15-3294-cv

United States Court of Appeals for the Second Circuit

RITCHIE CAPITAL MANAGEMENT, L.L.C., RITCHIE CAPITAL MANAGEMENT, LTD., RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,

Plaintiffs-Appellants,

v.

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee,

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

New York May Not Subject Foreign Corporations To General Jurisdiction Based Solely On Their Registration To Do Business 6

A. The Due Process Clause Forbids States From Compelling Foreign Corporations To Consent To General Jurisdiction 7

1. Daimler squarely rejected a "doing business" test for general jurisdiction 8

2. Requiring a foreign corporation to consent to general jurisdiction in order to do business in the State is an "unconstitutional condition." 10

3. The Supreme Court's modern personal jurisdiction decisions have overruled the Court's dated jurisdiction-by-consent cases 13

B. General Jurisdiction Based On Coerced Consent Would Produce The Very Unfairness And Other Adverse Consequences That The Supreme Court Sought To Prevent In Daimler 20

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Page(s)

CASES

Acorda Therapeutics Inc. v. Mylan Pharm. Inc.,
--- F. 3d ---, 2016 WL 1077048 (Fed. Cir. Mar. 18, 2016) 17

Asahi Metal Indus. Co. v. Super. Ct. of Cal.,
480 U.S. 102 (1987) (plurality opinion) 24, 27

AstraZeneca AB v. Mylan Pharm., Inc.,
72 F. Supp. 3d 549 (D. Del. 2014) 19

Augsbury Corp. v. Petrokey Corp.,
470 N.Y.S.2d 787 (App. Div. 1983) 6

Bane v. Netlink, Inc.,
925 F.2d 637 (3d Cir. 1991) 18

Brown v. Lockheed Martin Corp.,
--- F.3d ---, 2016 WL 641392 (2d Cir. Feb. 18, 2016) .... *passim*

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 3, 21, 23

Burnham v. Super. Ct. of Cal.,
495 U.S. 604 (1990) (plurality opinion) 16, 21

Connecticut v. Doehr,
501 U.S. 1 (1991) 13

Daimler AG v. Bauman,
134 S. Ct. 746 (2014) .... *passim*

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S. Ct. 2846 (2011) .... *passim*

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 3

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Hertz Corp. v. Friend,
559 U.S. 77 (2010) 21

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 19, 20

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) .... *passim*

J. McIntyre Machinery, Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 1, 23

Keeley v. Pfizer, Inc.,
2015 WL 3999488 (E.D. Mo. July 1, 2015) 19

Knowlton v. Allied Van Lines, Inc.,
900 F.2d 1196 (8th Cir. 1990) 18

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013) 10

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 16

MeadWestvaco Corp. v. *Ill. Dep't of Revenue*,
553 U.S. 16 (2008) 12

Morris & Co. v. Skandinavia Ins. Co.,
279 U.S. 405 (1929) 15

Morrison v. National Austl. Bank Ltd.,
561 U.S. 247 (2010) 27

National Equip. Rental, Ltd. v. Szukhent,
375 U.S. 311 (1964) 20

Neirbo Co. v. Bethlehem Shipbuilding Corp.,
308 U.S. 165 (1939) 14, 17

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Pennoyer v. Neff,
95 U.S. 714 (1877) 14, 15, 16, 17

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.,
243 U.S. 93 (1917) 14, 16, 17, 20

Robert Mitchell Furniture v. Selden Breck Constr. Co.,
257 U.S. 213 (1921) 14, 15

S. Pac. Co. v. Denton,
146 U.S. 202 (1892) 11, 12

Shaffer v. Heitner,
433 U.S. 186 (1977) 15, 16, 17

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 27

Tull v. United States,
481 U.S. 412 (1987) 13

Walden v. Fiore,
134 S. Ct. 1115 (2014) 1, 28

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 21

STATUTES, RULES AND REGULATIONS

Fed. R. Civ. P. 37(b)(2)(A) 19

N.Y. Bus. Corp. Law § 1301(a) 12

Gen. Law Tex. 1887 11

OTHER AUTHORITIES

Bureau of Econ. Affairs, *Foreign Direct Investment in the United States: Final Results from the 2012 Benchmark Survey*,
http://1.usa.gov/1oqcH72 26

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807 (2004) 25

Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721 (1988) 16

Remarks by the President at the SelectUSA Investment Summit (Mar. 23, 2015), https://www.whitehouse.gov/the-press-office/2015/03/23/remarks-president-selectusa-investment-summit 26

Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), https://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy 26

Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343 (2015) 12

U.S. Dep't of Commerce, *Foreign Direct Investment in the United States* (Oct. 2013), http://.usa.gov/25n2dHo 26

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases addressing the constitutional limits on courts' exercise of personal jurisdiction.[2]

Many Chamber members conduct business in States other than their State of incorporation and State of principal place of business.

