To be Argued by:
SEAN MAROTTA
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

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-Respondents,

– against –

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

Defendants,

– and –

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

Defendants-Appellants.

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

Non-Party Respondent.

Docket Nos.:
2016-06194
2016-07397

JOINT BRIEF FOR DEFENDANTS-APPELLANTS

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Queens County Clerk's Index No. 706909/15

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

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1. The index number of the case in the court below is 706909/15.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Queens County.

4. The action was commenced on or about June 30, 2015 by filing of a Summons and Complaint. Issue was joined by Defendant The Goodyear Tire & Rubber Company on or about August 12, 2015 by service of a Verified Answer. Issue was joined by Jose A. Aybar, Jr. on or about November 18, 2015 by service of a Verified Answer. Issue was joined by Defendant Ford Motor Company on or about June 8, 2016 by service of a Verified Answer.

5. The nature and object of the action is to recover damages for personal injuries allegedly sustained due to negligence.

6. This appeal is from (i) the Decision and Order of the Honorable Thomas D. Raffaele, dated May 25, 2016, which denied Defendant Ford Motor Company's Motion to Dismiss and (ii) the Decision and Order of the Honorable Thomas D. Raffaele, dated May 25, 2016, which denied Defendant The Goodyear Tire & Rubber Company's Motion to Dismiss.

7. This appeal is on the full reproduced record.

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QUESTIONS PRESENTED

1. Whether Ford Motor Company ("Ford")—a Delaware corporation with its headquarters in Dearborn, Michigan—is "at home" in New York such that it is subject to general jurisdiction in the State.

The Supreme Court held that Ford is "at home" in New York.

2. Whether The Goodyear Tire & Rubber Company ("Goodyear")—an Ohio corporation with its headquarters in Akron, Ohio—is "at home" in New York such that it is subject to general jurisdiction in the State.

The Supreme Court held that Goodyear is "at home" in New York.

3. Whether Ford and Goodyear validly consented to general jurisdiction in New York by registering as foreign corporations and appointing the Secretary of State as their respective agent for service of process—both steps required by Business Corporation Law § 304 for Ford and Goodyear to do business in New York.

The Supreme Court held that Ford and Goodyear validly consented to general jurisdiction in New York by complying with the Business Corporation Law.

PRELIMINARY STATEMENT

This is a product liability lawsuit that was filed in New York, despite having no connection to the State. Plaintiffs allege that they were injured in a rollover crash after the tread on a Goodyear tire installed on their 2002 Ford Explorer

separated. The accident occurred in Virginia; Plaintiffs sustained their alleged injuries in Virginia; and neither the Explorer nor the Goodyear tire was manufactured, designed, or first sold by either Ford or Goodyear in New York. Ford and Goodyear therefore moved to dismiss Plaintiffs' claims against them for lack of personal jurisdiction.

The Supreme Court agreed in part. It correctly held that New York did not have specific jurisdiction under either the state long-arm statute or the federal Due Process Clause. But the court held that New York had general—or dispute-blind—jurisdiction over Ford and Goodyear because they had "continuous and systematic" contacts with the State and each had "consented" to general jurisdiction by registering to do business with the Secretary of State and appointing the Secretary as their respective agent for service of process. The impact of the Supreme Court's two holdings is pronounced. They mean that any plaintiffs with grievances originating anywhere in the country can file suit in New York against Ford or Goodyear—or any company similarly situated—simply because the companies registered to do business in the State.

That troubling consequence proves precisely why the Supreme Court's decision cannot be correct. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court emphasized that general jurisdiction over a company does not exist

in every State in which it does business—even where the company does a lot of business. *Daimler* rejected as "unacceptably grasping" the argument that any time a company has "substantial, continuous, and systematic course of business" in a State, the defendant is subject to general jurisdiction there. *Daimler*, 134 S. Ct. at 761. The Court held that the "inquiry . . . is not whether a foreign corporation's in-forum contacts can be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State. *Id.* (citation omitted; alteration in original.)

The paradigmatic examples of where a corporation is "at home"—reiterated in both *Daimler* itself and the New York appellate case law applying *Daimler*—are the corporation's state of incorporation and its principal place of business. Ford is incorporated in Delaware and headquartered in Michigan. Goodyear is both incorporated and headquartered in Ohio. Neither can be considered "at home" in New York absent exceptional circumstances that Plaintiffs have not proved.

