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IN THE

Court of Appeals

of the

State of New York

ANNA AYBAR, et al.,

Appellants,

– against –

JOSE A. AYBAR, JR. et al.,

Defendants,

– and –

FORD MOTOR CO. et al.,

Respondents,

– and –

U.S. TIRES & WHEELS OF QUEENS, LLC

Nonparty-Respondent.

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in New York. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that the dramatic reversal of New York law proposed by the corporate defendants in this case will deprive wrongfully injured New Yorkers of their access to legal redress in the courts of this state.

PRELIMINARY STATEMENT

In their appeal to this Court, Ford Motor Company and Goodyear Tire & Rubber Company ask this Court for very special treatment. For many decades, they have promoted and sold their products to New Yorkers, employed New Yorkers in their many dealerships and other facilities, made themselves household names in New York through their advertising and promotional efforts here, and, by virtue of registering to do business, were entitled to access to New York's courts to protect

their own rights and property. In short, they were placed on equal footing with domestic corporations in New York.

They now contend that it is fundamentally unfair to require them to respond to causes of action by New Yorkers alleging that they have been harmed by Defendants' unreasonably dangerous products when those harms occurred out of state. The immunity they ask for is not enjoyed by domestic corporations in this state, and the companies make no claim that defending their products in a New York court would impose even the slightest hardship. Rather, they assert that the Supreme Court of the United States has instituted a new "modern rule" that corporations are subject to general jurisdiction only in their at-home states of incorporation or principal place of business.

AAJ submits that the meaning of "due process" does not ebb and flow according to the personal views of either courts or corporations. Those settled usages and procedures accepted in the justice system at the time the Fourteenth Amendment was adopted necessarily comport with due process. They are at least entitled to a powerful presumption of constitutionality.

Consent to the jurisdiction of a court is a waiver of due process requirements. Prior to 1868, states addressed the accountability of foreign corporations by requiring them to appoint in-state agents to accept service of process on behalf of

the corporation. This Court more than a century ago construed New York's statutory requirement as express consent to the general jurisdiction of New York.

The U.S. Supreme Court has extended specific jurisdiction based on "doing business" and "minimum contacts" in the forum state, but it has not altered the traditional basis of jurisdiction based on a corporation's express consent. Indeed, general jurisdiction in the state of incorporation is itself premised on the corporation's voluntary choice and consent.

Even if cases are brought to New York courts that in justice should be brought elsewhere, New York law already provides a complete remedy in the doctrine of *forum non conveniens*. There is no basis, either in law or in policy, to deprive injured plaintiffs of their access to justice.

ARGUMENT

I. REGISTRATION TO DO BUSINESS AND APPOINTMENT OF AN AGENT TO RECEIVE PROCESS IS EXPRESS CONSENT TO GENERAL JURISDICTION THAT DOES NOT VIOLATE DUE PROCESS.

A. Compliance by Foreign Corporations With New York's Registration and Designation Requirements Constitutes Express Consent to the Exercise of General Personal Jurisdiction by New York Courts.

AAJ addresses this Court on the crucial question of whether this Court's interpretation of Business Corporation Law §§ 304, 1301, and 1304, under which New York courts may assert general jurisdiction over foreign corporations based on

their registration to do business and designation of the secretary of state as an agent to accept service of process on behalf of the corporation, comports with due process. AAJ submits that it does.

1. Defendants have waived the argument that New York law does not require the express consent of foreign corporations to the general jurisdiction of New York courts.

Defendants Ford Motor Co. and Goodyear Tire & Rubber Co. ["Defendants"] suggest that this Court need not reach the due process issue because the statutory provisions do not really make foreign corporations subject to the general jurisdiction of New York courts. Joint Brief of Defendants-Respondents Ford Motor Co. and Goodyear Tire & Rubber Co. ["Ford/Goodyear Br."] 9-17. They argue in addition that they cannot have consented to the general jurisdiction of New York courts because the terms "consent" and "general jurisdiction" appear nowhere in the statute. *Id.* at 12-13.

Defendants have waived this argument. As the Appellate Division noted, "The parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction would be consistent with New York law." *Aybar v. Aybar*, 169 A.D.3d 137, 143 (2d Dept. 2019).