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[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

[2] The other cases presenting issues regarding the due process limits on the scope of personal jurisdiction in which the Chamber has filed *amicus* briefs include *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); and *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). The Chamber's most recent briefs in personal jurisdiction cases are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.

They therefore have a substantial interest in the rules governing whether, and to what extent, a nonresident corporation may be subjected to general personal jurisdiction.

Subjecting corporations to general jurisdiction in every State in which they are required to register to do business would eviscerate the due process limits on personal jurisdiction recognized by the Court in *Daimler*—and could well have the practical result of exposing corporations that do business nationwide to general personal jurisdiction in all fifty States. The Chamber files this brief to explain why that result is irreconcilable with the Supreme Court's personal jurisdiction decisions and would impose unfair burdens on businesses, permit forum-shopping undermining the integrity of the judicial system, and inflict significant harm on the nation's economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The Due Process Clause of the Fourteenth Amendment sets * * * outer boundaries [on] a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). This limitation on a court's authority "protects [the defendant's] liberty interest in not being subject to the binding

judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

Applying this due process principle, the U.S. Supreme Court has recognized "two categories of personal jurisdiction." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). Specific jurisdiction empowers courts to adjudicate claims relating to the defendant's in-forum conduct and exists when "the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

General jurisdiction, by contrast, permits courts to adjudicate claims against a defendant arising out of actions occurring anywhere in the world (subject, of course, to any limits specific to a particular cause of action). It exists "where a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). "'[S]pecific jurisdiction has become the centerpiece of modern jurisdiction theory,

while general jurisdiction [plays] a reduced role.'" *Daimler*, 134 S. Ct. at 755.

Daimler held that—in the absence of exceptional circumstances—general personal jurisdiction over a corporation is available only in the company's State of incorporation or principal place of business. And Plaintiffs do not argue that any "exceptional circumstances" exist here. Instead, they contend that New York law requires a foreign corporation to consent to general jurisdiction as a condition of doing business in New York, thereby subjecting the corporation to suit in New York on *any* claim.

But settled constitutional principles confirm that such compelled consent to general jurisdiction violates due process. *Daimler* itself held that general jurisdiction cannot be based on merely "doing business" in a State. And the unconstitutional conditions doctrine bars New York from forcing a foreign corporation to choose between doing business in the State and relinquishing its due process protection against expansive general jurisdiction. Finally, Supreme Court decisions pre-dating *International Shoe* provide no grounds for upholding general jurisdiction based on compelled consent.

All of the policy considerations that the Supreme Court has found relevant to the due process analysis in the personal jurisdiction context also weigh heavily against finding general jurisdiction on the basis of compelled consent. Compelled consent would prevent corporations from structuring their primary conduct to avoid being subject to suit on any claim in multiple jurisdictions; allow businesses to be haled into forums with which they have only limited contacts; infringe on important international comity principles; and deter cross-border investment. And subjecting the corporation to general jurisdiction is not necessary to vindicate any legitimate interest of the forum State—because specific jurisdiction principles ensure that the State's courts will be available with respect to claims relating to the corporation's conduct in the State. This Court should therefore reject the compelled consent theory as inconsistent with both the Due Process Clause and the Supreme Court's guidance.

ARGUMENT

New York May Not Subject Foreign Corporations to General Jurisdiction Based Solely On Their Registration To Do Business.

The test for general personal jurisdiction is demanding: because of its extraordinary scope, general jurisdiction ordinarily may be exercised over a defendant only by those States in which the defendant is considered "at home"—its State of incorporation and the State of its principal place of business. *Daimler*, 134 S. Ct. at 760.

