15-3294-cv

IN THE

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,

—against—

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Costco registered to do business in New York in 1990, 74 years after the New York Court of Appeals held that such registration constitutes consent to general jurisdiction and over 100 years after the United States Supreme Court held that such consent comports with due process. For years, Costco has enjoyed substantial benefits from its registration, earning significant revenue from 17 wholesale stores throughout New York, and using the state's courts to protect its business rights. Yet after a quarter-century of profiting from its registration, Costco now wants to avoid a consequence of that registration, which it has long been aware of—that registering to do business in the state subjects it to New York's general jurisdiction. The Court should not sanction Costco's effort to evade New York's jurisdiction after having profited for a quarter-century from its extensive local business activities here.

Ritchie did not "waive" its right to invoke jurisdiction based on Costco's consent. Ritchie claimed general jurisdiction over Costco in the district court, and nothing more is necessary to pursue its argument on appeal. In any event, Costco ignores that Ritchie's argument presents a pure question of law, a paradigm case for excusing any claimed forfeiture.

Nor does *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), foreclose 100 years of Supreme Court precedent recognizing the validity of consent-via-registration.

Daimler was not a consent case and it did not *sub silentio* eradicate a century of precedent establishing that consent-via-registration is a knowing and voluntary act that comports with due process where, as here, the state has unequivocally announced this consequence of registration. This holds true even if the consent allows a state to exercise jurisdiction where it would not otherwise exist—that, in fact, is the whole point of the consent-via-registration regime. Moreover, even if *Daimler* were inconsistent with the Court's prior consent jurisprudence, Costco ignores controlling authorities establishing that only the Supreme Court may overrule its prior holdings.

Costco's remaining arguments—that the doctrine of unconstitutional conditions and the Commerce Clause bar consent-via-registration—suffer from the same defect. These arguments are barred by Supreme Court precedent holding that consent to jurisdiction is a permissible "part of the bargain" by which foreign corporations engage in localized business, and that subjecting companies with substantial physical operations in the state to general jurisdiction does not unduly burden commerce.

ARGUMENT

I. RITCHIE'S ARGUMENT IS PROPERLY BEFORE THE COURT

A. Ritchie Did Not Waive or Forfeit Its Argument

Costco contends that Ritchie "waived" its consent-via-registration argument in support of general jurisdiction because Ritchie advanced a different argument before the district court in support of this same general jurisdiction claim. (Costco Br. 14-20). Ritchie did not intentionally "waive" its argument; its inadvertent failure to raise the argument below would amount, at most, to "forfeiture." *Puckett v. United States*, 556 U.S. 129, 138 (2009).

But Ritchie did not forfeit its argument, because "parties are not limited to the precise arguments they made below" if the underlying "claim is properly presented." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (petitioner who "raised a taking claim" in district court based on "physical taking argument" did not forfeit "regulatory taking argument" in support of that same claim). Ritchie properly raised a claim of general jurisdiction (rather than specific jurisdiction) before the district court, and it continues to argue for general jurisdiction on appeal.

Costco's only response is to argue, without citing any authority, that *Yee* does not apply because *Yee* involved a substantive claim and not a jurisdictional one. (Costco Br. 17-18). Costco is wrong, as *Yee*'s principle is not limited to

substantive claims. *See Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) (applying *Yee* to exhaustion of administrative remedies). Ritchie has preserved its argument for appeal.

B. Ritchie's Appeal Presents A Pure Question Of Law

Even if *Yee* did not apply, this Court has discretion to overlook forfeiture, and Costco ignores the most compelling reason to do so here: the allegedly forfeited issue presents a pure question of law. (Ritchie Br. 25-26). Costco concedes that this appeal raises only a question of law—the constitutionality of consent-via-registration—but ignores the cases Ritchie cites (*id.*) showing that this Court routinely considers new legal arguments on appeal.[1]

Costco relies on *Spiegel v. Schulmann*, 604 F.3d 72 (2d Cir. 2010), in which this Court declined to consider the new *claim* that the defendant was subject to general jurisdiction based on its registration to do business in New York. *See id.* at 77 n.1. Unlike here, the plaintiffs had argued only *specific* jurisdiction below. *See* Pls.' Opp'n to Summ. J. at 19-21, *Spiegel v. Schulmann*, No. 03-cv-5088 (E.D.N.Y. Oct. 24, 2005), ECF No. 32-5. Thus, they had forfeited their argument under *Yee*. *Spiegel*, moreover, did not consider any of the factors that normally

[1] Costco attempts to distinguish only *Booking v. General Star Management Co.*, 254 F.3d 414 (2d Cir. 2001), as the "new" argument there had been raised below in a reply brief. (Costco Br. 20). But *Booking* explained that the Court would have considered that argument even if it had been completely "abandoned or waived." 254 F.3d at 419 n.5.