The Supreme Court's consent by registration holding is similarly flawed. The Supreme Court based its decision on Business Corporation Law § 304, which requires an out-of-state corporation to register with the Secretary of State and appoint the Secretary the company's agent for service of process as a condition of doing business in New York. Significantly, however, nothing in Business

Corporation Law § 304—or any other provision of the Business Corporation Law, for that matter—even mentions consent or general jurisdiction. The Supreme Court's consent by registration theory is therefore at odds with the plain text of the statute that it purports to interpret.

In any event, a statute that attempts to impose general jurisdiction as a condition of registration to do business in a State would be unconstitutional. The consent by registration theory was developed before *Daimler*'s narrowing of permissible places for a corporation to be subject to general jurisdiction—and, indeed, before the modern era of personal jurisdiction. That is why, post-*Daimler,* most courts have rejected the Supreme Court's consent by registration theory, including courts in New York. This Court should do the same. At the very least, the Court should hold that the serious constitutional questions presented by the Supreme Court's consent by registration theory counsel in favor of applying the constitutional-avoidance canon and rejecting the Supreme Court's expansive interpretation of the Business Corporation Law.

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. R. 51-52. 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. R. 54-69. As to Ford, Plaintiffs claim that the Explorer had "certain defective, unsafe, and defective condition(s) in [its] design, manufacture, fabrication, and/or assembly" that caused the roll-over and rendered Ford liable for their injuries. R. 49. With respect to Goodyear, Plaintiffs allege that the subject tire was "dangerous, hazardous, and defective, and otherwise unsuitable for the use for which it was intended." R. 51.

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. R. 73. The Explorer was not designed or manufactured in New York. *Id.* 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. *Id.* 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. R. 51.

Goodyear is an Ohio corporation with its principal place of business in Akron, Ohio. R. 120. The tire identified by Plaintiffs was not designed or

manufactured in New York. R. 121. Nor could it have been, as Goodyear does not have any Wrangler AP-model tire manufacturing plants in New York. *Id.* Instead, the tire was designed in Akron, Ohio and manufactured at Goodyear's Union City, Tennessee plant. *Id.* Although tires do not have unique identification numbers and are not tracked the way vehicles are, Goodyear's records and the evidence below indicate that Goodyear was not involved in bringing the tire into New York. R. 120. Jose Aybar, Jr. 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. R. 21. Goodyear had no known ties with the tire after it left Goodyear's possession and control at the Tennessee manufacturing plant during the fourth week of 2002. R. 120.

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. R. 27-28, 75-76. Ford and Goodyear argued that the Supreme Court did not have specific jurisdiction over them under the New York long-arm statute, CPLR 302(a)(2)-(3), because they did not commit a tortious act in the State or a tortious act outside the State causing injury within the State. R. 33-34, 91. Ford and Goodyear also argued that the Supreme Court did not have specific jurisdiction under the U.S. Constitution's Due Process Clause because Plaintiffs' claims did not arise out of or relate to any of Ford or Goodyear's New

York contacts. R. 40-43, 89-91. Ford and Goodyear finally argued 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. R. 36-39, 79-88.

Plaintiffs and U.S. Tire and Wheels of Queens, a defendant in a related action brought by Plaintiffs arising from the same accident, opposed Ford and Goodyear's motions. R. 122-135, 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* R. 121-130, 153-166. U.S. Tires, meanwhile, 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* R. 206.

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions to dismiss in separate, but substantively identical, orders. R. 7-15, 20-26. The 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. R. 13, 24. The court also pointed to Jose Aybar, Jr.'s purchase, registration, and use of the Explorer in New York as distinguishing Ford from the

defendants in the U.S. Supreme Court and New York appellate cases where general jurisdiction was rejected. R. 9-13.

The Supreme Court further 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. R. 13, 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 "[t]here is 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. R. 14, 25.

Ford and Goodyear's Appeals. The Queens County Clerk entered the Supreme Court's orders on May 31, 2016, and Plaintiffs served the orders with notice of entry on June 10. R. 5, 18. Ford and Goodyear timely appealed the Supreme Court's orders on June 13 and June 23, respectively. R. 3-4, 16-17.

ARGUMENT

I. FORD AND GOODYEAR ARE NOT "AT HOME" IN NEW YORK.

The Supreme Court held that Ford and Goodyear are "at home" and subject to general jurisdiction in New York because they each have "continuous and systematic" contacts with the State. R. 13, 24. In doing so, the court misconstrued the U.S. Supreme Court's recent decisions retiring the "doing business" test in

favor of a much simpler and predictable approach: the "at home" test. *See generally Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Goodyear* and *Daimler*'s "at home" standard reflects the Court's recognition of the evolution of the global economy, and marked a decided change from the pre-*Daimler* standard the lower court used.

