To be Argued by:
SEAN MAROTTA
(Time Requested: 30 Minutes)

APL-2019-00239
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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,

(For Continuation of Caption See Inside Cover)

JOINT BRIEF FOR DEFENDANTS-RESPONDENTS FORD MOTOR COMPANY AND THE GOODYEAR TIRE & RUBBER COMPANY

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Date Completed: July 30, 2020

– and –

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

Defendants-Respondents.

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

Non-Party.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to 22 NYCRR § 500.1(f), Ford Motor Company states that it has no parent company. The corporate affiliates of Ford Motor Company are: Blue Oval Holdings; CAB East LLC; CAB West LLC; Canadian Road Leasing Company; FCE Bank plc; FCIF Holdings LP; FCSH GmbH; FMC Automobiles SAS; Ford Argentina S.C.A.; Ford Asia Pacific Automotive Holdings Ltd.; Ford Auto Securitization Trust; Ford Automotive Finance (China) Limited; Ford Credit Auto Owner Trust 2014-REV1; Ford Credit Auto Owner Trust 2014-REV2; Ford Credit Auto Owner Trust 2015-REV1; Ford Credit Auto Owner Trust 2016-REV1; Ford Credit Auto Owner Trust 2016-REV2; Ford Credit Auto Owner Trust 2017-REV1; Ford Credit Auto Owner Trust 2017-REV2; Ford Credit Canada Company; Ford Credit CP Auto Receivables LLC; Ford Credit Floorplan Master Owner Trust A; Ford Credit International LLC; Ford Deutschland Holding GmbH; Ford Espana S.L.; Ford European Holdings LLC; Ford Floorplan Auto Securitization Trust; Ford Global Technologies, LLC; Ford Holdings LLC; Ford India Private Limited; Ford International Capital LLC; Ford Italia S.p.A; Ford Lease Trust; Ford Mexico Holdings LLC; Ford Motor (China) Ltd.; Ford Motor Company Brasil Ltda.; Ford Motor Company Limited; Ford Motor Company of Australia Limited; Ford Motor Company of Canada, Limited; Ford Motor Company of Southern Africa (Pty)

Limited; Ford Motor Company, S.A. de C.V.; Ford Motor Credit Company LLC; and Ford Motor Service Company.

The Goodyear Tire & Rubber Company states that it has no parent company. The corporate affiliates of The Goodyear Tire & Rubber Company are: Celeron Corporation, Divested Atomic Corporation, Divested Companies Holding Company, Divested Litchfield Park Properties, Inc., Goodyear Export Inc., Goodyear Farms, Inc., Goodyear International Corporation, Goodyear Western T&WA, Inc Hemisphere Corporation, Laurelwood Properties, Inc., Raben Tire Co., LLC, Retreading L, Inc, Retreading L, Inc. of Oregon, Wingfoot Corporation, Airship Comercio de Produtos de Borracha e Participacoes Societarias Ltda, C.A. Goodyear de Venezuela, +Compania Goodyear del Peru, S.A., +DNA (Housemarks) Limited, Dunglaide Limited, Dunlop Grund und Service Verwaltungs GmbH, Dunlop Tyres Limited, Fonds de Pension Goodyear ASBL, GD Handelssysteme GmbH, GD Versicherungsservice GmbH, G.I.E. Goodyear Mireval, Goodyear Australia Pty Limited, Goodyear Baltic OU, Goodyear Belgium N.V./SA, Goodyear Canada Inc., Goodyear Czech s.r.o., Goodyear Dalian Tire Company Ltd., Goodyear Danmark A/S, Goodyear de Chile S.A.I.C., Goodyear de Colombia S.A., Goodyear do Brasil Produtos de Borracha Ltda, Goodyear & Dunlop Tyres (Australia) Pty Ltd, Goodyear & Dunlop Tyres (NZ), Goodyear Dunlop Sava Tires d.o.o., Goodyear Dunlop Tires Amiens Sud SAS,

Goodyear Dunlop Tires Austria GmbH, Goodyear Dunlop Tires Germany GmbH, Goodyear Dunlop Tires Ireland (Pension Trustees) Ltd., Goodyear Dunlop Tires Manufacturing GmbH & Co. KG, Goodyear Dunlop Tires Operations S.A., +Goodyear Dunlop Tires Operations Romania S.r.L., Goodyear Dunlop Tires Polska Sp. z.o.o., Goodyear Dunlop Tires Suisse S.A., Goodyear Dunlop Tires Ukraine, Goodyear Dunlop Tyres UK (Pension Trustees) Limited, Goodyear Earthmover Pty Ltd, Goodyear Europe B.V., Goodyear Finland OY, Goodyear France SAS, Goodyear Hellas S.A.I.C., Goodyear Holdings Sarl, Goodyear Hungary Kft., Goodyear India Ltd, Goodyear Industrial Rubber Products Ltd, Goodyear Italiana S.p.A., Goodyear Jamaica Limited, Goodyear Korea Company, Goodyear Lastikleri TAS, Goodyear Malaysia Berhad, Goodyear Maroc S.A., Goodyear Middle East FZE, Goodyear Nederland B.V., Goodyear Norge A/S, Goodyear Orient Company Private Limited, Goodyear Philippines, Inc., Goodyear Portugal Unipessoal, Ltda, Goodyear Regional Business Services Inc., Goodyear Romania S.r.L., Goodyear Russia LLC, Goodyear S.A., Goodyear Servicios y Asistencia Tecnica S. de R.L. de C.V., Goodyear Servicios Comerciales S. de R.L. de C.V., Goodyear (Shanghai) Trading Company Limited, Goodyear Slovakia s.r.o., Goodyear-SLP, S. de R.L. de C.V., Goodyear South Africa (Pty) Ltd, Goodyear South Asia Tyres Private Limited, Goodyear Sverige A.B., Goodyear Taiwan Limited, Goodyear (Thailand) Public Company Limited, Goodyear Tire

Management Company (Shanghai) Ltd., Goodyear Tires Espana S.A., Goodyear Tires Italia SpA, Goodyear Tyre and Rubber Holdings (Pty) Ltd, Goodyear Tyres Ireland Ltd, Goodyear Tyres Pty Ltd, Goodyear Tyres UK Limited, Goodyear Tyres Vietnam LLC, Goodyear Ventech GmbH, GY Tire Kitakanto Kabushiki Kaisha, Hi-Q Automotive (Pty) Ltd, Kabushiki Kaisha Goodyear Aviation Japan, Kabushiki Kaisha Tohoku GY, Kelly-Springfield Tyre Company Ltd, Kettering Tyres Ltd, Luxembourg Mounting Center S.A., Mercury Participacoes Ltda, Motorway Tyres & Accessories (UK) Limited, Neumaticos Goodyear S.r.L., Nippon Giant Tyre Kabushiki Kaisha, Nippon Goodyear Kabushiki Kaisha, P.T. Goodyear Indonesia Tbk, Rossal No 103 (Pty) Ltd, SACRT Trading Pty Ltd, Saudi Goodyear Management Consulting Co., Sava Trade d.o.o., Snella Auto SAS, SP Brand Holding EEIG, Tire Company Debica S.A., Tredcor (Kenya) Limited, Tren Tyre Holdings (Pty) Ltd, Trentyre (Lesotho) (Pty) Ltd, Trentyre (Pty) Ltd, Tyre Services Great Britain Limited, Vulcan Participacoes Ltda, Vulco Developpement, Vulco Truck Services, Weeting Tyres Limited, Wingfoot Insurance Company Limited, WTL Suffolk Limited, 4 Fleet Group GmbH.