weigh in favor of considering new arguments, *see Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 208 n.11 (2d Cir. 2012), including the purely legal nature of the question, and so its one-line disposition is not instructive. The other cases Costco cites involve factual disputes, rather than pure questions of law,[2] or raise unusual circumstances not present here, such as delay, inconsistent positions, and utter lack of merit.[3]

Costco, finally, insists that this Court should not excuse any forfeiture because Ritchie had the "opportunity" to raise its argument below. (Costco Br. 18-20). But having the "opportunity" to raise an argument below is a *condition* for finding forfeiture in the first place. *See Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135-36 (2d Cir. 2014) (a party cannot forfeit an argument it could not have

[2] *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 784 n.6 (2d Cir. 2013) (new factual argument that "one or more [defendants] were involved in the issuance of the mortgages on properties in the U.S. territories"); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531-32 (1st Cir. 1993) (new "fact-bound argument[s]" involving facts "not in the record"); *MacDermid, Inc. v. Canciani*, 525 F. App'x 8, 10 (2d Cir. 2013) (summary order; *see also* 2012 WL 3257616 at *22-24; 2012 WL 5457635 at *16; 2012 WL 5829108 at *7-8 (briefs confirming that argument raised fact issues)).

[3] *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (the "refusal to address this issue will not result in any injustice" because the Court's research "found nothing indicating" that the argument had merit); *Ehrenfeld v. Mahfouz*, 518 F.3d 102, 105 (2d Cir. 2008) (new argument raised only after "prolonged litigation in the federal courts" and certification to the New York Court of Appeals); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 166 (2d Cir. 2003) (argument was raised only after dismissal of two complaints and was inconsistent with prior litigation position).

made below). It does not preclude excusing the forfeiture. *See, e.g., Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (noting that "complaint could have alleged" new theory raised on appeal and that "[e]quitable factors" did not favor "review of a belated argument which was theoretically available," but nevertheless "reach[ing] the merits" because issue was "purely legal").

Similarly, avoiding injustice is a sufficient reason to excuse forfeiture, but not the only one. *See id.*; *Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000). Here, though, injustice *would* result, as Ritchie would be unable to recover its losses from Costco's fraud. Costco claims this is no injustice because Ritchie should have raised its argument earlier. But that was true of the appellant in *Booking* as well, and the Court nevertheless found it unjust to effectively foreclose her appeal. *See* 254 F.3d at 419 & n.5.

Moreover, the legal issue presented here is important and should be decided now. By addressing the consent-via-registration issue, this Court will resolve the uncertainty that presently exists over general jurisdiction in New York. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) (explaining that consent-via-registration may raise due-process issues); *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, No. 2015-1456, 2016 WL 1077048, at *10 (Fed. Cir. Mar. 18, 2016) (O'Malley, J., concurring) (concluding that consent-via-registration is valid); *Gucci*, 768 F.3d at 136 n.15 (suggesting but not expressly deciding that

consent-via-registration survives *Daimler*); *Spiegel*, 604 F.3d at 77 n. 1 (confirming, pre-*Daimler*, that "regist[ration] to do business in New York" is "sufficient to establish personal jurisdiction.").

The parties have thoroughly briefed the issue, citing several other opinions analyzing this, or related, questions, and an *amicus* has weighed in. This Court is well-positioned to, and should, resolve this dispute.[4]

II. EXERCISING JURISDICTION OVER COSTCO IS CONSISTENT WITH DUE PROCESS

A. *Daimler* Does Not Apply Where The Foreign Corporation Has Consented To Suit In The Forum

Costco insists that *Daimler* resolves this case. According to Costco, *Daimler* makes no distinction "between contact-based and consent-based general jurisdiction over corporations." (Costco Br. 29). Instead, *Daimler* supposedly prohibits *all* assertions of general jurisdiction outside of the states where the corporation "is fairly regarded as at home": the states "where it is incorporated or

[4] In an effort to cast doubt on the merits of Ritchie's action, Costco claims (at 6-7) that Ritchie does not allege "that *anyone* at Costco actually learned that Tom Petters was engaged in a Ponzi scheme." But the complaint directly alleges that Costco was aware of the fraud. (A-22 ¶¶ 4-5; A-27-30 ¶¶ 20-32; A-40 ¶¶ 69-71; A-52-53 ¶¶ 109-11). Costco also misleadingly states (at 9 n.3) that it argued below that "the lawsuit was not timely filed." In fact, Costco argued only that the claims of *one* of the three plaintiffs were time-barred. (Dkt. 26 at i, 17-22). Costco's motion to dismiss, moreover, raised no argument that Ritchie's complaint failed to state a claim.

has its principal place of business," unless "exceptional" circumstances suggest otherwise. (*Id.* at 1, 22 (quoting *Daimler*, 134 S. Ct. at 760-61 & n.19)).