The district court correctly concluded that Costco, which is incorporated in and has its principal place of business in Washington State, is not "at home" in New York under *Daimler*. SPA12-13. Plaintiffs have therefore shifted to a different theory on appeal: that Costco *consented* to general jurisdiction simply by registering to do business in New York.[3]

Some New York courts have held that a foreign corporation's registration to do business in the State constitutes consent to general personal jurisdiction. *See, e.g.*, *Augsbury Corp. v. Petrokey Corp.*, 470

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[3] *Amicus* agrees with Costco that plaintiffs have waived this argument (Answering Br. 15-20), but addresses plaintiffs' "consent" theory in the event this Court chooses to reach the merits of the issue.

N.Y.S.2d 787, 789 (App. Div. 1983) (citing cases). But any such "consent" would be invalid under the U.S. Constitution. New York cannot compel foreign corporations to relinquish their due process protection against being haled into court in New York on any and all potential claims as a condition for being permitting to do business in one of the world's financial capitals. Such an assertion of general jurisdiction based on compelled "consent" would violate the unconstitutional conditions doctrine in addition to due process. It also would subject foreign corporations to the very unfairness, and lead to the precise adverse consequences, that the due process limits on general jurisdiction are designed to prevent.

A. The Due Process Clause Forbids States From Compelling Foreign Corporations To Consent To General Jurisdiction.

"A state court's assertion of jurisdiction" must be assessed for "compatibility" with the Due Process Clause of the Fourteenth Amendment, because such an assertion "exposes defendants to the State's coercive power." *Goodyear*, 131 S. Ct. at 2850. *Daimler* makes clear that a state law subjecting all foreign corporations doing business within a State to general personal jurisdiction cannot survive this due

process analysis. It follows that a State may not circumvent that limitation by requiring foreign corporations to consent to general personal jurisdiction as a condition for doing business within the State.

1. *Daimler* squarely rejected a "doing business" test for general jurisdiction.

The plaintiffs in *Daimler* contended that general jurisdiction should be available "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" 134 S. Ct. at 761. But the Supreme Court considered and rejected "[t]hat formulation" of the general jurisdiction standard as "unacceptably grasping." *Id.* The Court explained that "[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. ***A corporation that operates in many places can scarcely be deemed at home in all of them***." *Id.* at 762 n.20 (emphasis added). Indeed, the Court warned that it is an "obsolescing notion[]" to confer jurisdiction "based on nothing more than a corporation's 'doing business' in a forum." *Id.* at 756 n.8.

But that would be the precise result of upholding general jurisdiction based on compelled consent. If the Due Process Clause permitted a State to exercise general jurisdiction based on "consent" in

connection with registration to do business, then it would permit *every* State to do so. The result would be to transform every state and federal court into an all-purpose forum with respect to *every* corporation registered to do business. A nonresident business that registers in each of the "many places" where it "operates" would "be deemed at home in all of them"—the very result rejected in *Daimler*. *Cf. id.* at 762 n.20.

Indeed, this Court recently noted the direct conflict between *Daimler* and that compelled consent theory of general jurisdiction in a case involving Connecticut's corporate registration statute. The court observed that the compelled consent theory would allow "the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all,* so long as it had registered"—a result incompatible with *Daimler*, which "rejected the idea that a corporation was subject to general jurisdiction" in multiple States, even those in which the corporation "conducted *substantial* business." *Brown v. Lockheed Martin Corp.*, --- F.3d ---, 2016 WL 641392, at *17 (2d Cir. Feb. 18, 2016) (emphasis added). This Court reasoned that "*Daimler*'s ruling" should not be thus "robbed of meaning by [the] back-door thief"

of state registration statutes. *Id.*[4] The same conclusion applies here: *Daimler*'s logic precludes plaintiffs' expansive "consent" theory of jurisdiction.

2. Requiring a foreign corporation to consent to general jurisdiction in order to do business in the State is an "unconstitutional condition."

The compelled consent theory also runs afoul of the doctrine of "unconstitutional conditions." That doctrine holds that "'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (citation omitted). It "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* A State engages in just such impermissible "coercion" when it conditions a corporation's ability to transact business in the State on the corporation's waiver of its due process right not to be subject to general jurisdiction.