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PRELIMINARY STATEMENT

This case is about interpreting a plain and unambiguous statute to mean exactly what it says. New York's Business Corporation Law requires that foreign corporations doing business in the State register with the Secretary of State and appoint the Secretary as their agent for service of process. Ford Motor Company and The Goodyear Tire & Rubber Company, two companies that do business in New York but are headquartered and incorporated in other States, followed this requirement and properly registered. The question here is whether Ford and Goodyear's registration means that they also consented to the general jurisdiction of the New York courts—that is, whether they agreed that they can be sued in the New York courts for *any* case, regardless of its connection with the State. The answer is no.

Plaintiffs contend, however, that the answer is yes, as they must to take advantage of the New York courts. Why? Because their claims have no link to New York: the auto accident at the heart of this case occurred in Virginia; Plaintiffs sustained their alleged injuries in Virginia; and neither the Ford Explorer nor the Goodyear tire involved in the accident were manufactured, designed, or sold by either Ford or Goodyear in New York. So Plaintiffs must rely on the nearly century-old doctrine of "consent by jurisdiction" to have even a chance to bring their claims in New York.

But Plaintiffs' consent-by-jurisdiction gambit fails on both statutory and constitutional grounds. The Business Corporation Law says nothing about "consent" or "general jurisdiction." Plaintiffs' consent-by-registration theory thus adds words to the plain text of the statute that changes its meaning. The Court need go no further to affirm the judgment below.

And if the Business Corporation Law *did* construct a consent-by-registration scheme, it would violate the Due Process Clause. Plaintiffs' consent-by-registration theory evolved before *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310 (1945) repudiated the prior bases on which personal jurisdiction had rested and before *Daimler AG v. Bauman*, 571 U.S. 117 (2014) narrowed the permissible places for a corporation to be subject to general jurisdiction. Even before *Daimler*, most courts rejected consent by registration; after *Daimler*, there should be no doubt that the theory does not withstand constitutional scrutiny.

The Appellate Division below rightly recognized all this. It observed that the Business Corporation Law "do[es] not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do[es] [it] expressly notify a foreign corporation that registering to do business here has such an effect." R263. It recognized that consent by registration is supported only by a "judicial construction" that grew up in a personal-jurisdiction regime that predated *Daimler*

and that relied upon fictions like registration to find that a corporation was "present" in the forum. R263-266. And it rightly rejected Plaintiffs' argument that such a "construction" survived *Daimler*. R267-268. In the Appellate Division's words, "asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*." R267 (quoting *Daimler*, 571 U.S. at 138).

That is exactly right. This Court should affirm.

QUESTION PRESENTED

Whether the Appellate Division correctly held that a foreign corporation cannot be subject to general jurisdiction in New York merely because it registered to do business in the State and appointed the Secretary of State as its agent for service of process, both of which are statutory requirements for a foreign corporation to conduct business in New York.

Suggested Answer: Yes.

STATEMENT OF FACTS AND NATURE OF THE CASE

Plaintiffs' Accident and Suit. Plaintiffs allege that on July 1, 2012, while traveling in Brunswick, Virginia, the 2002 Ford Explorer in which they were passengers left the roadway and rolled over following a tread-detachment event

involving a Goodyear tire installed on the vehicle. R51-52. Plaintiffs allege the accident caused them various personal injuries, and they sued Ford and Goodyear in the Queens County Supreme Court, asserting product-liability claims. R54-69.

Neither Ford nor Goodyear had any contacts in New York with Plaintiffs, the Explorer, or the Goodyear tire installed on it. Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. R73. The Explorer was not designed or manufactured in New York. R73-74. Ford assembled the vehicle at its St. Louis, Missouri plant, and first sold it to Team Ford Lincoln, an independently owned Ford dealership in Steubenville, Ohio. R73. Team Ford Lincoln then sold the Explorer to a retail consumer. *Id.* According to Ford's records, the Explorer entered New York in 2009, when it was purchased by an individual named Jose Velez without Ford's involvement. *Id.* Defendant Jose Aybar, Jr., then purchased the Explorer sometime in late 2011. R51.

Goodyear is an Ohio corporation with its principal place of business in Akron, Ohio. R120. The tire identified by Plaintiffs was not designed or manufactured in New York. *Id.* Nor could it have been, as Goodyear does not have any Wrangler AP-model tire manufacturing plants in New York. R121. Instead, the tire was designed in Akron, Ohio and manufactured at Goodyear's Union City, Tennessee plant. R120. Although tires have unique identification numbers, they are not tracked the way vehicles are. Goodyear's records do not

reflect that it was involved in the Explorer's tire entering New York. *Id.* Jose Aybar apparently bought the tire used and brought it to New York, where a party unrelated to Goodyear inspected and installed it on the Explorer two weeks before the Virginia accident. R21. Goodyear had no known contacts with the tire after it left Goodyear's possession and control at the Tennessee manufacturing plant during the fourth week of 2002, ten years prior to the accident. R120.

Ford and Goodyear's Motions to Dismiss and the Supreme Court's Orders. Ford and Goodyear moved to dismiss Plaintiffs' claims against them for lack of personal jurisdiction. R27-28, 75-76. Ford and Goodyear explained that the Supreme Court did not have specific jurisdiction over them under either the New York long-arm statute or the U.S. Constitution's Due Process Clause, R33-34, 40-43, 89-91, and that the Supreme Court did not have general jurisdiction over them under the Due Process Clause because neither is headquartered or incorporated in New York, R36-39, 79-88.