But *Daimler* did not consider the issue of consent-based jurisdiction and had no occasion to do so. The applicable state law (California's) did not provide for consent-via-registration, and the defendant corporation was not even registered in the state. (Ritchie Br. 17). As a result, *Daimler* held only that the defendant's business operations were insufficient "*contacts* with the [s]tate" to subject it to general jurisdiction there. *Daimler*, 134 S. Ct. at 760 (emphasis added). It did not suggest that the defendant was precluded from *consenting* to jurisdiction in the state.

The Federal Circuit is the first Court of Appeals to be presented with whether consent-via-registration remains a valid basis for general jurisdiction after *Daimler*. In *Acorda Therapeutics*, 2016 WL 1077048, the panel declined to reach the question because it found specific jurisdiction. *Id.* at *1. But in a concurrence, Judge O'Malley concluded that the defendant had consented to general jurisdiction by registering to do business in Delaware. *Id.* at *13.

Judge O'Malley found that "*Daimler* did not impliedly eradicate the distinction between cases involving an express consent to general jurisdiction and those analyzing general jurisdiction in the absence of consent; it actually maintains

it." *Id.*[5] Indeed, "*Daimler* confirms that consent to jurisdiction is an alternative to the minimum contacts analysis discussed in that case, citing to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as 'the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum.'" *Id.* (quoting *Daimler*, 134 S. Ct. at 755-56 (emphasis in *Acorda*)).

Costco claims this "passing reference" to "consent" in *Daimler* has no significance. (Costco Br. 29-30). But that reference has led this Court, as well, to interpret *Daimler* as "defin[ing] the scope of a court's jurisdiction when an entity 'has not consented to suit in the forum.'" *Gucci*, 768 F.3d at 136 n.15 (quoting *Daimler*, 134 S. Ct. at 755-56). Although Costco asserts that Ritchie overstates *Gucci*, it is significant that *Gucci* identified consent-via-registration as a basis for jurisdiction available after *Daimler*. *See id.*

Daimler is about contacts with the forum and does not call into question any theory of jurisdiction based on consent. The notion that Ritchie is "manufactur[ing] an exception to *Daimler*" based on consent is therefore

[5] Recent district court cases have reached the same conclusion. *See In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 1047996, at *2 (D. Kan. Mar. 11, 2016); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14-cv-508-LPS, 2015 WL 880599, at *13 (D. Del. Feb. 26, 2015), *adopted*, 2015 WL 1467321 (D. Del. Mar. 30, 2015).

erroneous. (Costco Br. 28). No "exception" is needed, as *Daimler* does not govern here.

B. Consent-Via-Registration Does Not Create A *Daimler* "Loophole"

Costco argues that because doing business in a state is not enough to subject corporations to general jurisdiction after *Daimler*, a state cannot reach the same result "by adding the formal step of requiring companies that do business there to register." (Costco Br. 23, 30). Given *Daimler*'s rationale, however, the additional step of registration makes all the difference.

Daimler's primary concern was the *unpredictable* nature of the "continuous and systematic" contacts test, which did not allow corporations "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 761-62 (quotation marks omitted); *see also id*. at 760 ("Simple jurisdictional rules . . . promote greater predictability." (quotation marks omitted)). But where a corporation takes the affirmative step of registering to do business in a state that construes such registration as consent to general jurisdiction, it knows *precisely* where it may be subject to suit. These states are as "easily ascertainable" as the state of incorporation, *id.* at 760, and even *more* predictable than a corporation's principal place of business, *see Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (establishing multifactor "nerve center" test for principal place of business).

It is no answer to say that the corporation does not know in advance *which* of these states the plaintiff will choose as the forum for its claims. All *Daimler* seeks to ensure is that a foreign corporation knows "where [its] conduct *will* and *will not* render [it] liable to suit." *Daimler*, 134 S. Ct. at 762 (emphasis added). If the corporation has registered in a state that interprets registration as consent to general jurisdiction, the corporation knows that its conduct *will* render it liable to suit there.[6]

Costco also argues (at 24) that consent-via-registration could subject a corporation to jurisdiction in every state where it does business. Not all "business," however, requires a foreign corporation to register. A corporation that engages in interstate transactions without a "localiz[ed] or intrastate" component is not obligated to register to do business in the states touched by those transactions. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974).[7]

Moreover, Costco identifies (at 25 n.6) only nine states that interpret registration as consent to jurisdiction, despite a century of Supreme Court jurisprudence permitting states to do so. In contrast, eleven states and the District

[6] Contrary to Costco's assertion (at 26), *Daimler* says nothing about forum shopping. Had the Court wanted to eliminate forum shopping, it would not have given plaintiffs at least two separate fora (state of incorporation, principal place of business and, potentially, others due to exceptional circumstances) for any and all claims against a corporation.