2. Compliance with New York's Registration/Designation law amounts to express consent to the jurisdiction of New York courts.

Defendants rely on the Appellate Division's statement 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," violates due process. Ford/Goodyear Br. 20 (quoting *Aybar*, 169 A.D.3d at 152) (emphasis added). As the italicized phrase suggests, Ford and Goodyear concede that personal jurisdiction in this case would be constitutional if they had actually consented to the jurisdiction of New York's courts. They nonetheless insist: "There is no actual consent here." Ford/Goodyear Br. 31. They could not have consented, they argue, because neither the statute nor the application they filled out "mention 'consent' or 'general jurisdiction.'" Ford/Goodyear Br. 12. The argument borders on frivolous.[1]

[1] Defendants concede that general jurisdiction can be asserted by the courts of the state where the defendant is incorporated. Ford/Goodyear Br. 18. However, state statutes governing incorporation typically do not mention consent to general jurisdiction of the state's courts. Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 Hous. L. Rev. 631, 690 n.222 (2016). And "nothing inherent in the incorporation process warns the corporation that the courts of that state will exercise all-purpose jurisdiction over the corporation simply because it chooses that state for incorporation." *Id.* at 685.

Defendants complain that "the Secretary of State's form application for authority to do business in New York says nothing about general jurisdiction." Ford/Goodyear Br. 11. However, the Secretary's application for incorporation, which without question grants general jurisdiction, also makes no such reference. *See* Certificate of Incorporation (DOS-1511-f (Rev. 07/20)), Department of State, Division of Corporations, State Records, and Uniform Commercial Code, *available at* https://dos.ny.gov/system/files/documents/2021/02/1511-f.pdf.

The meaning of a corporation's voluntary act of registering to do business in this state and designating an agent was made crystal clear more than a century ago when Judge Cardozo declared that these actions show that the foreign corporation expressly consents to be subject to the jurisdiction of New York courts. *Bagdon v. Philadelphia & Reading Coal & Iron Co*., 217 N.Y. 432, 436-37 (1916) ("The person designated is a true agent. The consent that he shall represent the corporation is a real consent."). Judge Cardozo made clear that this "distinction is between a true consent and an imputed or implied consent, between a fact and a fiction." *Id.* He reinforced that emphasis by citing to *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915), in which Judge Learned Hand referred to the same New York provision as based on "express," not implied, consent. *Id.* at 150.

The Supreme Court of the United States twice agreed with Judge Cardozo's reading of New York law. In *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co*., 243 U.S. 93 (1917), the Court upheld the jurisdiction of Missouri courts over an Arizona corporation in a suit arising out of loss of insured buildings in Colorado. The defendant had appointed an agent authorized to receive service, as required by the Missouri statute, which had been construed by the Missouri Supreme Court to confer general jurisdiction. *Id.* at 95. In stating that general jurisdiction did not violate due process, the Court explicitly adopted the rationale enunciated by Judge Cardozo – that appointment of an agent specifically authorized to accept service of

process on behalf of the corporation constitutes express consent jurisdiction, even over causes of action arising elsewhere. *Id.* at 95-96. Justice Holmes, writing for the Court, was careful to distinguish cases in which foreign corporations "had not appointed the agent as required by statute." *Id.* In such cases, their consent would be "presumed" from their doing business in the state, but "this consent is a mere fiction," and would be "ineffective in suits upon causes of action arising in other states." *Id.* at 96. But where service is "upon an agent voluntarily appointed," for the purpose of receiving service on behalf of the corporation, the power of general jurisdiction "actually is conferred." *Id.* at 96.

The second case is *Neirbo Co. v. Bethlehem Shipbuilding Corp*., 308 U.S. 165 (1939), where a Delaware corporation was sued by a non-resident of New York in federal district court in New York. The U.S. Supreme Court relied on Judge Cardozo's "authoritatively determined" interpretation in *Bagdon* to hold that appointment of an agent for service of process was "part of the bargain by which Bethlehem enjoys the business freedom of the State of New York," and constituted "actual consent by Bethlehem to be sued in the courts of New York." *Id.* at 175.