Plaintiffs and non-party U.S. Tire and Wheels of Queens ("U.S. Tire"), a defendant in a related action brought by Plaintiffs arising from the same accident, opposed Ford's motion. R122-135, 152-169, 205-207. Plaintiffs argued that Ford and Goodyear's contacts with New York were sufficiently continuous and systematic to render both "at home" in New York for general-jurisdiction purposes. *See* R121-130, 153-166. U.S. Tire argued that Ford and Goodyear had consented

to general jurisdiction in New York by registering as a foreign corporation with the Secretary of State and appointing the Secretary as their agent for service of process. *See* R206.

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions to dismiss in separate, but substantively identical, orders. R7-15, 20-26. The Supreme Court first held that Ford and Goodyear's "activities with the State of New York have been so continuous and systematic" that the companies are "essentially at home" in New York. R13, 24. The Supreme Court also held that Ford and Goodyear had "consent[ed] to general jurisdiction" in New York by registering as foreign corporations and appointing the Secretary of State as their agent for service of process. R13, 25. The court recognized, however, that "the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes" and that at that time there was "no New York state court appellate authority directly on point." *Id.* Yet the court "[a]greed with those courts that hold general jurisdiction based on consent through registration and appointment" is constitutional. *Id.*

The Appellate Division. Ford and Goodyear appealed, R2, and the Appellate Division reversed. R268. The Appellate Division explained that in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler*, the U.S. Supreme Court limited the exercise of general jurisdiction only

to those defendants that are "at home" in the forum or, in an exceptional case, where a corporate defendant's operations in the forum are "so substantial and of such a nature as to render the corporation at home in that State." R260 (quoting *Daimler*, 571 U.S. at 139 n.19).

The Appellate Division then applied that rule. It held that "[n]either Ford nor Goodyear is incorporated in New York or has its principal place of business here," meaning that neither Ford nor Goodyear are "at home" in New York. R260. And it held that this was not an "exceptional case" warranting the exercise of general jurisdiction. *See* R261-262.

The Appellate Division also rejected Plaintiffs' consent-by-registration theory as unconstitutional. The court recognized that "New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect." R263. The court instead found the consent-by-registration theory to be rooted in what it called "a longstanding judicial construction . . . that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." *Id.*

The court explained that the judicial construction was a product of "the conceptual structure of *Pennoyer v. Neff*," 95 U.S. 714 (1877), under which courts

created "fictions" like consent by registration to bring foreign corporations into a court's "territorial limits or geographic bounds." R263-264. But *International Shoe* then "altered . . . in personam jurisprudence": Personal jurisdiction is now about "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States." R266 (quoting *Daimler*, 571 U.S. at 126). And *Daimler* made explicit that "general jurisdiction cannot be exercised solely on . . . [the] presence" of a foreign corporation in the forum. R267. The court further noted that *Daimler* "expressly cautioned that cases" from the *Pennoyer* era "which uphold the exercise of general jurisdiction based on the presence of a local office, 'should not attract heavy reliance today.' " *Id.* (quoting *Daimler*, 571 U.S. at 138 n.18).

The Appellate Division thus concluded that *Daimler* prohibits exercising general jurisdiction over a foreign corporation based on the corporation's registration to do business in New York. R267. In the court's words, "a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York." R268.

This Court granted leave to appeal. R254.[1]

ARGUMENT

I. THE BUSINESS CORPORATION LAW DOES NOT DEEM A FOREIGN CORPORATION'S REGISTRATION TO DO BUSINESS IN NEW YORK AS CONSENT TO BE SUED IN THE STATE FOR ALL CAUSES OF ACTION.

The Appellate Division held that, under modern due-process principles, "it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York." R263. But before the Court ever reaches the constitutional question, it must first decide the predicate statutory question of whether the Business Corporation Law even requires companies to consent to general jurisdiction in New York as a condition to doing business here. *See Matter of Clara C. v. William L.*, 96 N.Y.2d 244, 250 (2001) (explaining that this Court is "bound by principles of judicial restraint not to decide constitutional questions 'unless their disposition is necessary to the appeal' " (citation omitted)); *see also Matter of Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531, 535 (1992) ("Under established principles of judicial

[1] In their motion for leave to appeal, Plaintiffs sought review of the Appellate Division's holding that Ford and Goodyear are not "at home" in New York. But they abandoned that challenge by not pressing it in their opening brief. *E.g. Mendoza v. Akerman Senterfitt LLP*, 128 A.D.3d 480, 483 (1st Dep't 2015).

restraint, . . . courts should not address constitutional issues when a decision can be reached on other grounds").

It does not. When this Court is "presented with a question of statutory interpretation," its "primary consideration 'is to ascertain and give effect to the intention of the Legislature.' " *Matter of DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) (quoting *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000)). "The clearest indicator of legislative intent is the statutory text" and "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

The plain language of the Business Corporation Law does not require, even impliedly, a foreign corporation to consent to general jurisdiction in order to do business in New York. Business Corporation Law § 1301(a) requires foreign corporations wishing to do business in New York to first register with the State. BCL § 1301(a) ("A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article."). Business Corporation Law § 304 then establishes one of the requirements for authorization: "The secretary of state shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served" and "[n]o . . . foreign corporation . . . may be . . . authorized to do business in this state under this chapter

unless in its . . . application for authority it designates the secretary of state as such agent." BCL § 304(a)-(b).

Business Corporation Law § 1304, which specifies the required contents of a foreign corporation's application for authority, imposes a similar requirement: The application needs only to contain "[a] designation of the secretary of state as [the corporation's] agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it." BCL § 1304(a)(6). Consistent with that statute, the Secretary of State's form application for authority to do business in New York says nothing about general jurisdiction. *See* N.Y. Dep't of State, Div. of Corps., State Records & Uniform Commercial Code, *Application for Authority of ___ Under Section 1304 of the Business Corporation Law* (Mar. 2017), http://goo.gl/e6kwO3.[2]

[2] As the Appellate Division noted, "some New York lawmakers have proposed amending Business Corporation Law § 1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation." R263 n.3 (citation omitted). This indicates that the statute as presently drafted does not constitute consent. Moreover, there is no suggestion that the measure will pass the Legislature or be signed by the Governor. And it is being opposed by multiple groups, including the New York City Bar Association, on economic and constitutional grounds. *See e.g.*, Lanier Saperstein et al., *New York State Legislature Seeks to Overturn 'Daimler'*, N.Y. Law J., May 20, 2015, http://goo.gl/1T4WUI. But even if the bill were to pass, it would be unconstitutional. *See infra* pp. 18-37.