[7] Thus, Costco's claim that registration statutes would reach foreign corporations doing "*any* business in the state" is a gross exaggeration. (Costco Br. 3, 23, 49).

of Columbia have statutes expressly providing that "[t]he appointment or maintenance in this state of a registered agent does not by itself create [a] basis for personal jurisdiction over the represented entity." Ark. Code § 4-20-115; *accord* D.C. Code § 29-104.14; Haw. Rev. Stat. § 425R-12; Idaho Code § 30-21-414; Me. Rev. Stat. tit. 5, § 115; Miss. Code § 79-35-15; Mont. Code Ann. § 35-7-115; Nev. Rev. Stat. § 77.440; N.D. Cent. Code § 10-01.1-15; S.D. Codified Laws § 59-11-21; Utah Code § 16-17-401; Wash. Rev. Code § 23.95.460. Other states have declined to construe their registration statutes as providing for consent. *See, e.g.*, *Thomson v. Anderson*, 113 Cal. App. 4th 258, 268 (2003). This is hardly the nationwide general jurisdiction that Costco ominously predicts.

C. *Lockheed* Did Not Reject Consent-Via-Registration

Contrary to Costco's suggestion, this Court did not hold in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), that the consent-via-registration theory of jurisdiction is unconstitutional.

The issue in *Lockheed* was whether Connecticut could exercise general jurisdiction over a company registered to do business there. That question had two parts: whether the registration statute provided for consent under state law, and whether such an interpretation accorded with due process. The Court found that the Connecticut Supreme Court had not opined on the statute's reach; the statute did not expressly provide for consent to general jurisdiction; the statutory language

indicated that the Connecticut legislature did not intend to provide for such consent; and accordingly Lockheed had "no notice" when it registered to do business that registration could subject it to general jurisdiction. *Id.* at 633-37 & n.19. Against that setting, the Court declined to find that the Connecticut statute provided for consent to general jurisdiction.

The Court explained that interpreting the statute as providing consent to jurisdiction would raise due-process concerns and, accordingly, found it prudent to avoid that construction. The Court had these concerns because Connecticut, unlike New York, *had never given clear notice* that its registration statute provided for consent to general jurisdiction. *See id.* at 637 (noting that "due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction"); *id.* at 638-39 (rejecting the "easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business" under a "statute lacking explicit reference to any jurisdictional implications").

Lockheed expressly contrasted Connecticut's "run-of-mill" registration statute with statutes, such as New York's, that could be "fairly construed as requiring foreign corporations to consent to general jurisdiction," which would present "a more difficult constitutional question." *Id.* at 640. The Court

recognized that some states have enacted statutes "that more plainly advise the registrant" of the jurisdictional consequences, including New York, whose statute "has been definitively construed to accomplish that end" and therefore provides adequate notice. *Id.*[8] The Court also observed that "sister circuits have upheld states' determinations that in their respective states, registration to do business constitutes consent to the exercise of general jurisdiction, and that due process requires no more,"[9] and that the Supreme Court has approved consent to jurisdiction "without regard to the due process analysis." *Id*. (*citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) ("*Bauxites*")). *Lockheed* concluded by cautioning only that consent-via-registration "*may* be limited by the Due Process clause." *Id*. at 641 (emphasis added). It did "not reach that question." *Id.*

[8] Costco tries to equate New York's statute to Connecticut's because, on its face, neither includes language regarding consent to jurisdiction. (Costco Br. 39). But New York's highest court has made clear for 100 years that New York's registration statute provides for consent to general jurisdiction. (Ritchie Br. 20-23). As *Lockheed* recognizes, notice of that consequence from New York's highest court is no different from notice on the face of the statute. *See* 814 F.3d at 636 n.17, 640. Moreover, because the New York legislature has amended the registration statute on several occasions without rejecting this judicial interpretation, *see*, *e.g.*, 1998 N.Y. Sess. Laws ch. 375 (McKinney), it is deemed to have adopted that construction, *see Knight-Ridder Broad., Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987).

[9] Costco's *amicus* suggests that in the wake of *Daimler*, district courts have refused to follow these decisions. (*Amicus* Br. 18-19). Most, however, have not. (Ritchie Br. 17-18 (citing district court cases)).

D. Consent-Via-Registration Survives The Demise Of *Pennoyer*

Costco further argues that *Pennsylvania Fire* and its progeny are no longer valid because they belong to the "*Pennoyer* era" of personal-jurisdiction theory, which came to an end with the Supreme Court's decision in *International Shoe v. Washington*, 326 U.S. 310 (1945). (Costco Br. 31-35).

In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Supreme Court held that "due process of law" permitted a court to determine claims against a defendant only if "he [was] brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.* at 733. To circumvent this territorial limitation, some states enacted registration statutes that required foreign corporations doing business in the state to consent to jurisdiction. *See Acorda*, 2016 WL 1077048, at *11. In *Pennsylvania Fire* and other cases, the Supreme Court endorsed the exercise of jurisdiction over corporations registered in these states as premised on true "consent[]," satisfying "due process of law." *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-95 (1917).