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[4] Because the Connecticut statute at issue in *Brown* had not been definitively interpreted by the Connecticut Supreme Court to require consent to general jurisdiction, this Court avoided "constitutional concerns" by interpreting the statute not to require such consent. *Brown*, 2016 WL 641392, at *19.

Indeed, the Supreme Court recognized over a century ago that a State may not "requir[e] [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." *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)).

The Supreme Court there invalidated a Texas registration statute that, as a condition of doing business in Texas, barred a foreign company from removing to federal court a suit filed in state court. 146 U.S. at 206-07 (citing Gen. Laws Tex. 1887, pp. 116-17). The statute required a nonresident corporation to stipulate that if it were sued in Texas and sought to remove to federal court, it would "forfeit and render null and void any permit issued or granted to such corporation to transact business in this state." *Id.* at 207 (internal quotation marks omitted). Describing the statute's "attempt to prevent removals" as "vain," the Court concluded that the state law "was unconstitutional and void," and that there would be "no validity or effect to any agreement or action of the corporation in obedience to its provisions." *Id.*

The logic of *Denton* controls here. Plaintiffs argue that failing to register to do business in New York bars a company from doing business within the State. N.Y. Bus. Corp. Law § 1301(a). When New York and other States impose such "penalties for non-registration" (Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1366 (2015); *see also id.* at 1363-66), they put companies to the choice of suffering adverse consequences or relinquishing their constitutional rights—here, the due process protection recognized in *Daimler*. The unconstitutional conditions doctrine prohibits recognition of any legal effect from such a coerced choice.

Indeed, if the compelled consent here were effective, States could add numerous other "consents" to their foreign corporation registration statutes.

For example:

- "The Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values'" (*i.e.*, income), *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 19 (2008), but a State could require foreign companies to waive those

protections as a prerequisite to being permitted to do business within the State;

- The Due Process Clause requires States to provide preattachment process in certain situations, *Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991), but corporations could be required to waive those protections;
- The Seventh Amendment provides a jury trial right in certain cases, *e.g.*, *Tull v. United States*, 481 U.S. 412, 417-18 (1987), but corporations could be required to waive that right.

The unconstitutional conditions doctrine would plainly bar draconian statutes such as these. It just as plainly bars general jurisdiction based on New York's compelled "consent."

3. The Supreme Court's modern personal jurisdiction decisions have overruled the Court's dated jurisdiction-by-consent cases.

Plaintiffs cite several Supreme Court decisions from another era—prior to the landmark ruling in *International Shoe*—that allowed States to require foreign corporations to consent to general jurisdiction as a condition of doing business in the State. Opening Br. 18-20 (citing

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 165 (1939), *Robert Mitchell Furniture v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921), and *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-95 (1917)). As this Court has recently recognized, those cases are no longer good law.

At the time these cases were decided—70 years ago or more—personal jurisdiction was governed by the "strict territorial approach" (*Daimler*, 134 S. Ct. at 753) to personal jurisdiction adopted in *Pennoyer v. Neff*, 95 U.S. 714 (1877). Under *Pennoyer*, a tribunal's personal jurisdiction "reache[d] no farther than the geographic bounds of the forum." *Daimler*, 134 S. Ct. at 753.

States therefore enacted registration statutes to ensure that a nonresident company could be served within the State and brought within the power of state courts—without registration, no assertion of personal jurisdiction over a foreign corporation was permissible, even with respect to injuries occurring from conduct with in the State. Indeed, as this Court recently explained, these registration statutes were aimed primarily at providing grounds for *specific jurisdiction*: they were meant to apply when foreign corporations' activities *within a State*

had given rise to "state citizens' claims against them." *Brown*, 2016 WL 641392, at *10; *see also, e.g., Morris & Co. v. Skandinavia Ins. Co.,* 279 U.S. 405, 408-09 (1929) ("The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts *in controversies growing out of transactions within the state*." (emphasis added)); *Robert Mitchell*, 257 U.S. at 215 ("The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction *in respect of business transacted within the State*." (emphasis added)).

When the Supreme Court overruled *Pennoyer*'s territorial approach and replaced it with *International Shoe*'s "minimum contacts" standard, "'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.'" *Daimler*, 134 S. Ct. at 754 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). For that reason, as the *Daimler* Court explained, cases "decided in the era dominated by

Pennoyer's territorial thinking * * * should not attract heavy reliance today." *Id*. at 761 n.18.

