jurisdiction by consent existed because of registration). If *Daimler* or due process precluded the exercise of registration jurisdiction, the Court would not have done so. And while the Montana Supreme Court later held that Montana law does not recognize consent to jurisdiction by registration, it relied on the fact that Montana's registration statute "specifically provide[s] that the appointment of a registered agent 'does *not by itself* create the basis for personal jurisdiction over the represented entity in this state.'" *DeLeon v. BNSF Ry. Co.*, 392 Mont. 446, 453 (2018) (emphasis in original) (quoting Mont. Code Ann. § 35-7-115). New York's statute does not include such a restriction. To the contrary, New York courts have interpreted that statute for over a century to mean that registering to do business in this State *is sufficient* to exercise personal jurisdiction over foreign corporations for claims reasonably related to their in-state activities.

Even Ford has conceded in other cases that the question is open. In its petition for certiorari in *Ford Motor Company v. Bandemar*, Ford contested the exercise of specific and general jurisdiction but admitted that the issue of whether the Minnesota

registration statute, like New York's, could provide the basis for personal jurisdiction was unresolved. Pet. for Cert. at 33 n.9, No. 19-369 (U.S. filed Sept. 18, 2019). Surely, if that issue had been foreclosed by *Daimler* and its progeny, Ford would not have made such a concession.

In sum, recent decisions of the Supreme Court do not unsettle the compatibility of registration jurisdiction and the Due Process Clause. Indeed, those decisions do not even signal the contrary. Respondents' position that registration jurisdiction necessarily entails consent to general jurisdiction is a strawman that need not be reached, let alone accepted. Because the claims in this case are reasonably related to respondents' in-state conduct, plaintiffs have satisfied the requirements of registration jurisdiction and the Constitution.

## III. NEITHER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE NOR THE DORMANT COMMERCE CLAUSE FORECLOSES NEW YORK'S EXERCISE OF PERSONAL JURISDICTION IN THIS CASE

### A. There Is No Coerced Consent or Unconstitutional Condition Here

Apparently recognizing that a defendant's actual consent via registration suffices for personal jurisdiction, respondents argue that they were "coerced" into signing the New York registration statement in order to do business in New York. They appear to be invoking the "unconstitutional conditions" doctrine under which an individual cannot be required to surrender certain constitutional rights in order to obtain a benefit from the State. The classic example is *Speiser v. Randall*, where the

Court ruled that an individual could not be forced to surrender his First Amendment right to free speech as a condition of obtaining a property tax exemption. 357 U.S. 513 (1958). Respondents make no First Amendment claim here; they simply object to being subjected to suits in the New York courts for matters relating to the business they do in the State.

For support, they cite two recent Supreme Court decisions—*Burchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)—but neither is relevant to this situation. Neither involved an actual consent signed by the objecting party, let alone the kind of corporate registration forms that both respondents have signed in New York for almost a century. Rather, consent to violate constitutional rights was presumed in both cases, and the question was whether the state had acted unreasonably and hence unconstitutionally. In *Burchfield*, the Court set aside a blood draw to test for intoxication while driving, but upheld a breath test as reasonable, noting that consents to searches that would otherwise be unconstitutional, including implied consents, are valid in that context. 136 S.Ct. at 2185. As for *Koontz*, the landowner who was seeking compensation for a taking of his property prevailed under cases that reflect "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." 570 U.S. at 604. Aside from the fact that respondents are not asserting

an enumerated right of the kind at issue in *Koontz*, the opinion there does not hold that a state may not impose any requirements on a person seeking a permit (there, for a building), but only that the state must act reasonably, as New York has done here, and not make "[e]xtortionate demands." *Id.* at 607.

### B. The Dormant Commerce Clause Does Not Foreclose the Exercise of Registration Jurisdiction Here

Amici agree with respondents that the Dormant Commerce Clause can be relevant to the exercise of personal jurisdiction, but that abstract argument in no way requires the New York courts to dismiss this case against them.[4]

There is no claim here that New York's registration requirements discriminate against non-resident corporations, and therefore those requirements must be assessed against the standard set forth in *Pike v. Bruce Church, Inc.*, which respondents did not cite:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.