Notably, the Court approved consent-via-registration even though it achieved the result, otherwise proscribed by due process, of allowing states to exercise jurisdiction over corporations outside their territorial limits. Consent-via-registration, like other forms of consent, has always been an alternative route to jurisdiction when the defendant does not have the required connection to the

forum. Costco calls it a "loophole," but consent-via-registration has been an exception to the normal rules since its inception, and that exception has always comported with due process.[10]

In *International Shoe*, the Supreme Court abrogated *Pennoyer*'s teaching that a defendant's "presence within the territorial jurisdiction of [the] court was a prerequisite" to personal jurisdiction. *Int'l Shoe*, 326 U.S. at 316. Instead, "due process" was satisfied if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (quotation marks omitted). A decade later, in considering the "long history of litigation" over personal jurisdiction, the Court observed a "clearly discernible [trend] toward expanding the permissible scope of state jurisdiction over foreign corporations." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). Far from circumscribing the permissible bases for jurisdiction, the shift from *Pennoyer* to *International Shoe* marked a new era in which it was *easier* to subject foreign corporations to suit.

[10] *Pennoyer*-era courts did develop "fictional" theories of "consent" and "presence" to allow states to exercise jurisdiction within *Pennoyer*'s rigid framework. *Burnham v. Superior Court*, 495 U.S. 604, 617-18 (1990) (plurality) (citing *Hess v. Pawloski*, 274 U.S. 352, 356 (1927); *Phila. & Reading R. Co. v. McKibbin*, 243 U.S. 264, 265 (1917)). The Supreme Court has construed consent-via-registration, however, as true consent. *See Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 341-42 (1953) (contrasting *Hess* and *Neirbo*).

Costco contends that the Supreme Court somehow abandoned consent-via-registration as a basis for jurisdiction when *International Shoe* rejected *Pennoyer*. But the Supreme Court did not restrict jurisdiction by consent at the very moment it was expanding jurisdiction by other means. *International Shoe* and its progeny contradict Costco's thesis.

Far from implicitly rejecting consent-via-registration, *International Shoe* recognized that "authorization to an agent to accept service of process" could give rise to jurisdiction. *Int'l Shoe*, 326 U.S. at 317. Although Costco claims that a decade later, the Court in *McGee* described a shift away from "'consent,' 'doing business,' and 'presence' as the standard" for jurisdiction, *McGee* said nothing about consent-via-registration. 355 U.S. at 222. Costco relies next on the plurality in *Burnham v. Superior Court*, 495 U.S. 604 (1990). The plurality, however, identifies *Hess* (*supra* note 10) as its example of "purely fictional" consent, and it cites *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930), with approval. *See* 495 U.S. at 617-18. *Hutschinson* cites *Pennsylvania Fire* as an example of "express consent." 45 F.2d at 140-41.

Costco, finally, points to *Shaffer v. Heitner*, 433 U.S. 186 (1977), where the Supreme Court stated that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*," and "overruled" any decisions "inconsistent with this standard." *Id.* at 212 & n.39.

But *Shaffer*—which simply extended *International Shoe* to in rem jurisdiction (*id.* at 206)— makes clear that this statement dealt with contacts-based jurisdiction and not consent. The appellants in *Shaffer* "had no reason to expect to be haled before a Delaware court" because Delaware "ha[d] not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." *Id.* at 216.

Supreme Court cases decided after *International Shoe* confirm that consent-via-registration remains valid, despite its origins in the *Pennoyer* era. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 889 (1988) ("[A] foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts."); *Olberding*, 346 U.S. at 341-42 (reaching a result "entirely loyal" to *Neirbo*); *Perkins*, 342 U.S. at 446 n.6 (citing *Pennsylvania Fire*); *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 441-44 (1946) (noting that the defendant in *Neirbo* had "consented to be sued by appointing a resident agent"); *see also Henderson v. United States*, 517 U.S. 654, 671 n.20 (1996) (citing the Restatement (Second) of Conflict of Laws (1971 and Supp. 1989) as describing "relationships sufficient" to support personal jurisdiction); Restatement § 44, cmt. a (approving consent-via-registration).

This Court's binding precedent also demonstrates that consent-via-registration survived *International Shoe*. *See, e.g.*, *STX Panocean (UK) Co. v.*

Glory Wealth Shipping Pte Ltd., 560 F.3d 127, 131-33 (2d Cir. 2009).[11] The other Courts of Appeals are in accord. (Ritchie Br. 20 n.7).

Finally, Costco observes that since *International Shoe*, specific jurisdiction has played an increasingly important role relative to general jurisdiction. From this premise, Costco concludes that reaffirming consent-via-registration here "would swing the pendulum back in the other direction." (Costco Br. 25-26). But, as set forth above, that wrongly assumes that consent is not a recognized path to obtain jurisdiction where it otherwise does not exist. Consent-via-registration has been alive and well for a century. The pendulum has not moved.[12]

E. This Court Does Not Have Authority To Overrule 100 Years Of Supreme Court Precedent

Even if Costco were correct that the Supreme Court decisions upholding consent-via-registration could not be reconciled with *Daimler*, or that *International Shoe* had eroded their foundations, Costco could not prevail.