Indeed, even before *Daimler*, the Supreme Court had explained that assertions of personal jurisdiction "must be evaluated according to the standards set forth in *International Shoe* and its progeny" and "[t]o the extent that prior decisions are inconsistent with this standard, they are overruled." *Shaffer*, 433 U.S. at 212 & n.39. *See also Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 617-18 (1990) (plurality opinion) (rejecting pre-*International Shoe* precedent based on outdated concepts of territoriality and implied consent); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (same); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 758 (1988) (noting that neither pre-*International Shoe* cases addressing general jurisdiction, such as *Pennsylvania Fire*, nor "their underlying theories seem[] viable under today's due process standard").[5]

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[5] Plaintiffs contend that "*Daimler* did not *sub silentio* reverse the Supreme Court's long-standing case law" on jurisdiction by consent. Opening Br. 16. That is because the Court had already made the point in *Shaffer* by stating that "[t]o the extent that prior decisions are inconsistent with [the *International Shoe*] standard, they are overruled." 433 U.S. at 212 & n.39. *Daimler* reemphasized that decisions "decided in the era dominated by *Pennoyer*'s territorial

This Court recognized in *Brown* that the Supreme Court's jurisdiction-by-consent cases, such as *Pennsylvania Fire*, "cannot be divorced from the outdated jurisprudential assumptions of [their] era" and that *Daimler*'s "warning" that courts should not rely on *Pennoyer*-era cases "embrace[s] *Pennsylvania Fire*." *Brown*, 2016 WL 641392, at *16-17. And the Court rejected the "easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the

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thinking should not attract heavy reliance today." 134 S. Ct. at 761 n.18.

For this reason, this Court is not obligated to follow *Pennsylvania Fire* and its progeny and leave it to the Supreme Court to overrule them. *See Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, --- F. 3d ---, 2016 WL 1077048, at *13 (Fed. Cir. Mar. 18, 2016) (O'Malley, J., concurring). The Supreme Court has twice made clear that those decisions are overruled. And Judge O'Malley's assertion (*id.* at *13 n.1) that *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 173-74 (1939), demonstrates the inapplicability of the unconstitutional conditions doctrine in this context is flawed for the same reason: *Neirbo* relied on the territorial approach to personal jurisdiction that was rejected by *International Shoe* and therefore is one of the cases characterized as overruled by *Shaffer* and *Daimler*.

Plaintiffs state that *Daimler* did not address the consent issue (Opening Br. 17), but that is irrelevant. *Daimler* held in no uncertain terms that cases "decided in the era dominated by *Pennoyer*'s territorial thinking"—a category that includes the "consent" cases—are no longer good law after *International Shoe* and *Daimler* itself. *Daimler*, 134 S. Ct. at 761 n.18. The Court was not required to single out the consent cases in particular.

corporation's registration to do business and appointment of an agent." *Id.* at *16.

Of course, *Brown* relied on the canon of constitutional avoidance to resolve the issue presented in that case, and therefore did not decide the precise question here—whether the Constitution permits a State to require foreign corporations to consent to general jurisdiction as a condition of doing business. But the *Brown* Court's reasoning strongly suggests that the result would have been the same if the Connecticut registration statute at issue there expressly required consent.

Brown did identify (and not address) two possible arguments why compelled consent might be permissible. Neither contention withstands scrutiny.

First, *Brown* noted decisions from two other circuits that upheld compelled consent. *Brown*, 2016 WL 641392, at *18 (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991), and *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990)). But those decisions are inconsistent with *Daimler*—as district courts within these circuits have concluded in declining to follow them. "If following [registration] statutes creates jurisdiction, national companies would be

subject to suit all over the country. This result is contrary to the holding in *Daimler*." *Keeley v. Pfizer, Inc.*, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015); *see also AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 557 (D. Del. 2014), *aff'd on other grounds*, 2016 WL 1077048 ("Finding mere compliance with [registration] statutes sufficient to satisfy jurisdiction would expose companies with a national presence . . . to suit all over the country, a result specifically at odds with *Daimler*.").