The Appellate Division below acknowledged the "longstanding judicial construction . . . by New York courts and federal courts interpreting New York law," as express consent to general jurisdiction." *Aybar*, 169 A.D.3d at 147. Nor is New York alone in this construction. "Many state and federal courts hold that registering

to do business in a state and appointing an agent for service of process subjects a corporation to general jurisdiction." Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1359 (2015). The reasoning of those courts "usually focuses on the issue of consent – that by registering to do business pursuant to the state registration statute, a corporation has *expressly* consented to jurisdiction." *Id.* at 1369. (citing cases) (emphasis added). *See also* Heiser, 53 Hous. L. Rev. at 672-73. (The "majority of the jurisdictions that have addressed this issue after *International Shoe* have held that the designation of an in-state agent constitutes consent to general jurisdiction.").[2]

Ford, "which has been authorized to do business in New York since 1920," and Goodyear, which "has conducted business in New York for nearly a century," *Aybar*, 169 A.D.3d at 145 & 146,[3] clearly knew that their compliance with New York law amounted to actual, express consent to the jurisdiction of the courts of this state. As one district court has observed:

> When . . . the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions.

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[2] *See also* Restatement (Second) of Conflict of Laws § 43 (1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which has consented to the exercise of such jurisdiction."). "Consent" is defined as "actual assent to the exercise of jurisdiction and not a fictitious one." *Id.* at cmt. a. "Most commonly . . . consent by a corporation takes the form of the appointment of a statutory agent to receive service of process." *Id.* at cmt b.

[3] Goodyear registered to do business in New York approximately 60 years ago (R. 228-29).

Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F Supp. 3d 572, 591 (D. Del. 2015), affd, 817 F.3d 755, 768 (Fed. Cir. 2016).

3. Compliance with New York's Registration/Designation Law is consent to general jurisdiction.

Defendants assert that under their own reading of New York's Business Corporation Law, the statute "does not require, even impliedly, a foreign corporation to consent to general jurisdiction." New York courts, however, have read the statute as very clearly requiring such consent. *See Serov ex rel. Serova v. Kerzner Int'l Resorts, Inc.*, No. 162184/2015, 2016 WL 4083725, at *2-3 (N.Y.Sup.Ct., Jul. 26, 2016) (citing numerous decisions and authorities).

Ford and Goodyear, each of whom has ready access to highly talented legal counsel, cannot claim ignorance of the century-long line of decisions on this precise point, including a few penned by some of the nation's most illustrious jurists. In any event, as Justice Holmes stated in rejecting a similar argument raised by the insurer in *Pennsylvania Fire*, when the company voluntarily appointed an agent to accept service of process in Missouri, it took the risk that courts would naturally interpret that action as consent to general jurisdiction. 243 U.S. at 96. And the defendant will not be heard to claim he has been taken "by surprise." *Id.* at 95.

Because the New York Business Corporation Law does require foreign corporations to consent to the general jurisdiction of New York courts, and because Ford and Goodyear by complying with the statutory requirements gave their express

consent to general jurisdiction, the question remains, as the Appellate Division recognized, "whether the exercise of such jurisdiction would comport with the limits imposed by federal due process," in view of recent decisions of the Supreme Court of the United States. *Aybar*, 169 A.D.3d at 143.

B. Procedures That Were Practiced and Accepted by State Courts at the Time the Fourteenth Amendment Was Adopted Satisfy the Due Process Guarantee.

Ford and Goodyear proffer a theory that under the Supreme Court's "modern rule," corporations can be subject to general jurisdiction only in states where they are "at home," generally their state of incorporation and their principal place of business. Ford/Goodyear Br. 18-19 & 24. They further contend that this new at-home rule abrogates this Court's decision in *Bagdon*, as well as Supreme Court precedents condemned by Defendants as *Pennoyer*-era relics. *Id.* at 28.