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[11] Costco claims (at 36) that these cases did not consider due process. But *STX Panocean* turned on whether registered corporations were subject to jurisdiction in New York and repeatedly states that registration is "voluntar[y]" and constitutes "consent" to jurisdiction. 560 F.3d at 131-33.

[12] For this reason, the policy concerns raised by Costco's *amicus* concerning international comity and foreign direct investment have no weight. (*Amicus* Br. 24-27). Consent-via-registration has been the law for 100 years, and the sky has not fallen. The studies cited by Costco's *amicus* (at 26) about the value and magnitude of foreign investment *confirm* that maintaining the legal status quo will not injure the country's competitive position.

Pennsylvania Fire and its progeny are good law unless and until the Supreme Court "expressly overrule[s]" them. *Ognibene v. Parkes*, 671 F.3d 174, 184 (2d Cir. 2011). "If a precedent of th[e] [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *accord Tenet v. Doe*, 544 U.S. 1, 10-11 (2005).

Indeed, "[e]ven if a Supreme Court precedent was unsound when decided and even if it over time becomes so inconsistent with later decisions as to stand upon increasingly wobbly, moth-eaten foundations," the precedent remains binding. *Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir. 2005) (quotation marks omitted) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20 (1997)), *abrogated on other grounds by McDonald v. Chicago*, 561 U.S. 742 (2010). In short, it is never permissible for this Court to conclude that "more recent cases have, by implication, overruled an earlier [Supreme Court] precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

As *Daimler* did not so much as mention *Pennsylvania Fire* or *Neirbo*, it could not have "expressly overruled" them. *Ognibene*, 671 F.3d at 184. Costco argues that *Daimler* overruled these decisions by warning that cases "decided in

the era dominated by *Pennoyer*'s territorial thinking . . . *should not attract heavy reliance today*." (Costco Br. 34 (quoting *Daimler*, 134 S. Ct. at 761 n.18); *see also Amicus* Br. 15-17 & n.5).[13] This is, in fact, a misquotation. *Daimler* specified that the cases undeserving of "heavy reliance" were "two decisions" that "upheld the exercise of general jurisdiction based on the presence of a local office"—in other words, two cases whose holdings flatly contradicted *Daimler*. 134 S. Ct. at 761 n.18.[14] But even if *Daimler* had cast doubt on *all* cases decided in the *Pennoyer* era, including the unrelated consent-via-registration ones, *Daimler* stopped short of expressly overruling them. *See Acorda*, 2016 WL 1077048, at *10, *12 (O'Malley, J., concurring) ("*Daimler* did not overrule" consent-via-registration). It therefore provided no license to ignore settled law.

Thus, regardless of whether "the shift announced in *International Shoe*" undermines the conceptual underpinnings of *Pennsylvania Fire* (Costco Br. 33), "[t]his Court does not have the discretion to ignore Supreme Court precedent simply because the reasoning on which it is premised may seem no longer viable."

[13] Costco also suggests (at 35 n.12) that *Daimler* overruled these cases "by implication," but the Supreme Court has directed that this is an inadequate basis for disregarding its precedents, as has this Court. *Agostini*, 521 U.S. at 237; *Ognibene*, 671 F.3d at 184.

[14] Although the *Lockheed* panel "interpret[ed] that warning to embrace *Pennsylvania Fire*," 814 F.3d at 639, this statement was *dictum* with no binding effect, *see Chem One, Ltd. v. M/V Rickmers Genoa*, 660 F.3d 626, 640 (2d Cir. 2011). For the reasons above, it was also incorrect.

In re CBI Holding Co., Inc., 529 F.3d 432, 469 (2d Cir. 2008). And even if consent-via-registration creates a "giant loophole" in *Daimler* (Costco Br. 22), only the Supreme Court can close that loophole. *Pennsylvania Fire* and its progeny squarely address the issue of consent-via-registration; *Daimler* does not. "In resolving disputes," this Court must "follow the case[s] which directly control[]." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 108 (2d Cir. 2010) (quotation marks omitted).

III. COSTCO'S CONSENT IS VALID AND DOES NOT VIOLATE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Costco's argument that consent-via-registration violates the doctrine of unconstitutional conditions (Costco Br. 45-46) is foreclosed by Supreme Court precedent.

The unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from [using a denial of benefits to] coerc[e] people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Costco argues (at 45) that New York's registration statute triggers this doctrine because New York may not present corporations with the "unfair choice" between ceasing to do business in the state and waiving their due-process objection to personal jurisdiction. But this is the very proposition the Supreme Court rejected in *Pennsylvania Fire*, which held that

the bargain of which Costco complains does "not deprive the defendant of due process." *Pa. Fire*, 243 U.S. at 94-95.

