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COURT OF APPEALS

STATE OF NEW YORK

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AYBAR, et al.,

Appellants,

-against-

NO. 54

AYBAR; FORD MOTOR COMPANY,

Respondents.

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20 Eagle Street  
Albany, New York  
September 1, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.  
2 The first appeal on this afternoon's calendar is appeal  
3 number 54, Aybar v. Aybar.

4 Counsel?

5 MR. BREAKSTONE: Good afternoon, Your Honors.  
6 May it please the court, my name is Jay Breakstone, and I  
7 represent the plaintiff-appellants in this matter.

8 As a matter of housekeeping, I will reserve, with  
9 the Court's permission, three minutes of my argument time  
10 as allotted for the purposes of reply.

11 CHIEF JUDGE DIFIORE: You have three minutes,  
12 sir.

13 MR. BREAKSTONE: Thank you, Your Honor.

14 Your Honor, this case involves an automobile  
15 accident that occurred in the State of Virginia in a New  
16 York registered vehicle in which all the occupants were  
17 also New York residents. The driver was licensed in New  
18 York, and among the plaintiffs, there were three wounded  
19 and three who died as a result of this accident.

20 The defendant's auto was a Ford automobile. Ford  
21 is resident in Delaware. It's place of business is  
22 Michigan, and it has been registered to do business in this  
23 state since 1920. The tire involved and the allegation - -  
24 -

25 JUDGE GARCIA: Counsel, I'm sorry. Counsel, are



1           you still arguing that even under Daimler, you - - -  
2           jurisdiction is proper over Ford in New York state without  
3           the - - - forget the registrations.

4                   MR. BREAKSTONE: Yes, both Ford and Goodyear, and  
5           that jurisdiction is because of the fact that both  
6           corporations were registered to do business and chose and  
7           consented to do business in the State of New York.

8                   JUDGE GARCIA: But only on that basis, not that  
9           they're at home here in some other way?

10                   MR. BREAKSTONE: No, not that - - - not that  
11           they're at home under Daimler, under any of the two choices  
12           that we have to define that term.

13                   JUDGE GARCIA: Thank you.

14                   CHIEF JUDGE DIFIORE: Just finish that sentence.  
15           You said registered to business and consented to - - -

16                   MR. BREAKSTONE: Yes, and consented to  
17           jurisdiction in the State of New York as part and parcel of  
18           that registration.

19                   CHIEF JUDGE DIFIORE: So where in the relevant  
20           statutes that we need to review is a corporation advised  
21           that registering to do business and designating an agent  
22           for service of process has a corporation consenting? Where  
23           do you - - - where is that, sir?

24                   MR. BREAKSTONE: That - - - that agreement, that  
25           contract, for lack of a better term, was part and parcel of



1 the registration process, the agreement to register. The  
2 act of registering based on the case law since 1916 set by  
3 Justice Cardozo when Bagdon affirmed by the United States  
4 Supreme Court in Neirbo. Make no mistake, and these  
5 defendants don't make the mistake of believing, that that  
6 was anything but an agreement - - - a simple agreement, an  
7 agreement to be treated no better and no worse than a  
8 domestic corporation.

9 JUDGE CANNATARO: Are you saying that the holding  
10 in Bagdon creates some sort of contractual agreement to  
11 consent to jurisdiction?

12 MR. BREAKSTONE: That's precisely what I'm  
13 saying.

14 JUDGE CANNATARO: And does - - -

15 MR. BREAKSTONE: That's what Justice - - - I'm  
16 sorry, Your Honor.

17 JUDGE CANNATARO: No, no. That's what I was  
18 going to ask you. Where does Judge Cardozo tell us about  
19 the nature of the agreement in Bagdon?

20 MR. BREAKSTONE: Well, he says - - - and Judge  
21 Cardozo, and the portion is quoted in my brief - - - says  
22 that that agreement is a contract, or that contract is an  
23 agreement. And it's a true agreement, he says. There's  
24 nothing unusual about it. There's nothing strange about  
25 it. There are benefits to both sides. Both sides operate



1 under that agreement, and Ford operated under that  
2 agreement since 1920, sometimes moving on both sides of the  
3 caption.

4 JUDGE CANNATARO: Would you agree that Bagdon was  
5 a case about service of process on an agent that was  
6 designated within the state?