Under *Goodyear* and *Daimler*, "as a matter of due process," general jurisdiction over a non-resident corporation like Ford and Goodyear "exists only if the corporation is 'essentially at home in the forum State.' " *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 160 n.4 (2014) (quoting *Daimler*, 134 S. Ct. at 761). A corporation's homes are "typified by 'the place of incorporation and principal place of business.' " *Id.* (quoting *Daimler*, 134 S. Ct. at 761). These are the "paradigm" places for general jurisdiction because they "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Daimler*, 134 S. Ct. at 760 (internal quotation marks and alteration omitted). Applying this rule, New York appellate courts routinely hold that they lack general jurisdiction over defendants that are neither incorporated nor headquartered in New York. *See D&R Global Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 487 (1st Dep't 2015) ("As defendant neither is incorporated in New York State nor has its principal place of business here, New York courts may not

exercise [general] jurisdiction over it . . . . "); *Magdalena v. Lins*, 123 A.D.3d 600, 600 (1st Dep't 2014) ("[T]here is no basis for general jurisdiction . . . , since [the defendant] is not incorporated in New York and does not have its principal place of business in New York.").

The Supreme Court acknowledged the "at home" standard set forth in *Goodyear* and *Daimler*, as well as the New York appellate cases just cited. R. 11-13, 23-24. The Supreme Court's general jurisdiction analysis thus should have been easy. Neither Ford nor Goodyear is incorporated or headquartered in New York; therefore, they are not "at home" in the State. R. 73, 120. The Supreme Court nevertheless found that the cases were inapposite—and the general jurisdiction outcome different—because in the prior cases, the contacts between the corporation and the forum state were minimal, whereas the contacts between Ford and Goodyear and New York here are, in its view, more significant. *Id.*

Daimler considered—and rejected—this line of reasoning, emphasizing that "the general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' " *Daimler*, 134 S. Ct. at 762 n.20 (citation omitted; alteration in original). "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* Many corporations, like Daimler, Ford, and Goodyear, do significant business across the

United States. But "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.*

Under *Daimler*'s comparative analysis, Ford's plant in New York and its franchise agreements with independent dealers in the State (R. 9) do not add up to Ford being "at home" in New York. Ford *also* has plants and franchise agreements with independent car dealers in the rest of the world. In fact, Ford has 62 plants and 11,980 franchise agreements with independent dealerships worldwide. R. 144-145. Ford's economic contacts with New York are therefore not so substantial as compared to its contacts elsewhere so as to make Ford "at home" in New York.

The same is true of Goodyear. Although Goodyear had an unrelated plant in New York and has service centers in the State (R. 24, 121), it also has plants and service centers across the country and around the world. Goodyear has more than 15 plants in the United States alone and 50 plants and 1,200 retail tire outlets worldwide. R. 235-237. Like Ford, Goodyear's economic contacts with New York are not so great as compared to its contacts elsewhere so as to make Goodyear "at home" in New York.

Daimler's facts prove as much. Daimler had a regional headquarters, a vehicle-preparation center, and a classic-car center in California.[1] Daimler was also the largest supplier of luxury vehicles to the California market and made 2.4% of its worldwide sales in California. *Daimler*, 134 S. Ct. at 752. The U.S. Supreme Court nonetheless found that *Daimler* was not "at home" in California. *Id.* at 761-762. To hold Daimler subject to general jurisdiction in California, the Court held, would be "unacceptably grasping." *Id.* at 761.

So too for Ford and Goodyear in New York. Indeed, Justice Sotomayor pointed out in her separate *Daimler* opinion that the majority's rule would result in no general jurisdiction over defendants like Ford and Goodyear that are "large corporation[s] that own[] property, employ[] workers, and do[] billions of dollars' worth of business in the State." *Id.* at 773 (Sotomayor, J., concurring in judgment). But that criticism did not change the Court's decision in *Daimler*, and it cannot support the Supreme Court's decision here.

To be sure, *Daimler* recognized that a corporation could be "at home" somewhere other than its State of incorporation and the State in which its principal place of business is located—but only in "exceptional case[s]." *Id.* at 761 n.19. A corporation will be "at home" outside of the two paradigm places *only* when its

[1] Many of Daimler's contacts discussed in text were those of Daimler's wholly-owned subsidiary, Mercedes Benz USA. *See Daimler*, 134 S. Ct. at 752. The Court assumed, without deciding, that Mercedes Benz's contacts could be imputed to Daimler for general jurisdiction purposes. *Id.* at 759-760.

relationship with the forum State is so strong as to be "comparable to a domestic enterprise." *Id.* at 758 n.11. To illustrate just how rare those exceptions are, the *Daimler* Court provided only a single example of an "exceptional" case: *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, general jurisdiction was appropriate in Ohio because the defendant, a Philippine mining company, temporarily transferred its management activities to Ohio during World War II. *See Daimler*, 134 S. Ct. at 756 & n.8. In that sense, *Perkins* is hardly an exception at all, given that "Ohio was the corporation's principal, if temporary, place of business." *Id.* at 756 (citation omitted).