None of these provisions mention "consent" or "general jurisdiction." Finding consent by registration in these provisions would be in effect adding a clause that "by appointing the secretary of state as agent for service of process, every authorized foreign corporation consents to jurisdiction in New York for all claims, regardless of their connection to New York." But that proviso appears nowhere in the text, and it is a fundamental tenet of statutory interpretation that courts should "not add words to a statute which has a rational meaning as written." *Matter of Richmond Constructors v. Tishelman*, 61 N.Y.2d 1, 6 (1983); *Matter of Palmer v. Spaulding*, 299 N.Y. 368, 372 (1949) ("It is a strong thing so to read into a statute words which are not there and, in the absence of a clear necessity, it is a wrong thing to do."). The Appellate Division was therefore right when it noted that the Business Corporation Law does "not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect." R263.[3]

[3] The Appellate Division below referenced only Business Corporation Law §§ 304, 1301, and 1304. *See* R. 262-263. Plaintiffs likewise root their consent-by-registration scheme in these three provisions. *See* Plaintiffs' Br. 13 n.10. But the remainder of the Business Corporation Law is similarly silent on the subject of general jurisdiction. Business Corporation Law § 1305—which addresses the "effect" of an application for authority—states that "[u]pon filing by the department of state of the application for authority the foreign corporation shall be authorized to do in this state any business set forth in the application." Business Corporation Law § 1306—which addresses the "[p]owers of authorized foreign corporations"—states that the corporation shall "have such powers as are permitted

The Second Circuit agrees. It has "h[e]ld that a foreign corporation does not consent to general personal jurisdiction in New York by merely registering to do business in the state and designating an in-state agent for service of process under BCL § 1301(a)." *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020). The Second Circuit's conclusion was rooted in the court's "constitutional concerns" about consent by registration, *see infra* p. 21, as well as its recognition "that nothing in the statutory text of BCL § 1301(a) expressly conditions registration on consent to general jurisdiction in the state." 954 F.3d at 499.

The Business Corporation Law does not impliedly create consent by registration, either. Plaintiffs' reliance on Business Corporation Law §§ 304, 1301, and 1304 suggests an argument that Ford and Goodyear's designation of the Secretary of State as agent for service of process also constitutes consent to general jurisdiction. *See* Plaintiffs' Br. 13 n.10. But service of process and personal jurisdiction are distinct concepts. Jurisdiction refers to a court's power to adjudicate a claim. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (discussing personal jurisdiction as "the power of a state court to render

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by the laws of the jurisdiction of its incorporation but no greater powers than those of a domestic corporation." Neither references the obligations or burdens placed on an authorized foreign corporation.

a valid personal judgment"). Service of process, in turn, is the "procedural requirement" by which a court exercises this power. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (citation omitted). A plaintiff must prove *both* that a court has jurisdiction *and* that the plaintiff properly served process upon the defendant before a New York court may render a binding judgment on a defendant. *See World-Wide Volkswagen*, 444 U.S. at 291 ("Due process requires that the defendant be given adequate notice of the suit, *and* be subject to the personal jurisdiction of the court.") (internal citation omitted; emphasis added); *see also Hatch v. Tran*, 170 A.D.2d 649, 650 (2d Dep't 1991) ("[A] challenge to the basis of the court's jurisdiction is distinct from a claim of defective service of process."); 62B Am. Jur. 2d *Process* § 258 (May 2019 update) (observation) ("While service of process and personal jurisdiction both must be satisfied before a suit can proceed, they are nonetheless distinct concepts that require separate inquiries . . . . "). Ford and Goodyear's consent to service through the Secretary of State was not also consent to general jurisdiction in New York.

Plaintiffs also suggest that consent by registration exists because "the text of CPLR 301"—New York's general-jurisdiction long-arm statute—"specifically preserved all prior grounds for jurisdiction." Plaintiffs' Br. 12. True enough, but irrelevant. That saving clause does not say anything about whether the Legislature

has statutorily chosen to make consent to do business in New York a basis for general jurisdiction.

To the extent that there is any doubt about the Business Corporation Law's proper construction, the presumption against waiving constitutional rights resolves it in Ford and Goodyear's favor. "There is a presumption against the waiver of constitutional rights," *People v. Howard*, 50 N.Y.2d 583, 593 (1980), and personal jurisdiction is an "individual liberty interest preserved by the Due Process Clause," *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). As a result, "courts must indulge every reasonable presumption against waiver." *People v. Davis*, 75 N.Y.2d 517, 523 (1990). Because there is no clear statement in the Business Corporation Law that a corporation waives its due-process protections against general jurisdiction by registering to do business in New York, the presumption against waiver prevents the Court from construing the statute in that way.

Despite the Appellate Division's recognition that the plain language of the Business Corporation Law does not create consent by registration, it deferred to the "longstanding judicial construction . . . by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." R263.

This Court need not. First, it is the plain text of the statute that controls, not "judicial construction." *See Majewski*, 91 N.Y.2d at 583. And that plain text points in only one direction: There is no consent by registration. *See supra* pp. 9-15. The many courts to consider the question all agree: A corporate-registration statute's silence on consent by registration means that there is no consent by registration. *See Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 898 N.W.2d 70, 79-80 (Wis. 2017); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 447 (Ill. 2017); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 52 (Mo. 2017); *Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1030 (Or. 2017); *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435, 446 (N.J. Super. Ct. App. Div. 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016).

Second, the "longstanding judicial construction" cited by the Appellate Division is illusionary. The one Court of Appeals case cited by that court is *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916)—a case that did not interpret the Business Corporation Law, which was enacted some 55 years later. *See* N.Y. Laws 1961, ch. 855. The remaining cases are no more helpful. The Appellate Division's recognition that the Business Corporation Law "do[es] not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do[es] [it] expressly notify a foreign corporation that

registering to do business here has such an effect," R263, is sufficient to decide the matter. Because the plain language of the Business Corporation Law does not address consent by registration, it does not create consent by registration.

In the end, it makes no sense for the Legislature to have intended a corporation's registration to do business to serve as consent to general jurisdiction in New York. Such an interpretation would mean that any plaintiff anywhere in the country with any grievance against Ford or Goodyear could file suit in New York. *See Walden v. Fiore*, 571 U.S. 277, 283 n.6 (2014) (general jurisdiction "permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit"). Under such an expansive interpretation, a disgruntled employee in Washington State, a personal-injury plaintiff in California, and a Lemon Law claimant in Texas could all impose upon New York's already taxed judicial resources to resolve their suits against the companies. There is no reason to think the Legislature would have intended that result in enacting the Business Corporation Law, nor is there one. *See People v. Santi*, 3 N.Y.3d 234, 242 (2004) (courts "will not blindly apply the words of a statute to arrive at an unreasonable or absurd result") (citation omitted); N.Y. Stat. § 145 ("A construction which would make a statute absurd will be rejected.").

II. CONSENT BY REGISTRATION IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

The Appellate Division "h[e]ld that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York." R263. That is exactly right: Consent by registration violates the Due Process Clause. Should it reach the question, this Court should affirm.