7 MR. BREAKSTONE: No, I don't agree with all due  
8 respect, Your Honor. I think that Bagdon is a contract  
9 clause case. I don't think Bagdon is a due process clause  
10 case. I think that's the essential difference here, and  
11 it's the difference that the Second Department refused to  
12 see. If it were as simple as that, the Second Department  
13 would have - - - would have decided it on the basis of  
14 Daimler on the trilogy. But that's not what the Second  
15 Department did. The Second Department said that New York  
16 Common Law would change as to in personam jurisdiction  
17 because of - - - and I quote this phrase - - - an evolution  
18 - - - an evolution of in personam jurisdiction. So what we  
19 do is we have over a hundred years of common law,  
20 uninterrupted, unaffected, both parties operating under  
21 that common law, under that nature and belief that this is  
22 an agreement, but the Second Department turns around and  
23 says, no, not law, ethos. Ethos. The ether has changed.  
24 The world has changed.

25 JUDGE GARCIA: But Counsel, honestly, if - - - I



1 guess it's not the world so much, but it's the  
2 constitutional interpretation, right, has changed. So  
3 let's assume - - - and I understand the points made by my  
4 colleagues here - - - but assume Bagdon says what you say  
5 it said. I think the theory would be it's read in a  
6 certain way, a hundred or so years ago, in a certain  
7 constitutional context, but we've done this, and again in a  
8 different context, in a criminal law context. We had a  
9 statute. The constitutional landscape changed. A case  
10 called Epton 19 N.Y.2d 496, and we reevaluated that statute  
11 in light of changing first amendment rules and came out  
12 with a different interpretation applying our ordinary  
13 cannons of statutory construction, you know, constitutional  
14 avoidance, right. Why wouldn't we do that here?

15 MR. BREAKSTONE: There's not a need to. And, in  
16 fact, after the most recent decision by the United States  
17 Supreme Court in this area of Ford Motor Company talking  
18 about specific jurisdiction, which now sort of has an  
19 asterisk against it.

20 JUDGE GARCIA: But you've dropped a claim of  
21 jurisdiction, I thought we just made clear earlier on - - -  
22 based on the changing landscape of personal jurisdiction,  
23 right? Like, didn't you have a claim, unless I'm wrong, in  
24 the Appellate Division that you had a separate basis of  
25 jurisdiction here under doing business?



1 MR. BREAKSTONE: Well, in - - - in the - - - I  
2 think there's a basis - - - I think there are two bases,  
3 both under the fourteenth amendment due process clause and  
4 under the contract clause of the constitution. I think  
5 there are two bases here. I think that these defendants  
6 are subject to the jurisdiction of New York, both under the  
7 contract clause because of their agreement, and I think  
8 they're both - - - and they're also subject to the  
9 jurisdiction of New York since the evolution, if we're  
10 dealing with evolutions and ethos, since the evolution of  
11 jurisdiction under the due process clause after the most  
12 recent Ford Motor Company case. Because this is not a case  
13 of where we're looking to Ford and Goodyear for anything  
14 other than the relationship - - -

15 JUDGE GARCIA: Okay, I just want to - - -

16 MR. BREAKSTONE: - - - they have with the state.

17 JUDGE GARCIA: I'm sorry, I just want to be clear  
18 on the position because I might have understood in the  
19 Appellate Division, the court said the plaintiffs argue  
20 that New York courts have general jurisdiction over Ford  
21 because Ford has "become woven into the fabric of New York  
22 State domestic activity." That seems to be an extra  
23 statutory - - - statutory basis for jurisdiction. Forget  
24 the registration clause. Are you arguing a separate basis  
25 for general jurisdiction?



1 MR. BREAKSTONE: If I understand Your Honor's  
2 question, and I think that that discussion was not - - -  
3 not directed at trying to convince anybody that New Year -  
4 - - the other corporation was at home here in the current  
5 sense of the word. I think it was designed to show that  
6 these two defendants had become related and relevant to  
7 their conduct in the State of New York, vis a vis this  
8 case. In other words, I don't know what else Ford Motor  
9 Company does, and I don't know what else Goodyear does, but  
10 as to their relationship with this state and the Ford Motor  
11 Company talks about, you know, the fact that that we're not  
12 talking about causation.