Following *Perkins*, courts have recognized that a company cannot be "at home" outside of the States where it is incorporated or headquartered unless "the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of incorporation or principal place of business." *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1205 (11th Cir. 2015). Put differently, the company's activities in the forum State must be a "surrogate for the place of incorporation or head office." *Daimler*, 134 S. Ct. at 756 n.8 (citation omitted).

The Supreme Court did not find that Ford's and Goodyear's operations in New York were equivalent to either company being incorporated or headquartered in the State, nor could it on this record. Instead, the court proceeded as if

"regularly engag[ing] in commercial activity" in New York is sufficient to subject a company to general jurisdiction in its courts. *See* R. 12, 24. Federal courts applying New York law, however, have repeatedly held the opposite. The Second Circuit has held that "when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to" allow general jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016); *see also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (*Daimler* and *Goodyear* "make clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum") (citation omitted; brackets in original). Similarly, federal courts applying New York law have repeatedly rejected general jurisdiction over non-New York corporations, even where the corporations owned manufacturing plants, ran restaurants, or operated bank branches in the State. *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 387-88 (E.D.N.Y. 2015) (finding the operation of manufacturing plants and restaurants insufficient to find general jurisdiction); *Karoon v. Credit Suisse Grp. AG*, No. 15-CV-4643 (JPO), 2016 WL 815278, at *3 (S.D.N.Y. Feb. 29, 2016) (finding the operation of a bank branch insufficient to find general jurisdiction); *see also SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 168 (S.D.N.Y. 2015) (same). In short, engaging in "continuous

business" in New York is "insufficient to establish general jurisdiction after *Daimler.*" *Karoon,* 2016 WL 815278, at *3.

Courts have held that even Ford is not subject to general jurisdiction in States where it has significant business dealings. One court held that Ford was not subject to general jurisdiction in Mississippi because the plaintiffs "demonstrate[d] that Ford is at most 'doing business' in Mississippi"—a finding that was not sufficient to render Ford " 'at home' in Mississippi." *Pitts v. Ford Motor Co.*, 127 F. Supp. 3d 676, 683 (S.D. Miss. 2015) (citation omitted). Another held that Ford was not subject to general jurisdiction in California, observing that the plaintiffs' "reliance on pre-*Daimler* cases that use a 'continuous and systematic' analysis must be reconsidered" in light of *Daimler*. *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015) (citation omitted). The court found that "[e]ven if Ford's business contacts with California are continuous and systematic, approving the exercise of general jurisdiction in every state in which [Ford] does business would be 'unacceptably grasping.' " *Id.* (citation omitted). And yet another court applied *Daimler* to deny the exercise of general jurisdiction over Ford in Utah. Order Granting Ford's Mot. to Transfer 3-5, *Oversen v. Kelle's Transp. Serv., Inc.*, No. 2:15-cv-535-JNP-DBP (D. Utah May 12, 2016) (reprinted in the addendum to this brief). Although there was "no doubt that Ford's contacts with Utah are extensive," the "same can be said of Ford's operations in every state

across the country." *Id.* at 5. The plaintiff's arguments relying on the "substantial" business conducted by Ford in Utah were "indistinguishable from those raised by the plaintiff in *Daimler*"—and firmly rejected by the U.S. Supreme Court. *Id.* Courts have applied similar logic to find that Goodyear is not subject to general jurisdiction in States where it has significant business dealings, as well. *See, e.g.*, *Clark v. Lockheed Martin Corp.*, No. 15-CV-995-SMY-PMF, 2016 WL 67265, at *2 (S.D. Ill. Jan. 6, 2016).