AAJ submits that the meaning of "due process" does not ebb and flow so erratically. Fundamental fairness, as Justice O'Connor stated for the Court, does not change with the personal "predilections" of judges, or even Justices. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Rather, the Due Process Clause receives its meaning from historical practice. When the drafters referred to "due process," they had in mind the procedures that were already familiar to them. Due process "look[s] to those settled usages and modes of proceeding existing in the common and statute law" when the

constitutional guarantee was adopted. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). That is, "a process of law, which is not otherwise forbidden [by the constitution], must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country." *Hurtado v. People*, 110 U.S. 516, 528 (1884). The Fourteenth Amendment Due Process Clause "does not constrain the states to accept particular modern doctrines" but it also does not require the states to dispense with "an ancient and familiar method of procedure." *Corn Exch. Bank v. Coler*, 280 U.S. 218, 223 (1930) (quoting *Ownbey v. Morgan*, 256 U. S. 94, 112 (1921)). *See also Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934) ("The Fourteenth Amendment has not displaced the procedure of the ages").

The Fourteenth Amendment was adopted on July 9, 1868. Those who drafted and adopted the guarantee of due process could not have intended that the procedures developed and applied by the common law courts at that time, including procedures for obtaining personal jurisdiction, could be inimical "to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968). Rather, the "settled usages and modes of proceeding existing in the common law and statute law" of the states at that time, as *Murray's Lessee* instructs, almost certainly satisfy due process. *Hurtado*, 110 U.S. at 528. *See also Johnson v. United States*, 135 S. Ct.

2551 (2015) (Thomas, J., concurring) (The due process clause "guarantee[s] usages and modes of proceeding existing in the common and statute law.").

For example, the Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), determined that the traditional procedure giving broad discretion in awarding punitive damages to properly instructed juries does not offend procedural due process. "[T]he common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method." *Id.* at 17-18. Despite complaints from companies that juries had become unfairly generous to plaintiffs, it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Id.* at 28 (Scalia, J., concurring).[4]

The same due process standard applies to the rules governing state court *in personam* jurisdiction. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Supreme Court first recognized that proceedings in a court lacking personal jurisdiction over the parties violated due process. The Court had "no doubt" that the phrase due process of law includes "legal proceedings according to those rules and principles which

[4] The Court has approved review of punitive damage awards for excessiveness as a matter of substantive due process, based on pre-Fourteenth Amendment practice. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). "Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts" since the late eighteenth century. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994).

have been established in our systems of jurisprudence." *Id.* at 733. As Justice Scalia has explained,

> [For new procedures], "the Due Process Clause requires analysis to determine whether traditional notions of fair play and substantial justice have been offended. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

Burnham v. Superior Court, 495 U.S. 604, 622 (1990) (quotation and citation omitted) (plurality).[5] Justice Scalia therefore concluded that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619. Amicus submits that jurisdiction based on the other traditional basis – voluntary consent – constitutes due process as well.

C. Consent, Including Consent by Registration and Appointment of an Agent To Receive Service, Was an Accepted and Settled Basis for Jurisdiction When the Fourteenth Amendment Due Process Clause Was Adopted.

1. Courts have traditionally exercised personal jurisdiction over defendants based on consent.

[5] Justice Stevens concurred, citing to his concurrence in *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Stevens, J., concurring), agreeing that the due process clause does not "invalidat[e] other long-accepted methods of acquiring jurisdiction over persons with adequate notice." *Burnham*, 495 U.S. at 640 (Stevens, J., concurring).

The two well-established bases for personal jurisdiction at common law were (1) presence within the territorial boundaries of the forum state, and (2) the defendant's consent, as by voluntary appearance in court. *Pennoyer*, 95 U.S. at 733. Similarly, in this state, "before a judgment could be pronounced, the defendant must be in court, either upon its process *or by voluntary submission of his person to its jurisdiction.*" *Hulbert v. Hope Mut. Ins. Co.*, 1850 WL 4705 (N.Y. Sup. Ct. 1850) (emphasis added).

Because "the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest . . . it may be intentionally waived." *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982). *See, e.g.*, *The La Nereyda*, 21 U.S. 108, 125 (1823) (When "a Court has jurisdiction of the subject matter, but not of the person, consent would remove the objection."). No additional connection between the state and the litigant or the litigation need be shown.

2. Prior to 1868, states required foreign corporations to consent to service of process as a condition of conducting business in the state.