In an attempt to escape this conclusion, Costco cites *Southern Pacific Co. v. Denton*, 146 U.S. 202 (1892), one of the doctrine's paradigm cases.[15] *Denton* held that Texas could not require a corporation to waive its right to remove lawsuits to federal court as a condition of doing business in the state. *See id.* at 207. But as *Neirbo* recognized, *Denton* "involved an entirely different situation" than consent-via-registration. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 173 (1939). In particular, *Denton* involved "the absence of any valid consent to be sued." *Id.* at 174. By contrast, the "designation of [an] agent [pursuant to a state registration statute is] 'a voluntary act,'" and "[a] statute calling for such a designation is constitutional" even though it subjects the corporation to general jurisdiction. *Id.* at 175 (quoting *Pa. Fire*, 243 U.S. at 96). This is an acceptable "part of the bargain by which [foreign corporations] enjoy[] the business freedom of the State of New York." *Id.*; *cf. Bauxites*, 456 U.S. at 704 (noting that consent to jurisdiction "is [a] price which the state may exact as the condition of opening its courts to [a] plaintiff" (quoting *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938))).

[15] The unconstitutional-conditions doctrine was well established by the end of the 19th century, yet *Pennsylvania Fire* found it no obstacle to holding that consent-via-registration was consistent with due process. *See Pa. Fire*, 243 U.S. at 94-95.

Thus, *Neirbo* considered and rejected the very argument Costco makes here. *See Acorda*, 2016 WL 1077048, at *13 n.1 (O'Malley, J., concurring).

"[C]onditions can lawfully be imposed on the receipt of a benefit—conditions that may include the surrender of a constitutional right"—"provided the conditions are reasonable." *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (Posner, J.). The Supreme Court has already determined that it is reasonable to condition the authorization to do business on consent to jurisdiction. *See Pa. Fire*, 243 U.S. at 94-95.[16] Dressing its due-process argument in different garb does Costco no good.

Relatedly, Costco contends that its waiver of rights was not truly "voluntary," and that the consequences of failing to register distinguish this from the other situations in which courts infer consent to personal jurisdiction. (Costco Br. 38-45). These arguments have no force, as they presume that Ritchie is proposing a novel theory of consent. The Supreme Court has unequivocally held that a corporation's submission to general jurisdiction as a condition of doing business in New York is a "voluntary act" evincing "actual consent . . . to be sued

[16] Costco's *amicus* argues that approving consent-by-registration would lead states to write "draconian" waivers of rights into their registration statutes. (*Amicus* Br. 12-13). But the unconstitutional-conditions doctrine evaluates each condition on its own merits. Consent-by-registration has already been held valid; reaffirming it does not require endorsing these extreme hypotheticals.

in the courts of New York." *Neirbo*, 308 U.S. at 175. This waiver is entirely consistent with "due process." *Pa. Fire*, 243 U.S. at 95.

"The relevant inquiry is not whether [Costco] voluntarily consented to jurisdiction in [New York], but whether it voluntarily elected to do business in [New York] and to register and elect an agent for service of process in that state." *Acorda*, 2016 WL 1077048, at *13 (O'Malley, J., concurring). It cannot now complain that its choice was coerced.

IV. EXERCISING JURISDICTION OVER COSTCO DOES NOT VIOLATE THE COMMERCE CLAUSE

Costco's argument that consent-via-registration violates the Commerce Clause fares no better. While state regulations that discriminate against interstate commerce are ordinarily invalid, *see Bendix*, 486 U.S. at 891, non-discriminatory regulations that burden interstate commerce are valid unless the burden is "*clearly* excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

The Commerce Clause imposes minimal limits on the assertion of personal jurisdiction. In *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312 (1923), the Supreme Court "invalidated judgments against interstate railroads on the ground that [exercising general jurisdiction] in a forum where no physical operations were conducted would violate the Commerce Clause." *Buckley v. New York Post Corp.*, 373 F.2d 175, 183 (2d Cir. 1967). Where, however, the defendant has physical

operations in the state, the Court has rejected Commerce Clause challenges to jurisdiction. *See, e.g.*, *Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 51 & n.11 (1941) (railroad "doing business in New York" could be sued there without "creat[ing] an inadmissible burden upon interstate commerce"); *id.* at 54 (citing prior decision as holding "that the burden on interstate commerce would be disregarded where the carrier had lines in the distant state"); *Moss v. Atl. Coast Line R. Co.*, 157 F.2d 1005, 1007 (2d Cir. 1946) (defendant "doing business" in New York could be sued there without "undu[e] burden" on "interstate commerce").