13 We're talking about relationship to the state;  
14 does the act they're being held for relate to the  
15 activities within the state? Under specific jurisdiction,  
16 Your Honor's correct about that. But what I'm saying here  
17 is that that material was put in the brief because at the  
18 point that that was written, we didn't have Ford Motor  
19 Company. This has had been pending a long time. And so  
20 things now have changed.

21 Things now show - - - and the court obviously can  
22 search the record to pull that up - - - things now have - -  
23 - have happened in which we have two bases for these  
24 defendants to be held, both under specific jurisdiction in  
25 the Daimler sense of the word, in the trilogy sense of the



1 word, and that's fourteen amendment, but also under their  
2 agreement to be treated exactly like New York corporations.

3 If the court held any different, if the court  
4 threw Bagdon out the window at this point, and threw  
5 Justice Cardozo's opinion out, and threw the United States  
6 Supreme Court's affirmance of that concept in Neirbo, what  
7 we would do is create an uber corporation. Domestic  
8 corporations could be held under general jurisdiction one  
9 way, but corporations like Ford and Goodyear, which are  
10 multinational, couldn't be held. In essence, they would  
11 have filed a paper saying we want to be authorized to do  
12 business in New York, but we want to do it on our terms.  
13 We want to do so we can't be reached under general  
14 jurisdiction.

15 JUDGE RIVERA: Yeah, but the point of where the  
16 Supreme Court is now, is that you have two places - - -  
17 potentially two, minimum one - - - where you can sue a  
18 corporation, where it's incorporated, and if it is not the  
19 same place, its principal place of business. A domestic  
20 corporation, if they're incorporated here, it's their  
21 principal place of business, you're going to get the same  
22 thing. How - - - how is a domestic corporation put in a  
23 worse position?

24 MR. BREAKSTONE: Well, because, and using these  
25 two defendants as an example - - -



1 JUDGE RIVERA: Yeah. Yeah.

2 MR. BREAKSTONE: - - - that as to Goodyear, they  
3 can only be sued in Ohio because their principal place of  
4 business is there, and that's where they're - - - they were  
5 born, in the corporate sense of the word. Ford in Michigan  
6 or Delaware. So here's a New York corporation - - - here's  
7 a New York authorized corporation who has to be sued in  
8 Michigan, Delaware, or Ohio. A domestic corporation doing  
9 the same thing - - -

10 JUDGE RIVERA: Yeah.

11 MR. BREAKSTONE: - - - would be sued only in New  
12 York. So we have created an uber corporation that really  
13 can't be sued anywhere, even though when they agreed to be  
14 - - - when they agreed to be an authorized business in the  
15 State of New York, they knew precisely what they were  
16 doing. And they have never taken that away. They never  
17 asked to leave.

18 JUDGE SINGAS: Didn't they just agree to process  
19 of service?

20 MR. BREAKSTONE: Oh no, not at all. It's much  
21 deeper than that. Much deeper than that. Actually I think  
22 Bagdon and Neirbo speak to that. They want to be treated  
23 the same way as a domestic corporation, and I think it's -  
24 - -

25 JUDGE SINGAS: Don't we have to view Bagdon under



1 Pennoyer and once International Shoe shifted jurisdiction,  
2 we have to now view Bagdon in that light?

3 MR. BREAKSTONE: Well, we possibly could do that.  
4 I don't think it's necessary because I think we're talking  
5 about different causes - - - different portions of the  
6 constitution. One is the 14 Amendment, and one is the  
7 commerce clause.

8 JUDGE RIVERA: But doesn't the shift actually  
9 work in your favor? The point of International Shoe was to  
10 expand the opportunities to get personal jurisdiction, not  
11 to contract.

12 MR. BREAKSTONE: I mean, I'm saying that in  
13 essence, Your Honor.

14 JUDGE RIVERA: I mean, isn't that what the Second  
15 Department really was trying to get to?

16 MR. BREAKSTONE: I don't know.

17 JUDGE RIVERA: Perhaps reaching a different  
18 result, but the evolution post Pennoyer that you seize with  
19 International Shoe is to expand not to contract. That's  
20 the whole point.