In its ruling below, the Supreme Court thought that these cases and the others like them were still distinguishable—at least as to Ford—because Jose Aybar, Jr.'s Explorer was purchased, used, registered, and primarily operated in New York. R. 12. But this distinction is irrelevant. By definition, general jurisdiction is agnostic as to a case's facts or their connection to the forum; a claim's factual connection to a state matters only for *specific* jurisdiction. *See Goodyear*, 564 U.S. at 926. Here, the Supreme Court (correctly) held that there was no specific jurisdiction over Ford or Goodyear on Plaintiffs' claims. R. 10, 22. By importing specific jurisdiction concepts such as place of purchase into its general jurisdiction analysis, the court committed the same analytical mistake that

the U.S. Supreme Court warned against in *Goodyear*. *See Goodyear*, 564 U.S. at 926-928.[2]

The Supreme Court's order is directly contrary to these decisions. Ford and Goodyear's contacts with New York are no different than their contacts with these other States. Under the Supreme Court's order, Ford and Goodyear would be subject to general jurisdiction in every State where their contacts are continuous and systematic—that is, virtually every State. Such a result would be directly contrary to *Daimler*'s core teaching: "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. The Supreme Court's holding that Ford and Goodyear are "at home" in New York was wrong.

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[2] None of this is to say that the Supreme Court's cited contacts are, in fact, relevant to specific jurisdiction in this case or any other. Ford did not sell the Explorer in New York, and there is no evidence that Goodyear sold the tire in the State, either. The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). That the Explorer was owned by a New York resident and driven by him there is similarly irrelevant. "[H]owever significant the *plaintiff's* contacts with the forum may be, those contacts cannot be 'decisive in determining whether the *defendant's* due process rights are violated.'" *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)) (emphases added).

II. FORD AND GOODYEAR DID NOT CONSENT TO GENERAL JURISDICTION IN NEW YORK BY REGISTERING TO DO BUSINESS HERE.

The Supreme Court was also incorrect in holding that Ford and Goodyear each consented to general jurisdiction in New York by registering to do business in New York and appointing the Secretary of State as their respective agent for service of process. Nothing in the Business Corporation Law requires a corporation to consent to general jurisdiction as a condition of doing business in New York. And the Business Corporation Law would be unconstitutional if it did. In light of these significant constitutional questions, the Court should apply the constitutional-avoidance canon and construe the Business Corporation Law as consistent with the constitution—just as other courts have.

A. 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 Supreme Court concluded that "a foreign corporation may consent to general jurisdiction in this state under CPLR 301"—the New York general jurisdiction statute—"by registering as a foreign corporation and designating a local agent for service of process." R. 13, 25. The Court found Ford and Goodyear's purported consent in their compliance with Business Corporation Law § 304, which requires companies to register with the Secretary of State and appoint

the Secretary as their agent for service of process before they do business in New York. R. 14, 25.

The Business Corporation Law does not expressly require a foreign corporation to consent to jurisdiction in order to be authorized to do business in New York.[3] Business Corporation Law § 304 is silent regarding jurisdiction and consent. All it says is that "[t]he secretary of state shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served" and that "[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). Similarly silent is Business Corporation Law § 1304, which the Supreme Court also cited. R. 14, 25. Business Corporation Law § 1304 specifies the required contents of a foreign corporation's application for authority—none of which reference general jurisdiction. The application needs to contain only "[a] designation of the secretary of state as [the corporation's] agent upon whom process against it may be served

[3] Some lawmakers have proposed a bill to amend Business Corporation Law §1301 to state what the Supreme Court believed it already says: that a foreign corporation's application for authority to do business constitutes consent. *See* NY S04846, 2015-2016 N.Y. General Assembly (June 25, 2015). There is no indication, however, that the measure will pass the Legislature or be signed by the Governor. And it is being vigorously 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, *available at* http://goo.gl/1T4WUI.

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 states 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* (Apr. 2016), http://goo.gl/e6kwO3.

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

Given the Business Corporation Law's silence on general jurisdiction, the Supreme Court's reading of Business Corporation Law § 304 cannot be the right one. When a court is "presented with a question of statutory interpretation," its

"primary consideration 'is to ascertain and give effect to the intention of the Legislature.' " *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) (quoting *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000)). In turn, "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 meaning of the Business Corporation Law here is unambiguous; nothing in it deems a corporation's executed application for authorization to do business in New York as consent to be sued on all causes of action in the State. Further, the Supreme Court's reading of the statute adds a nonexistent proviso 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." And it is a fundamental tenet of statutory interpretation that the Court "ought not to add to words having a definite meaning or interpret a statute when there is no need to do so." *People v. Tatta*, 196 A.D.2d 328, 331 (2d Dep't 1994); *see also Distribution Nat'l Fuel Gas Corp. v. Pub. Serv. Comm'n of N.Y.*, 277 A.D.2d 981, 981 (4th Dep't 2000) ("Courts are not free to amend a statute by adding words that do not appear therein.").