In both England and America, the "uniform opinion of the courts has been that 'from the earliest times to the present day, corporations have been liable for torts.'" Joseph Kinnicut Angell & Samuel Ames, A Treatise on the Law of Private Corporations Aggregate 221 (1832) (quoting *Chesnut Hill & Springhouse Tpk. Co. v. Rutter*, 1818 WL 2109, at *7 (Pa. 1818)). But early plaintiffs faced daunting

obstacles in establishing jurisdiction over foreign corporations. The Supreme Court initially deemed a corporation to be a mere fiction, with "no legal existence out of the boundaries of the sovereignty by which it is created." *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839). Even though employees of a foreign corporation might be found in the state, it was uncertain whether service upon them would bind the corporation. Angell & Ames, at 228.

As the Supreme Court came to recognize, due to the "great increase in the number of corporations of late years, and the immense extent of their business," the "exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice." *St. Clair v. Cox*, 106 U.S. 350, 355 (1882). To hold such entities accountable, "the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein." *Id.*

Prior to 1868, such legislative enactments fell into two broad categories. One common type of statute authorized service of process on the agents of foreign corporations who were doing business for the corporation in the state. *See* Gerard Carl Henderson, The Position of Foreign Corporations in American Constitutional Law 80-81 (1918) (tracing consent to jurisdiction "implied" from doing business in the forum state, beginning with an 1829 Florida statute and an 1834 Maryland statute).

The other type of statute frequently enacted prior to 1868 more closely resembles current New York law. "In many of the States there have been legislative enactments requiring foreign corporations to appoint resident agents, on whom service of process may be made, in order to entitle them to transact business within the State." *March v. Eastern R. Co.*, 40 N.H. 548, 582 (1860). Indeed, this Court took note that a foreign fire insurance company complied with an 1853 New York statute "making the appointment of an attorney or agent in this State upon whom process in suits against the company may be served a prerequisite to its doing business in the State, [so that] it thereby submits itself to the jurisdiction of the State courts." *Gibbs v. Queen Ins. Co.*, 63 N.Y. 114, 114 (1875).

Similarly, in Massachusetts, an 1851 statute required every "foreign corporation, before transacting any business within this state, to appoint . . . some person resident therein their attorney, and provid[e] that service of process upon such attorney shall be deemed to be sufficient service upon" the corporation. *Thayer v. Tyler*, 76 Mass. 164, 169 (1857). The court in *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 420-21 (1869), upheld a Maine statute that required every foreign fire insurance company in the state to instruct its agents to accept service of lawful processes against the company and to consent to the jurisdiction of state courts based on that service. *Id.* at 420-21. The Indiana Supreme Court in *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 270, 275 (1876), made reference to an 1854

statute requiring agents of foreign insurance companies to produce "an instrument from the company authorizing it to be sued and brought into court by service of process on the agent." *See also Leonard v. USA Petroleum Corp*., 829 F. Supp. 882, 887 (S.D. Tex. 1993) ("Since 1845, Missouri has required foreign insurance companies to register with the state to do business and appoint an agent for service of process."); *Baltimore & O. R. Co. v. Harris*, 79 U.S. 65, 74 (1870) (taking note of such statutes enacted in New York in 1849, in Pennsylvania in 1849, and a statute enacted by Congress for the District of Columbia in 1867).

3. Jurisdiction based on express consent prior to 1868 included general jurisdiction.

Moreover, such jurisdiction extended to actions arising in other states. The distinction between specific jurisdiction, extending only to disputes arising in the forum state, and general, dispute-blind jurisdiction, was first developed in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1135-36 (1966). "Prior to the twentieth century, English and American courts . . . justified jurisdiction solely upon general jurisdiction criteria." Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 614-15 (1988). Thus, where a foreign corporation consented to jurisdiction, as by voluntary appearance by its appointed agent, "the court would have jurisdiction to render a judgment, in all respects as obligatory as if the defendant were within the State." *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855).