21 MR. BREAKSTONE: Well, in terms of what the  
22 Second Department did, and just a point on International  
23 Shoe, it interests me that Ford filed it to - - - the  
24 permission to transact business in the State of New York in  
25 1920, but Goodyear didn't file until 1956, I believe. And



1 International Shoe was in 1945. So there's no sense of  
2 being duped by time.

3 JUDGE FAHEY: Why is that relevant?

4 MR. BREAKSTONE: It's a contemporaneous issue.

5 JUDGE FAHEY: Excuse me. Why is that relevant?

6 MR. BREAKSTONE: It's just relevant - - - it's  
7 relevant, Your Honor, in the sense that it has been of  
8 benefit to corporations to file in New York and to be  
9 treated as New York corporations for business and economic  
10 purposes. It's the same it was in 1920, as it was in 1956,  
11 as it is today. These two corporations have - - -

12 JUDGE FAHEY: Well, I think there's an assumption  
13 that any attorney would make that you would seek the  
14 jurisprudence that benefits your client.

15 MR. BREAKSTONE: I agree.

16 JUDGE FAHEY: I think that that would be true for  
17 every party in this action and every party in any action.  
18 It's just good lawyering.

19 MR. BREAKSTONE: I absolutely agree, Your Honor.

20 JUDGE FAHEY: From our point of view, though, I  
21 think we have to start with, how do we read Bagdon  
22 initially. Is it read in the context, as Judge Singas  
23 said, of the historical moment and the territorial  
24 jurisdiction of Pennoyer pre International Shoe, or do we  
25 read it as the beginning of an evolution in general



1 jurisdiction that became consent to general jurisdiction by  
2 a registration as some of the Appellate Division courts  
3 have done in New York pre this decision and pre Daimler?  
4 And if we do, how does Daimler change that? And - - -

5 MR. BREAKSTONE: I think, Your Honor - - - I'm  
6 sorry.

7 JUDGE FAHEY: Let me just finish my thought.  
8 Because I want to ask you about one of the briefs that I  
9 thought was - - - make some interesting points was the  
10 brief of the New York City Bar Association discussing that  
11 particular issue. I felt I'd learned something there. And  
12 I was wondering if you had had a chance to look at it and  
13 if you wanted to comment on it.

14 MR. BREAKSTONE: I will in a moment, Your Honor.  
15 I just to answer your first question.

16 JUDGE FAHEY: Sure, go ahead.

17 MR. BREAKSTONE: I think have to look at Bagdon  
18 the way that it was written and seen whether that - - -

19 JUDGE FAHEY: When you say you want to look at  
20 Bagdon the way it was written, yeah, but - - -

21 MR. BREAKSTONE: As - - -

22 JUDGE FAHEY: - - - what strikes me sometimes if  
23 you're divorcing it from its historic roots, and it's hard  
24 for me when I read that to say that Judge Cardozo was  
25 wrong. I just felt that he was writing it in the context



1 of Pennoyer. First off, no New York State Court of Appeals  
2 judge is ever going to say Judge Cardozo is wrong. I want  
3 you all to know that. The second thing - - - the second  
4 thing is that - - - none of would be that presumptuous - -  
5 - but the second thing is that when he was writing it, the  
6 law was in a much different place than it is now.

7 MR. BREAKSTONE: If that were so, Your Honor, why  
8 would the present United States Supreme Court consistently,  
9 throughout the trilogy of decisions that we're talking  
10 about put in the proviso, the disclaimer, that such and  
11 such is the state of jurisdiction without consent? That  
12 language is there for a reason because consent removes  
13 those line of cases - - -

14 JUDGE FAHEY: So let's say there is a question of  
15 consent, wouldn't all parties benefit by an express consent  
16 in the statute?

17 MR. BREAKSTONE: Well, if there were a statute,  
18 but the statute stands no different than the common law in  
19 this state, and though much is made, Your Honor - - - and  
20 in the city of - - - the city bar's brief - - - much is  
21 made of the legislative history where the city bar was  
22 obviously involved.

23 JUDGE CANNATARO: Counsel, can we try and maybe  
24 approach this consent idea from a different direction? A  
25 while back, the Supreme Court decided a case called, the



1 Insurance Company of Ireland, and they pointed out a number  
2 of instances that would be indicative of consent. They  
3 talked about fai - - - choice of venue clauses in  
4 contracts, arbitration within the forum. I thought it was  
5 notable that nowhere in there, in a nation where all fifty  
6 states have registration statutes for corporations, they  
7 didn't mention registration as one of the indices of  
8 consent. Does that trouble you at all?