A. The Appellate Division Correctly Held That Consent By Registration Violates Due Process.

"A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). The Supreme Court's recent cases hold that a State's exercise of general jurisdiction over a corporation is constitutionally sound *only* if that corporation is "at home in the forum State." *Goodyear*, 564 U.S. at 919. And a corporation is generally at home only in its "place of incorporation and principal place of business." *Daimler*, 571 U.S. at 137. Crucially, "at home" is *not* "synonymous with 'doing business.' " *Id.* at 139 n.20.

But exercising jurisdiction over a foreign defendant because of that defendant's registration to do business is effectively just that—rendering a foreign corporation "at home" everywhere it does business. In a consent-by-registration regime, registering to do business in New York is enough for general jurisdiction in the New York courts. That erases *Daimler*'s holding that "at home" is not "synonymous with 'doing business.' " 571 U.S. at 139 n.20; *see Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (if consent-by-registration were constitutionally permissible, "*Daimler*'s ruling would be robbed of meaning by a back-door thief"). "*Daimler*'s limitation on the exercise of general jurisdiction to those situations where 'the corporation is essentia[ly] at home' would be replaced by a single sweeping rule: registration equals general jurisdiction." *Display Works, LLC v. Bartley*, 182 F. Supp. 3d. 166, 178 (D.N.J. 2016) (citation omitted). That "cannot be the law." *Id.*

Critically, every State requires registration similar to New York as a condition of doing business. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1345 (2015) (*Fallacy of Consent*). That means that if a corporation consented to jurisdiction by registering to do business, it would be subject to general jurisdiction "in every state in which it does business." *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 371, *opinion modified on denial of reh'g*, 944 N.W.2d 514 (Neb. 2020). In fact,

consent by registration "could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*." *Chen*, 954 F.3d at 499 (quoting *Brown*, 814 F.3d at 640). That "is the same type of 'global reach' jurisdiction the U.S. Supreme Court expressly rejected as being inconsistent with due process." *Lanham*, 939 N.W.2d at 371.

The Appellate Division thus correctly held that consent by registration violates modern due-process principles. It was right to recognize that after *Daimler*, "personal jurisdiction cannot be asserted against a foreign corporation based solely on the corporation's continuous and systemic business activity in New York." R267. It was right to note that "*Daimler* made clear . . . that general jurisdiction cannot be exercised solely on" a defendant's "presence" in the forum. *Id.* And it was right to hold "that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*." *Id.* (citation omitted).

The Second Department's holding does not stand alone. Since the decision below, the First and Fourth Departments have likewise held that a foreign corporation does "not consent to the general jurisdiction of New York courts by registering as a foreign corporation with the New York State Department of State."

Best v. Guthrie Med. Grp., P.C., 107 N.Y.S.3d 258, 260 (4th Dep't 2019); *Fekah v. Baker Hughes Inc.*, 110 N.Y.S.3d 1, 2 (1st Dep't 2019) ("[A] corporate defendant's registration to do business in New York and the designation of the Secretary of State to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York.").

The Second Circuit, too, agrees. *See supra* p. 13. In addition to agreeing that the text does not expressly create consent by registration, the Second Circuit voiced its "constitutional concerns" that consent by registration would vitiate *Daimler*. *Chen*, 954 F.3d at 499. It recognized that "the three New York intermediate courts to have considered the issue" are "unanimous" in their agreement. *Id.* And it had "little trouble concluding that were the New York Court of Appeals to decide the issue, it would agree that this conclusion is consistent with the U.S. Constitution and the evolving law surrounding general personal jurisdiction." *Id.*

These courts join the numerous others that have recognized and applied *Daimler*'s principles in refusing to allow the exercise of general jurisdiction where a corporate defendant has merely appointed an agent to accept service of process. *See Genuine Parts*, 137 A.3d at 145 & n.119 (collecting cases and observing that "the majority of federal courts that have considered the issue of whether consent by

registration remains a constitutional basis for general jurisdiction after *Daimler* have taken the position" that it is not). The Montana Supreme Court has recognized that consent by registration "would swallow the Supreme Court's due process limitations on the exercise of general personal jurisdiction" altogether. *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 9 (Mont. 2018). The Missouri Supreme Court considered consent by registration "inconsistent with" *Daimler*. *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 232-233 (Mo. 2017). The Delaware Supreme Court found the theory not in "accord[ ] with *Daimler*." *Genuine Parts*, 137 A.3d at 142-143. And the Nebraska Supreme Court recently held that consent by registration "would exceed the due process limits prescribed in" *Goodyear* and *Daimler*. *Lanham*, 939 N.W.2d at 371. The list of post-*Daimler* appellate cases goes on.[4] And the list of federal-court opinions is even longer.[5]

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[4] *Countrywide Home Loans, Inc.*, 898 N.W.2d at 83 ("[T]he Supreme Court has made clear that the Due Process Clause proscribes the exercise of general jurisdiction over foreign corporations" based on registration alone.); *Dutch Run-Mays Draft*, 164 A.3d at 444 ("[W]e conclude reliance of an entity's business registration to establish general jurisdiction is belied by the holding set forth in *Daimler*'s clear narrow application of general jurisdiction.").

[5] *In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp. 3d 532, 545 (E.D. Pa. 2019) (holding that consent by registration "cannot stand under the new constitutional standard adopted in *Daimler*"); *Horowitz v. AT&T Inc.*, No. 3:17-cv-4827-BRM-LHG, 2018 WL 1942525, at *12 (D.N.J. Apr. 25, 2018) ("[T]he Court finds that consent by registration is inconsistent with *Daimler*."); *Humphries v. Allstate Ins. Co*., No. CV-17-01606-PHX-JJT, 2018 WL 1510441, at *3 (D. Ariz. Mar. 27, 2018) ("A categorical assertion of general jurisdiction where the

Even before *Daimler*, many courts recognized that asserting general jurisdiction based on "mere service on a corporate agent . . . displays a fundamental misconception of corporate jurisdiction principles" and is "directly contrary to the historical rationale of" the Supreme Court's personal-jurisdiction