Relatedly, the Commerce Clause prevents states from requiring foreign corporations to register to do business unless their "contacts with [the state]" have an "element of localization," such as offices for intrastate transactions. *Allenberg*, 419 U.S. at 32-34. In light of this requirement, New York's registration statute has been construed "to avoid unlawful interference with interstate commerce." *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (quotation marks omitted). A foreign corporation is "doing business in New York" and obligated to register only if it engages in "ongoing intrastate business activity" or has "localized some portion of its business activity in New York." *Id.* at 739. Consequently, the statute comports with the Commerce Clause by exempting

corporations engaged in purely interstate commerce. *See Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961).

Costco cites none of these cases, as they foreclose its argument. It is undisputed that Costco has substantial physical operations in New York—namely, seventeen warehouse stores that employ New Yorkers and engage in intrastate transactions with New York customers. (SPA-12; A-223-25). It has registered to do business precisely because of this localized activity. (Ritchie Br. 11). Asserting jurisdiction over Costco therefore does not impose an unreasonable burden on interstate commerce. *See Kepner*, 314 U.S. at 51, 54; *Moss*, 157 F.2d at 1007.

Costco relies on *Bendix*, 486 U.S. 888, where an Ohio statute suspended the statute of limitations for claims against foreign corporations if they did not consent to general jurisdiction in Ohio by registering and appointing an agent. This statute was blatant "discrimination" against foreign corporations and ensured that any foreign corporation would be "subject to suit in Ohio in perpetuity" by failing to register *even if it did no business in the state*. *Id.* at 891-93 & n.2 (corporations otherwise exempt from registration remained subject to tolling provision).

By contrast, New York's registration regime reaches only corporations engaged in localized activity, and the consequence of failing to register (when obligated to do so) is that the corporation is unable to file suit in New York and

may be enjoined from doing business there. (Costco Br. 42-43). This is called a "door closing" statute, and New York's has been held constitutional because it exempts corporations engaged only in interstate commerce. *See Netherlands Shipmortgage*, 717 F.2d at 732, 735; *see also Sternberg v. O'Neil*, 550 A.2d 1105, 1113-15 (Del. 1988) (Delaware's door-closing statute did not violate the Commerce Clause even though registration was deemed consent to general jurisdiction).

Thus, unlike in *Bendix*, New York's statute does not "subject[] the activities of foreign and domestic corporations to inconsistent regulations." *Bendix*, 486 U.S. at 894. All corporations that engage in intrastate business activity, whether organized under the laws of New York or another state, are required to submit to general jurisdiction. *See In re Syngenta Litig.*, 2016 WL 1047996, at *4 (rejecting Commerce Clause argument because consent-via-registration "does not treat out-of-state companies differently"). Costco argues that consent-via-registration, like the statute in *Bendix*, "impose[s] a substantial burden on interstate commerce that outweighs any legitimate state interest." (Costco Br. 50). But as explained above, binding decisions have rejected this argument, finding any "burden" on commerce to be reasonable where the defendant has substantial intrastate operations. *E.g.*, *Kepner*, 314 U.S. at 51, 54; *Moss*, 157 F.2d at 1007.

If this Court could engage in its own balancing analysis, it would reach the same result. New York imposes no burden whatsoever on corporations engaged in purely interstate transactions. *See Netherlands Shipmortgage*, 717 F.2d at 739. The burden falls solely on corporations with substantial operations in New York, *see id.*, which suggests that they have the ability to defend against suit there as well. Indeed, it is difficult to see how Costco has suffered any real prejudice from Ritchie's choice of forum, given that Costco has initiated dozens of actions in New York courts, has a major presence in the state, and generates significant revenue there. (Ritchie Br. 12 n.4; SPA-12; A-223-25).

Moreover, if a lawsuit is more appropriately brought in another forum, the foreign corporation may seek to transfer the case or have it dismissed on grounds of *forum non conveniens*, alleviating any burden. *See, e.g.*, *Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 967 N.Y.S.2d 328, 330-31 (1st Dep't 2013) (affirming *forum non conveniens* dismissal even though the court had jurisdiction over the defendant corporation because it "was registered to do business in New York").

Finally, New York has an interest in ensuring that its courts have jurisdiction to adjudicate claims against foreign corporations that transact business in the state. It certainly has an interest "in regulating the conduct of foreign businesses" that have substantial operations within its borders. *Theunissen v. Matthews*, 935 F.2d

1454, 1462 (6th Cir. 1991). Moreover, among other things, general jurisdiction over registered corporations provides "the certainty of a forum with open doors" without "the expense and burden of proving jurisdiction on a case-by-case basis." New York State Senate, *S4846* Sponsor Memo, http://www.nysenate.gov/legislation/bills/2015/s4846. Any incidental burden on commerce is minimal, as explained above, and does not clearly outweigh the benefit to New York.

CONCLUSION

The Court should vacate the district court's order of dismissal and remand for further proceedings.

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Dated: April 12, 2016

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