9 MR. BREAKSTONE: Well, no, because I think that  
10 we have such a clear statement of that in Bagdon and in  
11 Neirbo, such a clear statement, that nobody can doubt what  
12 was done. And none of these defendants have said they  
13 didn't know precisely what it was that they did. And I  
14 think it's important when we talk about the city bar brief  
15 is that if we take a look, as Your Honors know, there is  
16 new legislation that's been passed by both houses of the  
17 legislature waiting to be sent to the governor; this passed  
18 in the last day of the term and is waiting for the governor  
19 to receive the bill, and that bill creates a statutory  
20 framework, precisely what Your Honor says, to reaffirm the  
21 fact that consent is there and that jurisdictions in the  
22 State of New York, general jurisdiction for corporations  
23 they choose to register. And what's really interesting to  
24 me is in that new bill, it is described, Your Honors, not  
25 as a statute of new law but an explanation or clarification



1 of the statute of the old law.

2 JUDGE GARCIA: Counsel - - -

3 MR. BREAKSTONE: And that's in the legislative  
4 memo.

5 JUDGE GARCIA: Counsel.

6 MR. BREAKSTONE: Yes.

7 JUDGE GARCIA: I'm sorry, Counsel. Here. Over  
8 here.

9 CHIEF JUDGE DIFIORE: Judge Garcia.

10 MR. BREAKSTONE: Without seeing mouths, Your  
11 Honor, sometimes it becomes difficult.

12 JUDGE GARCIA: I know, I know, I know. It's  
13 hard. But just this idea about International Shoe as the  
14 kind of a pivot point, the Supreme Court recently decided a  
15 case Ford v. Montana, and Justice Gorsuch concurred or  
16 affirmed that decision, but he says, at the same time the  
17 court in International Shoe also cast doubt on the idea  
18 once pursued by many state courts that a company consents  
19 to suit when it is forced to incorporate or designate an  
20 agent for a seat of process in a jurisdiction other than  
21 its home state. Going on, it is unclear what remains of  
22 the old consent theory after International Shoe's  
23 criticism. Some courts read International Shoe and the  
24 cases that follow as effectively foreclosing it, while  
25 others insist it remains viable.



1                   Now, again, it's one justice writing, or a few  
2 justices writing here, but doesn't that, at a minimum,  
3 plant the idea that ever since International Shoe, this has  
4 been an issue, and I agree International Shoe in some ways  
5 in terms of specific jurisdiction, may have expanded  
6 opportunities, you have to look also at what it did with  
7 general jurisdiction and what happened with general  
8 jurisdiction over the decades since, so especially with  
9 Daimler, so doesn't that thinking whether or not it changed  
10 or didn't change, but the questioning of it itself, make it  
11 our responsibility to reexamine Bagdon and its holding in  
12 light of those developments?

13                   MR. BREAKSTONE: Well, Justice Gorsuch's comment  
14 to the extent it's an invitation to talk and speak about it  
15 in an intellectual sense, is probably fine. But it doesn't  
16 help us any here because there were three - - - there were  
17 two out of the three trilogy decisions before Justice  
18 Gorsuch got there saying very specifically that we decide  
19 these decisions so long as there's not consent, and the  
20 reason for that is because the court did not want to battle  
21 the effect of the contract clause sitting in article one, I  
22 believe. Now, I don't think there's any difference between  
23 amendments and the text of the original constitution, but I  
24 can't think of anything that is more primary in framers'  
25 minds than the contract clause.



1           But it's interesting to me, Your Honor, when you  
2 mention Ford Motor Company that if we looked at this case  
3 from the - - - if we - - - if we did not decide - - - if we  
4 decided not to decide the contract issue, and we looked at  
5 just under the terms of Ford Motor Company, where would we  
6 be? We'd be with jurisdiction in New York. Ford  
7 automobile, Goodyear tire. Accident occurs in Virginia, of  
8 some importance, but probably not overwhelming end of the  
9 restatement anymore, but you've got all New York  
10 plaintiffs. You've got defendants who were - - - we have  
11 specific jurisdiction over under Ford Motor Company. The  
12 opposite conclusion were the Court to turn around and  
13 decide there's no jurisdiction here either specific under  
14 Ford Motor Company or general under Bagdon is that these  
15 plaintiffs would have to litigate this case probably three  
16 times in three different jurisdictions. That can't be  
17 right.