It is true that the category of nineteenth century state statutes authorizing jurisdiction based solely on a foreign corporation's doing business in the forum state often provided that such "implied consent" extended only to suits arising from such in-state activities. Henderson, at 80-81 & 92-93. Similarly, where the statute required appointment of a service agent, but the foreign corporation failed to do so, it was deemed to have impliedly consented to jurisdiction in actions arising in the state. *Pennsylvania Fire*, 243 U.S. at 95-96. But that is not this case. Where a corporation has actually appointed a service agent, it has expressly consented to general jurisdiction. *Id.* at 94-95 (citing, in support, *Bagdon*).

Clearly, actual consent, expressed by registration to do business and appointment of an agent authorized to receive service was one of the "settled usages and modes of proceeding existing in the common and statute law" when the Fourteenth Amendment was adopted. Jurisdiction based on such consent therefore satisfies the guarantee of due process. At the very least, there is a strong presumption of its constitutionality. Defendants make no showing that such jurisdiction over corporations conducting substantial business in this state is a hardship or is fundamentally unfair.

There remains Defendants' assertion that the Supreme Court of the United States has recently altered the due process limits on state court personal jurisdiction.

II. THE SUPREME COURT OF THE UNITED STATES HAS NOT REJECTED OR OVERRULED ITS PRIOR PRECEDENTS HOLDING THAT JURISDICTION MAY BE BASED ON CONSENT EXPRESSED BY REGISTRATION TO DO BUSINESS AND APPOINTMENT OF AN AGENT FOR SERVICE.

Defendants contend that in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the U.S. Supreme Court disclaimed *Bagdon*, and its own prior precedents approving that decision. Ford/Goodyear Br. 26-28. To the contrary, the Supreme Court has never rejected jurisdiction based on consent expressed by compliance with state registration/designation statutes.

A. *International Shoe* Disapproved the "Fiction" of Implied Consent Based on Doing Business, Not Jurisdiction Based on Express Consent.

Ford and Goodyear argue strenuously that *Bagdon*, as well as *Pennsylvania Fire* and *Neirbo*, which cited *Bagdon* with approval, "were decided in the *Pennoyer* era, in which personal jurisdiction was tied to the defendant's presence in the forum State." Ford/Goodyear Br. 25-26. But *Pennoyer* itself recognized that, "a defendant not physically present in the state may consent to the jurisdiction of its courts." Jack H. Friedenthal et al., Civil Procedure 106 (4th ed. 2005). *See Pennoyer*, 95 U.S. at 733. As Justice Scalia has explained, *International Shoe* did not abolish the bases for jurisdiction that had been accepted even prior to *Pennoyer*. The proposition that "a defendant's presence [or consent] is itself no longer sufficient to establish

jurisdiction" is "unfaithful to both elementary logic and the foundations of our due process jurisprudence." *Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1990) (plurality opinion).

Defendants nevertheless contend that the Court in *International Shoe* cast aside the "fiction" that appointment of an agent constitutes consent to general jurisdiction. Ford/Goodyear Br. 26. In their view, the Court "disclaimed cases like *Bagdon*, *Neirbo*, and *Pennsylvania Fire* that based jurisdiction on the 'legal fiction…." Ford/Goodyear Br. 27.

Of course, the Court in *International Shoe* made no mention of any of those decisions, in which jurisdiction was based on actual consent. The Court was instead referring to fictional "consent being implied from [a corporation's] presence in the state through the acts of its authorized agents" doing business there. *International Shoe*, 326 U.S. at 318. The Court noted that specific jurisdiction could be based on activities in state that give rise to the liabilities sued on, "even though no consent to be sued or authorization to an agent to accept service of process has been given." *Id.* at 317. Thus, the Court in *International Shoe* disclaimed only jurisdiction based on fictional implied consent. The Court did not reject, and had no reason to reject, jurisdiction based on a corporation's actual consent to be subject to the jurisdiction of a state's courts in exchange for authorization to do business there. *See also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 900 (2011) (Ginsberg, J, dissenting)

("Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded.").

The Supreme Court continues to adhere to this distinction between actual consent, which can support general jurisdiction, and implied consent, a legal fiction that can support only specific jurisdiction. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there," due process is satisfied if the defendant has minimum contacts with the forum.) (emphasis added). *See also Acorda Therapeutics Inc.*, 817 F.3d at 768 ("The Supreme Court's subsequent decisions in *International Shoe* and *Daimler* did not overrule this historic and oft-affirmed line of binding precedent.").