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corporation complies with a state's registration and appointment laws would essentially contradict *Daimler* . . . ."); *Wilderness USA, Inc. v. DeAngelo Bros. LLC*, 265 F. Supp. 3d 301, 313 (W.D.N.Y. 2017) (holding that "[a]fter *Daimler* . . . the mere fact [that a defendant is] registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation [n]or its principal place of business" (citation omitted)); *Javage v. General Motors, LLC*, No. 3:17-CV-82 (GROH), 2017 WL 6403036, at *1 (N.D. W. Va. Aug. 18, 2017) (holding that exercising jurisdiction over the defendant based on its registration to do business in West Virginia did "not comport with the requirements announced in *BNSF*"), *aff'd*, 736 F. App'x 418 (4th Cir. 2018) (per curiam); *Taormina v. Thrifty Car Rental*, No. 16-CV-3255 (VEC), 2016 WL 7392214, at *7 (S.D.N.Y. Dec. 21, 2016) (noting that consent by registration would wipe out *Daimler*'s holding); *Bonkowski v. HP Hood LLC*, No. 15-CV-4956 (RRM) (PK), 2016 WL 4536868, at *3 (E.D.N.Y. Aug. 30, 2016) (same); *Display Works*, 182 F. Supp. 3d at 176 (noting that consent by registration "cannot be squared with the Supreme Court's current statements on jurisdiction in *Daimler*"); *Beard v. Smithkline Beecham Corp.*, No. 4:15-CV-1833 RLW, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016) (holding that *Daimler* abrogated precedent recognizing consent by registration); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, No. 1:15-cv-13760-FDS, 2016 WL 2349105, at *4 (D. Mass. May 4, 2016) (holding that consent by registration "would be inconsistent with . . . *Daimler*"); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) ("After *Daimler*, . . . the mere fact of [the foreign corporation] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business."); *Neeley v. Wyeth LLC*, No. 4:11-cv-00325-JAR, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015) (stating that if plaintiff's consent-by-registration argument were correct, "every foreign corporation transacting business in the state of Missouri would be subject to general jurisdiction here. *Daimler* clearly rejects this proposition.").

decisions. *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992).[6] *Daimler* simply made clearer what was already clear: Consent by registration cannot be squared with modern due-process precedents.

B. Plaintiffs' Attempts To Circumvent Due Process Have No Basis And Are Wrong.

Plaintiffs' varied arguments that consent by registration can be squared with modern due-process principles ignores modern due-process principles. This Court should reject them.

1. This is Not A Consent-To-Suit Case

Plaintiffs' primary argument is that the modern rule that general jurisdiction can be exercised over only a corporation that is "at home" in the forum applies only when that corporation has not consented to suit in the forum. *See* Plaintiffs'

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[6] *See also, e.g.*, *King v. American Family Mut. Ins. Co.*, 632 F.3d 570, 579 (9th Cir. 2011) (holding that a corporation's designation of an agent for in-state service of process does not create general jurisdiction over the corporation); *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 37 (1st Cir. 2010) ("Corporate registration . . . is not alone sufficient to confer general jurisdiction."); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("The casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent's activities."); *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993) ("[T]he mere designation of an agent in compliance with the service-of-process statute does not automatically eliminate the requirement of minimum contacts to establish personal jurisdiction."); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (holding that "[r]egistering to do business . . . standing alone" "cannot satisfy . . . the demands of due process"); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

Br. 11-15. Plaintiffs focus on *Daimler*'s reference to *Perkins v. Bengeut Consolidated Mining Co.*, 342 U.S. 437 (1952), as the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum," *Daimler*, 571 U.S. at 129, and *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017) statement that "absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." *See* Plaintiffs' Br. 14-15. According to Plaintiffs, this means that consent-to-suit cases are a matter of "contract" and are "not subject to the 14th Amendment jurisdictional analysis of *Daimler*." *See* Plaintiffs' Br. 11 (capitalization altered).

But this is not a consent-to-suit case. Plaintiffs first attempt to manufacture consent by invoking the legal fiction that Ford and Goodyear consented to general jurisdiction by registering to do business in New York. According to Plaintiffs, *Bagdon*, *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), and *Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining Co.*, 243 U.S. 93 (1917), all hold that such fictional consent by registration is a constitutional way to exercise jurisdiction over a foreign defendant. *See* Plaintiffs' Br. 15-19. But as the Appellate Division explained (*see* R263-266), these cases were decided in the *Pennoyer* era, in which personal jurisdiction was tied to the defendant's presence in the forum State. *Pennoyer*, 95 U.S. at 722-724. That

meant that corporations could be sued only in their state of incorporation, regardless of a suit's connection to the forum State. *See Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 557-559 (1844). Courts therefore created "fictions" like those in *Bagdon*, *Neirbo*, and *Pennsylvania Fire*, under which a corporation's appointment of an agent for service of process was deemed consent to suit in the State. *See* 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1066 (4th ed. 2010); *see also Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

2. Bagdon *Has Been Abrogated.*

Plaintiffs' assertion that *Bagdon* and its progeny are still good law because "no case decided by the Supreme Court undercuts or dilutes the decision of this Court in *Bagdon*" or "denies corporate registration as a basis for consent to personal jurisdiction," Plaintiffs Br. 15, 24, is wrong because the U.S. Supreme Court has overruled these cases. Three times.

First, in *International Shoe*, the Supreme Court "cast th[e] fiction[ ]" that appointment of an agent constituted consent to general jurisdiction "aside." *Burnham v. Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion). In that "canonical opinion," *Goodyear*, 564 U.S. at 923, the Court shed *Pennoyer*'s "strict territorial approach" in favor of "a less rigid understanding, spurred by changes in the technology of transportation and communication, and the

tremendous growth of interstate business activity," *Daimler*, 571 U.S. at 126 (internal quotation marks and citation omitted). In doing so, the Court disclaimed cases like *Bagdon*, *Neirbo*, and *Pennsylvania Fire* that based jurisdiction on the "legal fiction that [a nonresident corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents." *International Shoe*, 326 U.S. at 318.

Second, in *Shaffer*, the Supreme Court reaffirmed that *Pennoyer* "approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State" and that *International Shoe* marked a "departure from *Pennoyer*'s conceptual apparatus." 433 U.S. at 201, 204. The Court explained that, following *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*, 433 U.S. at 204. The Court emphasized that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212 (emphasis added). The Court then removed all doubt as to *Pennoyer*'s status by holding that "[t]o the extent that prior decisions are inconsistent with [*International Shoe*], they are overruled." *Id*. at 212 & n.39.

And third, the Supreme Court repudiated the old consent-by-registration cases in *Daimler* and *BNSF Railway*. In *Daimler*, the plaintiffs rested their theory of general jurisdiction on two cases "decided in the era dominated by *Pennoyer*'s territorial thinking." 571 U.S. at 138 n.18. One—*Barrow S.S. Co. v. Kane*, 170 U.S. 100, 112 (1898)—found personal jurisdiction over a nonresident corporation based on consent by registration. The other—*Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 268 (1917), which Judge Cardozo authored a year after *Bagdon*—applied *Bagdon* to hold that New York courts have jurisdiction over an unlicensed business that was doing business in New York and which had been served with process through a managing agent in its New York office. Yet the Supreme Court dismissed these older cases out-of-hand, cautioning that *Pennoyer*-era decisions "should not attract heavy reliance today." *Daimler*, 571 U.S. at 138 n.18; *see also* R267 (explaining that "*Daimler* made clear . . . that general jurisdiction cannot be exercised solely on such presence"). And in *BNSF Railway*, the Supreme Court again rejected reliance on cases "decided before this Court's transformative decision on personal jurisdiction in *International Shoe*." 137 S. Ct. at 1557-58. These decades of consistent U.S. Supreme Court precedent demonstrate that the *Pennoyer* era, including *Bagdon*, *Neirbo*, and *Pennsylvania Fire*, is a dead letter.