18           JUDGE GARCIA: But why wouldn't you have  
19 jurisdiction where the accident occurred?

20           MR. BREAKSTONE: Excuse me?

21           JUDGE GARCIA: Why don't you have jurisdiction  
22 under Ford v. Montana where the accident occurred?

23           MR. BREAKSTONE: Can I answer that with another  
24 question, Your Honor?

25           JUDGE GARCIA: No, I get to ask the questions.



1 So why not?

2 MR. BREAKSTONE: One might have it there,  
3 assuming that these two defendants decided that they were  
4 more finely attuned to the jurisprudence of Virginia than  
5 they were of the jurisprudence of New York. Because if  
6 not, Your Honor, we'd be doing this same dance in the  
7 Virginia Supreme Court. These two defendants only want to  
8 be sued, and they don't even want to be sued in the same  
9 place, one wants to be sued in Ohio or Delaware - - -

10 JUDGE GARCIA: But I guess my questions is,  
11 whatever they want, your position, would you have  
12 jurisdiction in the state where the accident occurred here  
13 over all the parties?

14 MR. BREAKSTONE: I don't think I could - - - I  
15 don't think that I could uphold jurisdiction against these  
16 defendants based on your question. So I would end up  
17 litigating in three different places. And remember,  
18 there's a third party defendant who's the installer, U.S.  
19 Tires coming up in another case. U.S. Tires is from  
20 Queens. That's four jurisdictions now; Ohio, Delaware or  
21 Michigan, Virginia, and the State of Queens.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. BREAKSTONE: Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. MAROTTA: Thank you, Your Honor, and may it



1 please the Court, Sean Marotta, for Ford Motor Company.

2 Let me start with - - -

3 JUDGE GARCIA: Before you start with that point,  
4 do you think you would have jurisdiction over all these  
5 companies in the site of the accident - - - the state?

6 MR. MAROTTA: There would be jurisdiction, I  
7 think, under the Ford Motor Company case over Ford and  
8 Goodyear in Virginia, yes. I think U.S. Tires might be its  
9 own kettle of fish, but they're not actually even a party  
10 in this particular case, so you could get jurisdiction over  
11 all the parties in this particular appeal in the state of  
12 Virginia, yes.

13 And I'd - - -

14 JUDGE WILSON: Can I ask you if you agree that  
15 consent - - - jurisdiction by consent can occur?

16 MR. MAROTTA: Sure. Absolutely.

17 JUDGE WILSON: Okay. So if this case were being  
18 litigated in 1940, is it your position that Bagdon would  
19 allow for jurisdiction by consent or no?

20 MR. MAROTTA: I think under Bagdon, under  
21 Pennoyer, under Pennsylvania Fire, under that regime, yes,  
22 there would probably be jurisdiction by consent.

23 JUDGE WILSON: Okay. So that's good because that  
24 helps me then understand that your argument really is about  
25 the pivot we've all been discussing from International



1 Shoe.

2 MR. MAROTTA: That's exactly right. I mean  
3 plaintiff's argument is somehow we are denigrating the  
4 great memory of Judge Cardozo. We're not. Bagdon was a  
5 perfectly sound Pennoyer opinion. Under that framework,  
6 Bagdon makes perfect sense. The problem is when you have  
7 the pivot in International Shoe, and it's a pivot that I  
8 think goes to the statute and that goes to the  
9 constitution.

10 JUDGE RIVERA: Well, the reality is, is that  
11 that's not true. I agree with you that International Shoe  
12 is a watershed. The pivot is the recent Supreme Court  
13 jurisprudence because it is clear that that jurisprudence  
14 took us in a different direction even the main author, of  
15 course - - - Justice Ginsberg, rest her soul - - -  
16 recognized that there was very little, very little case law  
17 from the Supreme Court on general juris - - - on general  
18 jurisdiction, excuse me. And so those are the cases that  
19 then shed a different light on what we understood from  
20 International Shoe. So I'm - - - I'm not sure that I would  
21 say that all of a sudden International Shoe means we're  
22 throwing away everything we understood before then, but I  
23 want to ask you about the common enemy to your adversary  
24 over here. Isn't International Shoe, the takeaway from  
25 that, the watershed moment is to expand personal



1 jurisdiction over foreign corporations?