Second, *Brown* noted that a court may assert personal jurisdiction over a defendant "as a sanction for failure to comply with jurisdictional discovery." *Brown*, 2016 WL 641392, at *18 (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982)). But *Bauxites* cannot be extended to reach the question of compelled consent. It held only that in *a particular case*, a court may adopt a "legal presumption" under Federal Rule of Civil Procedure 37(b)(2)(A) that the defendant is subject to personal jurisdiction *if the defendant fails to comply with jurisdictional discovery orders*. *Bauxites*, 456 U.S. at 709. That holding, which rests on a court's power to impose sanctions for misconduct, does not imply that a State may force a foreign corporation

to prospectively surrender its due process protections against overbroad personal jurisdiction in *every case*.

In short, the Supreme Court's modern personal jurisdiction decisions establish that the Due Process Clause forbids the outmoded notion that a corporation consents to general jurisdiction simply by registering to do business in a particular State.[6] As *Brown* suggested, *Pennsylvania Fire* and its progeny are no longer good law and should not be relied on by this Court.

B. General Jurisdiction Based On Coerced Consent Would Produce The Very Unfairness And Other Adverse Consequences That The Supreme Court Sought To Prevent In *Daimler*.

The Supreme Court has identified a number of powerful considerations that explain why the Constitution imposes constraints upon the exercise of personal jurisdiction. All of those considerations

[6] To be sure, a party may *voluntarily* consent to specific jurisdiction in a particular case a variety of ways—such as by entering into a contract with a forum selection clause, *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964), or by appearing voluntarily in court, *Bauxites*, 456 U.S. at 703. That is why *Daimler* and other cases refer to the possibility that a defendant may "consent" to personal jurisdiction. But a State may not compel foreign corporations to consent as a condition of being permitted to doing business within the State.

weigh heavily against permitting general jurisdiction based on compelled consent.

First, the due process limits on personal jurisdiction confer "'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

A corporation's place of incorporation and principal place of business are "affiliations" that "have the virtue of being unique." *Daimler*, 134 S. Ct. at 760. "[T]hat is, each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Id.* Such "[p]redictability * * * is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). This bright-line rule also avoids needless "uncertainty and litigation over the preliminary issue of the forum's competence." *Burnham*, 495 U.S. at 626.

Permitting general jurisdiction based on compelled consent would prevent corporations from structuring their affairs to limit exposure to general jurisdiction. Every State could enact a statute requiring consent to general jurisdiction, with the result that a corporation could be sued throughout the United States on any claim arising anywhere in the world. "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants" to structure their affairs to provide some assurance regarding where a claim might be asserted. *Daimler*, 134 S. Ct. at 761-62. Indeed, a corporation would be completely unable to predict where a particular claim might be brought.

Allowing general jurisdiction by compelled consent would also facilitate untrammeled forum-shopping by plaintiffs. Consider a computer manufacturer that has its headquarters in California, is incorporated in Delaware, and is registered to do business in New York (and many other States). Under the compelled consent theory, an Arizona resident who slips and falls during a visit to the company's California's headquarters could bring suit in New York. Even more outlandishly, a Chinese citizen who claims injury in China from (say) a defective laptop manufactured and sold in China could sue the company

in New York. Indeed, *any* claim against that company, arising from acts occurring *anywhere* in the world, could be brought in New York—or any other State where the manufacturer has been compelled to consent to general jurisdiction in order to conduct business.

Forum non conveniens principles would do little to ameliorate this hardship. The corporation would bear the cost and uncertainty of seeking to transfer the action to a more appropriate forum—the very costs and uncertainty that limits on general jurisdiction are designed to eliminate.

Second, the minimum-contacts requirement "protects [a defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. at 471-72; *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

The compelled consent theory would subject a company to the jurisdiction of a State's courts with respect to claims having nothing to

do with the State—even if the corporation has no meaningful contacts with the State beyond a token registration to do business. That result directly undermines the liberty protected by the Due Process Clause.

Third, the Court in *Daimler* recognized that litigation may have a "transnational" component and that an "expansive view of general jurisdiction" might well present "risks to international comity." 134 S. Ct. at 763. Appropriately limiting the exercise of personal jurisdiction over foreign entities is an essential element of the respect owed to the judicial systems of other nations. Thus, the "procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant" and "the Federal interest in Government's foreign relations policies" "will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case." *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (plurality opinion).