The Supreme Court's holding appears to be founded on the premise that Ford and Goodyear's designation of the Secretary of State as agent for service of process also constitutes consent to general jurisdiction. But service of process and personal jurisdiction are separate concepts; a plaintiff must prove both proper service of process *and* personal jurisdiction before the New York courts may exercise jurisdiction over the defendant. As this Court has held, "a challenge to the basis of the court's jurisdiction is distinct from a claim of defective service of process." *Hatch v. Tran*, 170 A.D.2d 649, 650 (2d Dep't 1991); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant be given adequate notice of the suit *and* be subject to the personal jurisdiction of the court.") (citation omitted; emphasis added); 62B Am. Jur. 2d *Process* § 258 ("While service of process and personal jurisdiction both must be satisfied before a suit can proceed, they are nonetheless distinct concepts that require separate inquires . . . . "). Ford and Goodyear's consent to service through the Secretary of State was not also consent to general jurisdiction in New York.

To the extent that there is any doubt about the Business Corporation Law's proper construction, the presumption against waving 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, "[i]t is the duty of the court to indulge every reasonable presumption against the waiver of fundamental constitutional rights." *People v. Jenkins*, 85 A.D.2d 265, 276 (1st Dep't 1982). 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 manner.

The Supreme Court cited two appellate cases—both from outside this Department—holding that registration to do business as a foreign corporation constitutes consent to general jurisdiction. R. 14, 25 (citing *Doubet LLC v. Trustees of Columbia Univ. in City of N.Y.*, 99 A.D.3d 433, 434-435 (1st Dep't 2012) and *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-176 (3d Dep't 1983)). These opinions are not persuasive. Neither opinion analyzed the Business Corporation Law's text or addressed its silence on jurisdiction. Also, neither opinion addressed the jurisdictional issue in any depth. *Doubet* resolved the jurisdictional question with a single sentence citing *Augsbury*. *Doubet*, 99 A.D.3d at 434-435. In turn, *Augsbury* cited only a Special Term and a trial court opinion

in support of its conclusions. 97 A.D.2d at 176. That is too slender a reed to subject Ford and Goodyear to jurisdiction in New York on all causes of action.

Moreover, both *Doubet* and *Augsbury* appear to have addressed whether registration constituted consent to general jurisdiction under the long-arm statute, CPLR 301. *See Doubet*, 99 A.D.3d at 434-435; *Augsbury*, 97 A.D.2d at 175-176. But even if registration to do business in New York constitutes consent to jurisdiction under the long-arm statute, it does not follow that registration constitutes consent under the Due Process Clause. A plaintiff must prove that there is jurisdiction over the defendant under both the long-arm statute *and* the Due Process Clause. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). That distinction is particularly relevant because New York courts have doubted that a finding of general jurisdiction under CPLR 301 satisfies the federal due-process analysis after *Daimler*. *See Sonera Holding*, 750 F.3d at 224 n.2 (noting that there is "some tension" between CPLR 301's and *Daimler*'s tests for general jurisdiction); *Continental Indus. Grp., Inc. v. Equate Petrochemical Co.*, 586 Fed. App'x 768, 769-770 (2d Cir. 2014) (holding that "[w]hatever the application of CPLR § 301 might be here, it is clear from the facts that general jurisdiction . . . would be inconsistent with due process" and *Daimler*).

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. Again, such an interpretation would mean that any plaintiff anywhere in the country with any grievance against Ford and Goodyear could file suit in New York. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 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. The Supreme Court gave no reason why 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); Statutes § 145 ("A construction which would make a statute absurd will be rejected.")

B. The Supreme Court's Interpretation Of The Business Corporation Law Renders It Unconstitutional.

The Supreme Court's finding that Ford and Goodyear consented to general jurisdiction by registering as a foreign corporation not only misreads the statute, but is also unconstitutional. Consent by registration cannot be squared with *Daimler*'s holding that a corporation is not subject to general jurisdiction everywhere it does business or the U.S. Supreme Court's unconstitutional-

conditions doctrine, which forbids States from forcing corporations to waive Due Process protections in return for the privilege of doing business within their borders.

1. Consent By Registration Cannot Be Reconciled With *Daimler* Or The Cases Before It.

It violates due process for a State to subject a company to general jurisdiction by requiring the company to file the routine paperwork necessary to conduct business in the State. 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*). If the Supreme Court's reasoning is allowed to stand, every state and federal court could be converted into an all-purpose forum with respect to every claim against every corporation registered to do business in the jurisdiction.