Defendants' assertion that *Bagdon* has been "abrogated," Ford/Goodyear Br. 26, has no basis. And the Supreme Court has continued to cite favorably both to *Pennsylvania Fire*, *e.g.*, *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 443 n.4 (1952); and to *Neirbo*. *E.g*, *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 341-42 (1953).

B. The Supreme Court in *Shaffer v. Heitner* Did Not Overrule Jurisdiction Based on Express Consent.

Defendants next contend that the Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), also disclaimed the Court's prior approval of consent

by registration. Ford/Goodyear Br. 27. The Court in that case held that Delaware could not exercise jurisdiction over corporate officers and directors of a Delaware corporation based solely on attachment of their property – stock – which was not otherwise related to the litigation. *Shaffer*, 433 U.S. at 216-17.

It is true, as Defendants point out, that the Court in *Shaffer* rejected that part of *Pennoyer*'s "conceptual apparatus" of implied consent that had "approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State." Ford/Goodyear Br. 27 (quoting *Shaffer*, 433 U.S. at 201, 204). However, as in their discussion of *International Shoe*, above, Ford and Goodyear conflate implied jurisdiction based on in-state activities, which the Court has held can support only jurisdiction in actions arising out of those activities, with express jurisdiction, which the Court has consistently stated will support general jurisdiction. See Part II.A, above.

Significantly, the *Shaffer* Court indicated that due process would be satisfied if Delaware had enacted a statute "that treats acceptance of a directorship as consent to jurisdiction in the state." 433 U.S. at 216. The registration/designation statute at issue in the case before this Court is very similar to the type of statute the *Shaffer* court suggested would comport with due process. The Court has continued to cite such statutes as valid. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 892-93 (1988) (Noting that under Ohio law appointment of an agent to

accept service would subject the company "to the general jurisdiction of the Ohio courts . . . whether or not the transaction in question had any connection with Ohio.").

Shaffer clearly did not undermine the constitutionality of jurisdiction based on compliance with state registration/designation statutes.

C. Daimler Did Not Reject Consent to Jurisdiction Based on Consent.

1. The Court in Daimler did not address consent based on registration/designation statutes.

Thirdly, Ford and Goodyear contend that the Supreme Court in *Daimler* limited general jurisdiction of state courts to those states where the corporate defendant is not merely registered to do business, but is "at home." Ford/Goodyear Br. 19. However, it is clear that the Court was referring to "general jurisdiction appropriately exercised over a foreign corporation that *has not consented* to suit in the forum." *Daimler*, 571 U.S. at 129 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011)).

Defendants further contend that *Daimler* "repudiated the old consent-by-registration cases" *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 112 (1898), and *Tauza v. Susquehanna Coal Co*., 220 N.Y. 259, 268 (1917). Ford/Goodyear Br. 28.

Both of those decisions were based on consent implied from doing business in the state without appointing an agent specifically to accept service. *See Barrow*,

170 U.S. at 108; *Tauza,* 220 N.Y. at 269. The *Daimler* Court stated that, to the extent those decisions stood for jurisdiction based on evidence "that the corporation was 'doing business' in the forum," they "should not attract heavy reliance today." 571 U.S. at 139, n.18. Indeed, the Court questioned "whether 'doing business' should persist as a basis for general jurisdiction." *Id.*

By contrast, this Court in *Bagdon* upheld general jurisdiction based on express consent, not "doing business." Nothing in the *Daimler* opinion suggests that a corporation's voluntary consent to state court jurisdiction has become unconstitutional.[6]

2. The Supreme Court's "at-home" standard for general jurisdiction is consistent with consent by registration.

Instructively, the Court's reasoning in *Daimler* supports recognition of compliance with registration/designation statutes as a valid basis for general jurisdiction.

The *Daimler* Court reiterated its explanation that "the paradigm" forum for the exercise of general jurisdiction over a corporation is the state of incorporation or principal place of business." 571 U.S. at 137 (citing Brilmayer et al., *A General Look*

[6] Post-*Daimler*, the Supreme Court ruled that a state could not assert general jurisdiction based solely on in-state activity "absent consent." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017). The Court did not reach the question of consent by compliance with registration/designation laws. *Id.* at 559.

at General Jurisdiction, 66 Tex. L. Rev. 721, 728 (1988); and Twitchell, 101 Harv. L. Rev. at 628).