Indeed, the Supreme Court observed in *Daimler* that "[o]ther nations do not share the uninhibited approach to" general jurisdiction (134 S. Ct. at 763) that had been a feature of the U.S. legal system prior to *Daimler*. The Court cited the federal government's *amicus* brief

stating that "'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'" *Id.*; *see also* Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807, 900 (2004) ("applying the American conception of general jurisdiction * * * to disputes without any relationship to the United States" often "is viewed with [abhorrence] by many other nations").

Allowing States to circumvent *Daimler* through the device of compelled consent would reintroduce the very "expansive" general jurisdiction that *Daimler* sought to foreclose. And it would present the very same risks to international comity—including the assertion in U.S. courts of claims having nothing to do with the United States.

Fourth, *Daimler*'s clear rule regarding general jurisdiction eliminates a potential obstacle to foreign direct investment, a driver of growth vitally important to our economy.

An October 2013 study by the federal government found that foreign direct investment "supports a host of benefits in the United States, notably good jobs and innovation led by research and

development investment." U.S. Dep't of Commerce, *Foreign Direct Investment in the United States* at 11 (Oct. 2013), http://1.usa.gov/25n2dHo; *see also* Statement by the President on US Commitment to Open Investment Policy (June 20, 2011) ("President Obama Statement") (foreign direct investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities"), https://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy.

Indeed, the U.S. affiliates of foreign firms in 2012 employed 6.4 million people in the United States, spent $57 billion on U.S. research and development, and exported nearly $360 billion worth of goods manufactured in the United States. Bureau of Econ. Affairs, *Foreign Direct Investment in the United States: Final Results from the 2012 Benchmark Survey*, http://1.usa.gov/1oqcH72. And the federal government has embarked on a concerted effort to further increase foreign investment in the United States. *President Obama Statement*, *supra*; *see also* Remarks by the President at the SelectUSA Investment Summit (Mar. 23, 2015), https://www.whitehouse.gov/the-press-office/2015/03/23/remarks-president-selectusa-investment-summit.

Endorsement of the compelled consent theory would threaten these benefits. If the price of investing in the United States is to subject a business to expansive assertions of general jurisdiction that will permit suits in courts located virtually anywhere in the United States on every claim arising anywhere in the world, "[o]verseas firms * * * could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (addressing risks of expansive liability under securities laws); *see also Asahi*, 480 U.S. at 114 (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").[7]

Fifth, there are no countervailing benefits from imposing these significant costs on corporations and our legal system. In particular, compelling consent to general jurisdiction is not necessary to protect in-state residents. To the contrary: if a nonresident corporation creates

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[7] Indeed, given the uniquely expansive procedural rules governing civil litigation in the United States—including broad discovery; the prospect of large damages awards dwarfing those available in most other countries; contingent-fee representation of plaintiffs; and the virtual prohibition against shifting of litigation costs to a losing plaintiff (*cf. Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 269 (2010))—there is little doubt that foreign enterprises would revamp their operations to avoid subjecting themselves to general jurisdiction in U.S. courts, even if that would require relocating or significantly reducing their U.S. operations.

meaningful contacts with the forum State and its in-state conduct harms an in-state resident, that corporation may be sued on a specific jurisdiction theory. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (observing that a state may "exercise jurisdiction consistent with due process" if "the defendant's suit-related conduct * * * create[s] a substantial connection with the forum State"); *see also Daimler*, 134 S. Ct. at 755 ("'[S]pecific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role'") (quoting *Goodyear*, 131 S. Ct. at 2854). Compelling consent to general jurisdiction is not necessary to ensure that nonresident corporations may be held accountable for their in-forum conduct.

In sum, all of the considerations that underlie the due process inquiry provide strong reasons to reject general jurisdiction based on compelled consent.

CONCLUSION

This Court should affirm the district court's order granting Costco's motion to dismiss for lack of personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), counsel for *amicus curiae* The Chamber of Commerce of the United States of America hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,383 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook.

Dated: April 5, 2016

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Local Rule 25.1(h), that on April 5, 2016, I electronically filed the foregoing brief with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

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