The Supreme Court's reasoning would virtually wipe out *Daimler*'s holding that "at home" is not "synonymous with 'doing business.' " 134 S. Ct. at 762 n.20. Under it, New York would revert back to the pre-*Daimler* principle that doing business in New York—combined with the statutorily required step of registering with the Secretary of State—is enough for general jurisdiction in the New York courts. *See Brown*, 814 F.3d at 640 (if consent by registration were constitutionally permissible, "*Daimler*'s ruling would be robbed of meaning by a

back-door thief"). In other words, "*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*, __ F. Supp. 3d. __, No. 16-583, 2016 WL 1644451, at *9 (D.N.J. Apr. 25, 2016) (citation omitted). That "cannot be the law." *Id.*

The Supreme Court's consent by registration holding is contrary to other aspects of *Daimler*, as well. The *Daimler* Court 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." 134 S. Ct. at 760. 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.* The "exorbitant exercise[] of all-purpose jurisdiction" entailed in Supreme Court's 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.' " *Daimler*, 134 S. Ct. at 761-762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Numerous courts have recognized and applied these *Daimler* principles in refusing to find general jurisdiction simply because the corporate defendant has

appointed an agent. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 (Del. 2016) (observing that "[t]he 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 Southern District of New York explained that "[a]fter *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." *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015). The Second Circuit, too, has cast doubt on the constitutionality of consent by registration. Consent by registration theories, it noted, "risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely." *Brown*, 814 F.3d at 639. Or, as a Missouri federal court put it, if registering to do business were sufficient to "create[] jurisdiction, national companies would be subject to suit all over the country," which would be "contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction." *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015); *see also Neeley v. Wyeth LLC*, 4:ll-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.").

Even before *Daimler*, many courts have recognized that asserting general jurisdiction based on "mere service on a corporate agent . . . displays a fundamental misconception of corporate jurisdictional principles" and is "directly contrary to the historical rationale of" the Supreme Court's personal-jurisdiction decisions. *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-183 (5th Cir. 1992).[4] This Court should hold the same.

The Supreme Court's contrary ruling rested largely on *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). R. 13, 25. But

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[4] *See also, e.g., Consol. Dev. Co. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation."); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 89 n.6 (1st Cir. 1990) (rejecting the argument that the defendant's "licensure and appointment of an agent for service of process constituted a consensual submission to the jurisdiction of Maine's courts"); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (a corporation's compliance with a State's registration act "cannot satisfy—standing alone—the demands of due process"); *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require [more than] mere compliance with state [registration] statutes."); *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) ("Service on a designated agent alone does not establish minimum contact."); *Freeman v. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000) ("[C]ourts and legal scholars have agreed that the mere act of appointing an agent to receive service of process, by itself, does not subject a non-resident corporation to general jurisdiction.")

that hundred-year-old case has been abrogated by more recent U.S. Supreme Court personal jurisdiction decisions, beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). At the time of *Bagdon*, personal-jurisdiction inquiries were governed by *Pennoyer v. Neff*, 95 U.S. 714 (1877), which held that "a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum." *Daimler*, 134 S. Ct. at 753; *see also Pennoyer*, 95 U.S. at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."). Courts therefore created "fictions" like those in *Bagdon*, 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).

The U.S. Supreme Court did away with the "fictions of implied consent to service on the part of the foreign corporation and of corporate presence," *Shaffer*, 433 U.S. at 202, in its "pathmarking" decision in *International Shoe*. *Goodyear* 564 U.S. at 915; *see also Burnham v. Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion) ("As many observed, however, the consent and presence were purely fictional. Our opinion in *International Shoe* cast those fictions aside . . . .") (citation omitted). With *International Shoe*, *Pennoyer*'s "strict territorial approach yielded to a less rigid understanding, spurred by 'changes in

the technology of transportation and communication, and the tremendous growth of interstate business activity.' " *Daimler*, 134 S. Ct. at 753-754 (citation omitted).

From then on, "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 U.S. Supreme Court explained that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," and explicitly held that "[t]o the extent that prior decisions are inconsistent with [*International Shoe*], they are overruled." *Id.* at 212 & n.39. That is a holding that *Daimler* repeated, admonishing that cases from before *International Shoe* "should not attract heavy reliance today." 134 S. Ct. at 761 n.18. Pre-*International Shoe* cases like *Bagdon,* holding that consent by registration is consistent with Due Process, 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." *Brown*, 814 F.3d at 639; *see also Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at *10 (D. Vt. July 24, 2009) (observing that "to the extent that early cases such as *Bagdon* . . . hold that compliance with a registration requirement alone establishes personal jurisdiction—whether based on

'consent,' 'presence,' or some other theory—the viability of such holdings is cast in doubt by . . . *International Shoe*.").