Professors Brilmayer et al. explain that state of incorporation is an appropriate basis for general jurisdiction precisely because the decision to incorporate in a particular state is itself a voluntary act of consent to be subject to the jurisdiction of that state, "presumably to obtain the benefits of that state's substantive and procedural laws," which "justifies general jurisdiction over the corporation," even if the it is not otherwise present or active in the state. 66 Tex. L. Rev. at 733. *See also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion) (incorporation within the state demonstrates "general submission to a State's powers").

AAJ suggests that rejection of jurisdiction based on a corporation's registration to do business in a state would call into question and undermine the basis for allowing general jurisdiction over a corporation based on its choice to incorporate in the forum state. *See* Heiser, 53 Hous. L. Rev. at 674.

III. THE PROBLEMS RAISED BY DEFENDANTS ARE ALREADY BETTER ADDRESSED BY THE DOCTRINE OF *FORUM NON CONVENIENS*.

Defendants falsely portray this case as a product liability lawsuit having "no connection to the State." Ford/Goodyear Br. 37. To the contrary, as the lower courts stated, this case involves a Ford Explorer that Jose Aybar purchased used in New

York, registered and licensed in New York, and drove primarily in New York. The Goodyear tire was purchased used by Jose Aybar and was installed on the Explorer in New York. The accident occurred as New York residents were traveling back to New York on Interstate 85 in Virginia. Three occupants of the vehicle were killed and three others injured. *See Aybar*, 169 A.D.3d at 139.

The state of New York surely has a strong interest in the accountability of foreign corporations who market their products for sale in New York, when those products may be responsible for causing deaths or serious injuries to New Yorkers. That the harm occurred in another state does not diminish that connection, particularly where the products purchased by New Yorkers are designed and intended for travel, including interstate travel. It is also worth noting that, as the Supreme Court recently pointed out, "Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021). Ford also actively fosters a post-sale market for maintenance and replacement parts for its vehicles. *Id.*

Nonetheless, Defendants urge this Court to shut the courthouse door to New York residents, conjuring unlikely, assertedly unfair, scenarios. Upholding *Bagdon*, they contend, would 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. Ford/Goodyear Br. 17. For example, they suggest, "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." *Id.* at 17. Because it cannot be said that foreign corporations agree to be sued upon such causes of action, they reason, "Consent by registration violates the Due Process Clause." *Id*. at 18.

It is difficult to discern the fundamental unfairness to corporations such as Ford or Goodyear, who conduct substantial business in New York and are entitled by virtue of their registration to resort to New York courts to protect their own rights and property, to be required to respond to claims in New York courts. Consent by registration works no unfairness, but simply places Ford or Goodyear – or any company similarly situated – on an equal footing with domestic corporations incorporated in New York.

In any event, there already exists an effective and non-constitutional safeguard against potentially unfair extensions of personal jurisdiction over causes of action that have little connection to the state. A defendant can move under the doctrine of *forum non conveniens* for dismissal on the ground the case should more appropriately be heard in the court of another jurisdiction. *See generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). As this Court has noted, New York

courts "are not required to add to their financial and administrative burdens by entertaining litigation which [though jurisdictionally sound] does not have any connection with this State." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-79 (1984). Consequently, New York law provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

N.Y. C.P.L.R. 327(a).

This rule authorizes New York courts to remedy any unfairness from the kinds of hypothetical cases Ford and Goodyear raise. There is no reason to bestow immunity from suit in New York courts to foreign corporations in a broad range of cases, shutting the courthouse doors to wrongfully harmed New Yorkers.

CONCLUSION

For the foregoing reasons, this Court should hold that New York's courts have personal jurisdiction over the defendants and the Appellate Division should be reversed.

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CERTIFICATION OF COMPLAINCE

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.13(c) that this brief contains 6,819 total words for all printed text in the body of the brief. This document was prepared on a computer using 14-point font, proportionally spaced typeface Times New Roman and is double-spaced.

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