3. *Ford And Goodyear Did Not Actually Consent To General Jurisdiction In New York Merely By Registering To Do Business Here.*

Plaintiffs then pivot, arguing that consent by registration is not fictional, but *actual* consent. *See* Plaintiffs' Br. 21-22. In Plaintiffs' eyes, there is actual consent here because Ford and Goodyear were not coerced into either doing business or registering to do business in New York. *See id.*

But to the extent that the Business Corporation Law creates general jurisdiction at all, *see supra* pp. 9-18, it is through legislative fiat—not Ford and Goodyear's freely given consent. "Consent requires more than legislatively mandated compliance with state laws. Routine paperwork to *avoid* problems with a state's procedures is not a wholesale submission to its powers." *Leonard v. USA Petrol. Corp*., 829 F. Supp. 882, 891 (S.D. Tex. 1993). In other words, "[a] waiver through consent must be willful, thoughtful, and fair. 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process." *Id.* at 889 (citation omitted). Under these standards, consent- by registration "is, in fact, functionally involuntary . . . . [and] not true consent at all." *In re Asbestos*, 384 F. Supp. 3d at 542. *Daimler*'s off-handed reference to consent cannot be reasonably read to create a gaping loophole into its rule limiting general jurisdiction. *See Brown*, 814 F.3d at 640.

Indeed, a U.S. Supreme Court plurality recently explained that statutory-consent regimes should not be analyzed as "consent" at all. It observed that in analyzing implied-consent laws intended to battle drunk driving, "our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532-33 (2019) (plurality op.). "Instead, [the Court] ha[s] based [its] decisions on the precedent *regarding the specific constitutional claims in each case* . . . ." *Id.* at 2533 (emphasis added). The same should be true here; the Court should base its decision on the due-process principles at issue, without regard to the fiction of "consent."

4. Ford And Goodyear's Supposed Option To Break The Law Is No Choice At All.

Finally, Plaintiffs' argument (at 22) that there is consent here because Ford and Goodyear could have violated New York law and *not* registered to do business in the State borders on nonsensical. Putting aside the fact that Plaintiffs are advocating breaking the law, a law is not coercive merely because it can be broken. And, even taken seriously, Plaintiffs' break-the-law argument quickly loses force. Plaintiffs argue that the Business Corporation Law is not coercive because "the only realistic penalty is the inability to institute an action in the state's courts if the court finds that the corporation is 'doing business' without having registered. And even in that event, the problem is readily cured by registration at that time,

rendering the rule hardly any penalty at all." Plaintiffs' Br. 22 (internal quotation marks omitted). That is wrong for three reasons. First, an inability to sue is not the only penalty: Under Business Corporation Law § 1303, the Attorney General can sue to enjoin a corporation's operations in New York while unregistered. BCL § 1303. That is much-more significant than barring unregistered corporations from the courts. Second, barring Ford and Goodyear from the New York courts *is* a serious penalty. And third, even Plaintiffs admit that avoiding this penalty leaves Ford and Goodyear subject to general jurisdiction by virtue of their "consent." In other words, Ford and Goodyear are back where they started.

The bottom line is this: The U.S. Supreme Court has soundly rejected Plaintiffs' fictional consent-by-registration theory of jurisdiction. There is no actual consent here. That means that this is not a "contract" case beyond the bounds of *Daimler*. Rather, applying *Daimler* here is straightforward: Ford and Goodyear are not "at home" in New York, so the New York courts do not have general jurisdiction over them. *See* R261-262.

Plaintiffs next criticize (at 23-24) the Appellate Division for "forg[ing] off on its own constitutional path, one not shared either by this Court or the United States Supreme Court[,]" when in fact the court agreed with the *Daimler* analysis in holding that the "rationale" underpinning consent by registration "is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and . . . no longer

holds in the post-*Daimler* landscape." R268. Nor is the Appellate Division by any measure alone. Its holding is firmly rooted in U.S. Supreme Court precedent. *See supra* pp. 18-19, 26-28. And numerous other courts have rejected upholding consent by registration based on *Pennoyer*-era cases.[7]

5. Public Policy Does Not Support Consent By Registration.

Having come up short on the law, Plaintiffs finally offer policy reasons for why consent by registration should survive constitutional review. According to Plaintiffs, if there is no consent by registration then "[t]he foreign corporation will be immune from suit within the state under general jurisdiction." Plaintiffs' Br. 18. But that is just an apt summary of *Daimler*'s holding, not a flaw in the Appellate Division's decision. *See Daimler*, 571 U.S. at 138-139.

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[7] *See Brown*, 814 F.3d at 638-639 (finding that *Pennoyer*-era cases upholding consent by registration are "now simply too much at odds with the approach to general jurisdiction adopted in *Daimler* to govern as categorically as [the Supreme Court] suggest[ed]"; their "holding[s] . . . cannot be divorced from the outdated jurisprudential assumptions of [their] era"); *Countrywide Home Loans*, 898 N.W.2d at 82 (holding that *Pennsylvania Fire*, *Neirbo*, and *Bagdon*, "represent a disfavored approach to general jurisdiction . . . [that does not reflect] prevailing due process standards"); *Genuine Parts*, 137 A.3d at 133 (rejecting plaintiff's consent-by-registration theory built on *Pennsylvania Fire* and *Neirbo* and noting that "*Goodyear* and *Daimler*[ ] made a major shift in our nation's personal jurisdiction jurisprudence—a shift that undermines . . . *Pennsylvania Fire*"); *Wilderness USA*, 265 F. Supp. 3d at 309 (rejecting "Plaintiff's reliance upon *Pennsylvania Fire* or *Neirbo* . . . given their outmoded approach to the application of general jurisdiction"); *Display Works*, 182 F. Supp. 3d at 176 ("[T]he sweeping propositions of jurisdictional power in *Pennsylvania Fire* and *Neirbo* cannot be squared with the Supreme Court's current statements on jurisdiction in *Daimler*.").