To its credit, the Supreme Court acknowledged that post-*Daimler* cases have undermined *Bagdon*. *See* R. 13 ("After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes."). The Supreme Court also acknowledged that "[t]here is no New York state court appellate authority directly on point." *Id.* But it cited one post-*Daimler* case from Delaware, *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015), *aff'd on other grounds*, 817 F.3d 755 (Fed. Cir. 2016), as supporting its conclusion that consent by registration is constitutional. R. 14, 25-26.

The Supreme Court did not mention, however, that the Delaware Supreme Court expressly rejected *Acorda Therapeutics*' interpretation of the Delaware registration statute. Reversing prior precedent, the Delaware Supreme Court concluded that there was a "stark tension" between *Daimler* and cases, like those cited by the Supreme Court, holding that consent by registration was constitutional. *Genuine Parts*, 137 A.3d at 145. The Delaware high court thus held that *Acorda Therapeutics*'s reading of its registration statute was not the correct one. *Id.* at 140-141. The case is no longer good law.

The Supreme Court's consent by registration holding is all the more unteable because Ford and Goodyear's supposed "consent" to general jurisdiction is a fiction. *See Shaffer*, 433 U.S. at 202; *Burnham*, 495 U.S. at 617-618 (plurality opinion). To the extent that the Business Corporation Law implicates general jurisdiction at all, *see supra* at 18-25, it is through legislative fiat—not Ford and Goodyear's freely given consent. And "[c]onsent 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; *see also Fallacy of Consent*, *supra*, at 1388 ("The idea that a corporation can fill out certain state-mandated forms that a court may deem to constitute consent to all-purpose jurisdiction, without the corporation knowing about that consequence in advance, is repugnant to any basic understanding of consent.").

The Supreme Court therefore cannot evade the Due Process Clause's limitations on general jurisdiction through the fiction of implied consent. "A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear*, 564 U.S. at 919; *see also World-*

Wide Volkswagen, 444 U.S. at 291 ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant."). The "reach of that coercive power, even when exercised pursuant to a corporation's purported 'consent,' " is still constrained by the Due Process Clause. *Brown*, 814 F.3d at 641. The Supreme Court's holding that Ford and Goodyear consented to general jurisdiction in New York by registering to do business here goes further than *Goodyear*, *Daimler*, and Due Process allow.

2. Consent By Registration Is An Unconstitutional Condition That Burdens Interstate Commerce.

Requiring Ford and Goodyear to consent to general jurisdiction in New York to do business here would also constitute an unconstitutional condition burdening interstate commerce. The unconstitutional-conditions 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." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)).

In *Denton*, the U.S. Supreme Court invalidated a Texas law barring companies, as a condition of doing business in Texas, from exercising their federal right to remove suits filed against them in state court. 146 U.S. at 206-207. The Supreme Court's holding below works 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 rights to resist state-court jurisdiction over matters unconnected to their activities in the State.

The Supreme Court reasoned that Ford and Goodyear could always cancel their registrations to avoid general jurisdiction in New York. R. 14, 26. But if Ford and Goodyear did business in New York without registering, they could no longer sue in the New York courts, even if New York was the only forum in which they could obtain personal jurisdiction over a defendant. *See* BCL § 1312(a). Worse still, the Attorney General could sue to enjoin Ford and Goodyear's operations. *See* BCL § 1303. The companies have no way to both avoid general jurisdiction and continue doing business in New York.

If the Supreme Court meant that Ford and Goodyear should stop doing business in New York to avoid Plaintiffs' lawsuit here, that only underscores the unconstitutionality of consent by registration. 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 specifically 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.*, 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 a state statute "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, 2186 (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 consent to be sued here on cases with no connection to the State.

C. Constitutional-Avoidance Principles Counsel In Favor Of Rejecting The Supreme Court's Expansive Reading Of The Business Corporation Law.

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); *see also Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118, 123 (2d Dep't 1974) ("[W]e are also obliged to construe statutes so as to avoid constitutional doubts.") (citation omitted). And there is a perfectly logical—and constitutional—way to read Business Corporation Law § 304'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 adopted similar service-only readings of States' corporate-registration statutes by interpreting the statute in a manner that does not conflict with the Due Process Clause. 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 v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). 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 limited 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* at 18-25. But if the Court concludes that the Business Corporation Law must be read to encompass general jurisdiction as well, it should hold that the statute is unconstitutional. *See supra* at 25-37.

CONCLUSION

For the foregoing reasons, the Supreme Court's orders should be reversed.

Respectfully submitted,

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