[4] For a discussion by one of the amici as to why the Dormant Commerce Clause is generally the preferable way to analyze efforts by state courts to exercise personal jurisdiction over non-resident businesses, see Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DePaul L. Rev. 517 (2019). That conclusion is supported by the Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which the Court reversed the portion of an earlier decision relying on due process in deciding the circumstances in which a state may require an out-of-state seller to collect the state's sales tax on merchandise sent into the state, relying instead on the Dormant Commerce Clause in its analysis.

> And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. 137, 142 (1970) (citations omitted). Under that test, Ford and Goodyear, as national, indeed international, sellers of products whose mobility is central to their utility, can hardly complain about having to defend a lawsuit in New York under these circumstances. Their products of this make and model were regularly sold in New York, and the owner of the car and the injured plaintiffs are New York residents. To be sure, the accident in question occurred in Virginia, but as amici note above, Ford takes the position in the pending *Bandemar* case that there would not even be specific jurisdiction in Virginia—or for that matter even in New York if the accident happened here—because Ford did not make the first sale of this car to its current owner in New York.

Respondents rely on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), to argue that exercising jurisdiction is a substantial burden on commerce. *Bendix* is inapposite. It discussed only general jurisdiction, which "would extend to any suit against [a defendant], whether or not the transaction in question had any connection with [the forum state]." *Id.* at 892. By contrast, the registration jurisdiction urged by amici does not extend to general jurisdiction but only to claims that bear a reasonable relation to respondents' in-state business—a significantly lesser burden. And in *Bendix*, it was "conceded by all parties that the [forum state's]

long-arm statute would have permitted service on [the defendant] throughout the period of limitations." *Id.* at 894.

The recent decision in *South Dakota v. Wayfair, Inc*, 138 S. Ct. 2080 (2018), confirms that the Dormant Commerce Clause does not preclude New York's use of its registration statutes to obtain jurisdiction over respondents in this case. The Court there upheld a South Dakota law that required large out-of-state sellers like Wayfair to collect sales taxes on their shipments into South Dakota and to remit them to the state in the face of a Commerce Clause challenge. There can be no question that the law imposed *some* burdens and costs on the sellers, but the law served two important purposes: It raised substantial revenues, and it protected in-state sellers from the unfair advantage that out-of-state sellers had because they did not have to charge the sales tax. So too here: New York's requirement that non-resident corporations doing business in the State be amenable to suit by New York residents in New York courts serves the important purposes of protecting New York residents and creating a level playing field for New York businesses that can be sued in the State.

*Wayfair* is important for another reason: Wayfair had argued that, if the South Dakota law at issue were upheld, that holding would support laws that harmed small sellers or permitted states to enact burdensome and complex laws that would result in substantial burdens on commerce. The Court's response was that the Commerce Clause is sufficiently flexible that it can respond to those situations, and hence there

was no need to bar South Dakota from enforcing its otherwise fair and reasonable law. 138 S. Ct. at 2098–99. As in *Wayfair*, the Dormant Commerce Clause is sufficiently flexible to respond to cases at the center of respondents' arguments, where the defendant would face significant hardship from being haled into a New York court, or where the claims have no connection to its conduct in the forum state. Thus, if a case is brought like *Daimler*, in which, as the Court observed, the claims had no relation to the forum state, 571 U.S. at 139 n.19, the courts will step in and prevent that kind of overreach. But there is no such overreach here, where Ford and Goodyear regularly defend against similar lawsuits in New York, and the only question is whether they can insist that these claims be tried in their home states, with no possibility that both of them could be sued together in *any* other forum or that the New York company that installed the tire could be joined anyplace except New York.