Plaintiffs imply that this is unfair (at 17-18), but *Daimler* itself explains that fairness actually *supports* its more-limited approach to general jurisdiction. *Daimler* emphasized the importance of the notice function created by its limited approach to general jurisdiction. A corporation's place of incorporation and principal place of business are "unique" and "easily ascertainable." 571 U.S. at 137. Despite those limitations, *Daimler*'s approach still "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.* But the "exorbitant exercise[ ] of all-purpose jurisdiction" entailed in Plaintiffs' theory "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Id.* at 139 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). It is consent by registration that is unfair, not *Daimler*.

Plaintiffs also argue that the Appellate Division somehow "ignored the incongruity of *Daimler*'s construct that a corporation can only be subject to general jurisdiction in two places, where it is 'at home' and where it is incorporated." Plaintiffs' Br. 18. But that is a point in *favor* of the decision below. Under Plaintiffs' theory, corporations could be held to general jurisdiction in *every* State in which they are registered. And as *Daimler* held, such an outcome would be "unacceptably grasping." 571 U.S. at 138.

III. CONSENT BY REGISTRATION IS AN UNCONSTITUTIONAL CONDITION THAT BURDENS INTERSTATE COMMERCE.

Although the Appellate Division did not reach the issue, requiring Ford and Goodyear to consent to general jurisdiction in New York to do business here would be unconstitutional for another reason: It would constitute an unconstitutional condition burdening interstate commerce. *See Matter of Working Families Party v. Fisher*, 23 N.Y.3d 539, 544 (2014) (the Court may "affirm the Appellate Division's judgment, though on grounds different from those the Appellate Division relied on").

The unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604 (2013). The doctrine prohibits a State from "requiring [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Id*. at 607 (quoting *Southern Pac. Co. v. Denton,* 146 U.S. 202, 207 (1892)).

Denton concerned a Texas business registration law. 146 U.S. at 206-207. In addition to requiring foreign corporations wishing to do business in Texas to "authoriz[e] service of process" upon "its . . . agents," the law barred foreign corporations from exercising their federal right to remove suits filed against them to federal court. *Id*. If the company did remove to federal court, it would "forfeit"

its license to do business in Texas. *Id*. at 207. The Supreme Court held the law to be "unconstitutional and void" because it required a corporation to surrender a constitutional right as the price of doing business within the State. *Id*.

A consent-by-registration scheme would work in the same impermissible way: It would read New York law to bar companies, as a condition of doing business in New York, from asserting their federal due-process right to resist state-court jurisdiction over matters unconnected to their activities in the State. That is an untenable choice. If a foreign corporation sought to avoid general jurisdiction in New York, it would have to avoid registering to do business in New York. But if the unregistered corporation conducted business in New York, it could no longer sue in the New York courts, even if New York was the only forum in which it could obtain personal jurisdiction over a defendant. *See* BCL § 1312(a). The Attorney General could also sue to enjoin the unregistered corporations' operations. *See* BCL § 1303.

And Plaintiffs' so-called choice—consent to general jurisdiction or stop doing business in New York—would impermissibly burden interstate commerce. The U.S. Supreme Court has warned that "States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses." *United States v. Lopez*, 514 U.S. 549, 579-580 (1995). In measuring state statutes' imposition on

commerce, the Court has held that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988); *see also Fallacy of Consent, supra*, at 1390 ("The option of refraining from doing business in the state is not really a viable one for most corporations. Since all fifty states have the same laws requiring registration, this 'option' really amounts to a corporation simply not doing business *at all* in the United States."). Thus, "exacting such a disproportionate toll on commerce" through consent-by-registration "is itself constitutionally problematic." *Genuine Parts*, 137 A.3d at 142.

There is no corresponding benefit to offset this substantial burden. *See Dolan v. City of Tigard*, 512 U.S. 374, 394-395 (1994) (a State may not condition a government benefit on waiver of a constitutional right where there is no "reasonable relationship" between the burden imposed on the right and the benefit obtained from the waiver); *cf. Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) ("There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."). New York has "no conceivable interest in adjudicating a dispute that does not involve the state in any way or does not involve a defendant who has made the state its

home." *Fallacy of Consent*, *supra*, at 1398; *see also* Charles W. Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 443 (2012) ("The state has no sovereign interest in regulating conduct without any connection to the corporation's activities, and the potential exposure exceeds forum benefits when the corporation is not acting as a local domiciliary."). The Constitution therefore prohibits New York from conditioning Ford and Goodyear's right to do business in New York on their implied consent to be sued here on cases with no connection to the State.

IV. CONSTITUTIONAL CONCERNS COUNSEL IN FAVOR OF REJECTING CONSENT-BY-REGISTRATION AS A STATUTORY MATTER.

This Court need not interpret the Business Corporation Law as working in these unconstitutional ways. Under settled rules of statutory construction "where there are two possible interpretations [of a statute] the court will accept that which avoids constitutional doubts." *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 389 (1963). And there is a perfectly logical—and constitutional—way to read the Business Corporation Law's requirement that Ford and Goodyear designate the Secretary of State as their agent for service of process. It can be construed as "requiring a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but not as a consent to general jurisdiction." *Genuine Parts*, 137 A.3d at 142.

Numerous courts have explained similar service-only readings of States' corporate-registration statutes through the constitutional-avoidance canon. The Second Circuit interpreted the Connecticut corporate-registration statute as only governing service of process in light of the "constitutional concerns" raised by consent-by-registration. *Brown*, 814 F.3d at 626. The Seventh Circuit, too, concluded that interpreting the Indiana corporate-registration statute as embracing consent-by-registration "would render [the statute] constitutionally suspect," and therefore "decline[d] to give it such a reading." *Wilson*, 916 F.2d at 1245. The Montana Supreme Court "refuse[d]" to read that state's corporation-registration statute as creating consent by registration because doing so "would swallow the Supreme Court's due process limitations on the exercise of general personal jurisdiction." *DeLeon*, 426 P.3d at 9. And the Delaware Supreme Court, reversing prior precedent interpreting its corporate-registration statute, held that a "far-reaching" consent-by-registration interpretation of its corporate-registration statute would "collide[] directly with the U.S. Supreme Court's holding in *Daimler*" and deployed the constitutional-avoidance canon to limit the statute to only service. *Genuine Parts*, 137 A.3d at 127 & n.8, 140-141.

This Court should join these others and hold the Business Corporation Law controls only how a registered foreign corporation is served. *See supra* pp. 9-18. But if the Court concludes that the Business Corporation Law must be read to

encompass general jurisdiction as well, it should hold, as the Appellate Division did, that the statute is unconstitutional. *See supra* pp. 18-37.

CONCLUSION

For the foregoing reasons, the Court should affirm the Appellate Division.

Respectfully submitted,

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