Put another way, New York's registration and consent-to-suit laws are constitutional on their face, and as applied to this case, even though there may be constitutional concerns when they are applied in a case in which the "burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. In fact, this Court in *Tauza* recognized that:

> [i]n construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to

> interstate commerce that it may, by a denial of a license, be prevented from being here.

220 N.Y. at 267. To support that statement, this Court cited *International Text-Book Co. v. Pigg*, 217 U.S. 91 (1910), in which Kansas required out-of-state corporations to file detailed financial information in order to register. The plaintiff was a non-resident corporation that sold educational materials in the state, but because it failed to register, state law precluded it from suing to collect money owed it by its customers. The Court held that the burden was unreasonable and set aside the law precluding the plaintiff from suing in the state. Amici agree that the protection against unreasonable assertions of registration jurisdiction is available, but not in this case.

Finally, amici note that respondents are also adequately protected by New York courts' discretion to dismiss a case over which they have jurisdiction but where neither the plaintiff nor the defendant resides in New York and the claim arose in a sister state. *See Murnan v. Wabash Ry. Co.*, 246 N.Y. 244 (1927). Indeed, the Supreme Court has endorsed the use of the doctrine of forum non conveniens under New York law in a diversity case filed in federal court in New York, where personal jurisdiction was based on the predecessor of the corporate registration statute relied on here. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). That doctrine may be invoked to protect a defendant when the applicable statutes:

> usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply

> justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

*Id.* at 507.

Of course, a dismissal on the ground of forum non conveniens would not be appropriate in this case, both because plaintiffs are New York residents and because respondents would also dispute personal jurisdiction in Virginia, which is the only other forum where it is arguable that the claims could be brought together against both defendants. *Compare Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 139 (2014) (invoking forum non conveniens when an alternative forum was available), *with Banco Ambrosiano v. Artoc Bank & Tr.*, 62 N.Y.2d 65, 74 (1984) (rejecting forum non conveniens argument when no alternative forum was available). But the availability of that doctrine is a direct answer to respondents' oft-repeated charge that if jurisdiction is upheld here, plaintiffs could bring and keep a suit in the courts of New York when the claim had no connection to the State. *See* Respondents' Br. at 1, 3, 37. Thus, even if the Dormant Commerce Clause did not suffice to preclude an expansive use of New York's registration laws to obtain personal jurisdiction in cases having no relation to the State, the doctrine of forum non conveniens would protect respondents from the overreach they fear in those other cases.

Simply put, what respondents ask this Court to do here—just as respondent Ford has asked the Supreme Court in *Bandemar*—is to shield them from state court jurisdiction even though plaintiffs' chosen forum has the greatest connection to the claims and parties, and defendants have chosen to derive benefits from the forum that reasonably relate to the claims at issue. The case has been brought by New York plaintiffs, arises from grievous harms to New York residents, relates directly to products sold and marketed by respondents in New York, and involves a tire that was installed by a New York company in New York on a car registered in New York to a New York owner. Ford and Goodyear—whose vigorous defense has not suffered from the fact that this lawsuit was filed in New York—would leave the New York plaintiffs, at best, to litigate across the courts of Delaware, Michigan, New York, and Ohio to seek redress for their injuries. If jurisdiction does not lie in the courts of this State—the only state where all defendants may be joined in a single action—then New York's consumer protection and products liability laws will be much diluted, leaving New York residents without vital protection against harmful business practices.

## CONCLUSION

For the foregoing reasons and those set forth in the briefs of plaintiffs-appellants, the decision of the Appellate Division should be reversed, and the case remanded for a trial on the merits.

Dated: New York, NY
March 3, 2021

Respectfully submitted,

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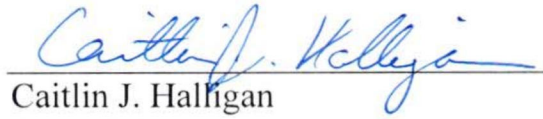
By: 

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## CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer using a proportionally spaced typeface, as follows:

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**On March 29, 2021**

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