2 MR. MAROTTA: Absolutely. Specific, you know - -  
3 -

4 JUDGE RIVERA: Okay. So how is your position in  
5 line with that? If that is the core essence of the intent  
6 of International Shoe, how is your interpretation that  
7 authorization and consent - - - authorization to do  
8 business by and then getting consent, as he argues it, is  
9 anything but in line with that core idea?

10 MR. MAROTTA: Well, what International Shoe gives  
11 us is specific jurisdiction. And you know what, Justice  
12 Ginsberg said, when she wrote in Goodyear, and when she  
13 wrote in Daimler for the court - - -

14 JUDGE RIVERA: Um-hum.

15 MR. MAROTTA: - - - was that specific  
16 jurisdiction has come to the fore. Most cases now before  
17 the courts are specific jurisdiction cases. So - - - you  
18 know, then it separated out specific and general  
19 jurisdiction, and you know, I think to get to a  
20 housekeeping note, there were three arguments that were  
21 before the Appellate Division, at home, specific, and  
22 registration.

23 JUDGE RIVERA: Um-hum.

24 MR. MAROTTA: At home the Appellate Division  
25 ruled against plaintiffs. They abandoned that argument in



1 their opening brief by not making it.

2 Specific jurisdiction, the Appellate Division  
3 found, was forfeit in the Supreme Court because it was not  
4 made in that court. Again, plaintiffs haven't challenged  
5 that decision in this court.

6 JUDGE RIVERA: Um-hum.

7 MR. MAROTTA: So all we have left is  
8 registration.

9 JUDGE RIVERA: Um-hum.

10 MR. MAROTTA: And sure, specific jurisdiction is  
11 quite broad. You know, specific jurisdiction is how you  
12 get jurisdiction over Ford and Goodyear in Virginia, even  
13 though they don't - - - you know, they don't build things -  
14 - - they didn't build these cars there or they didn't  
15 design those cars there and they didn't sell those - - -

16 JUDGE RIVERA: And any specific jurisdiction  
17 always opens you up to a change of venue anyway, but go  
18 ahead on that.

19 MR. MAROTTA: Absolutely, but so - - -

20 JUDGE RIVERA: So you might not end up in  
21 Virginia anyway, but go on.

22 MR. MAROTTA: - - - what we have here is this  
23 old, outdated consent by registration, which is really what  
24 the courts were doing when they were struggling against  
25 the, you know, Pennoyer was very constricting. So what



1 courts did was they came up with these fictions.

2 JUDGE RIVERA: No - - - why - - - no, I'm not  
3 sure I see that. Why isn't it really more like Burnham  
4 when it comes to a natural person that this is long in  
5 existence, you're in the state, you serve, that's personal  
6 jurisdiction. The state always has the opportunity to do  
7 that, and of course, a business entity somewhat being  
8 different than a natural person, if you agree to comply  
9 with the rules that are necessary to be authorized to do  
10 business and you agree to service by an agent of the state,  
11 that's the equivalent to the tagged jurisdiction under  
12 Burnham, very well established, everyone knows it, and that  
13 sort of addresses the concern. Why isn't it like that?

14 MR. MAROTTA: I don't think it's like that  
15 because I actually think Burnham cuts in our favor.  
16 Justice Scalia's - - -

17 JUDGE RIVERA: Okay.

18 MR. MAROTTA: - - - plurality opinion for the  
19 court in Burnham says yes, the rule is tagged for  
20 individual people. But it says, you know, corporations are  
21 different because they're these artificial people, and you  
22 don't really - - - you can't have tagged jurisdiction on a  
23 corporation. And in fact, the fifth circuit that has - - -

24 JUDGE RIVERA: Right, but that's my point about  
25 the consent, unless you're actually - - - unlike the tag



1 where the consent is fictional in this way, an individual  
2 may not really know that they're subject to this until they  
3 face the music. Lawyers and judges may understand it, but  
4 an individual may not. And yet corporations, right, they  
5 consent so that they can do business.

6 MR. MAROTTA: Well, I think that gets us back to  
7 the statute, which I don't think there's really any consent  
8 here. I mean if you look across the bracket for the  
9 Business Corporation Law, there is absolutely nothing in it  
10 that would tell you that when you send in this form to the  
11 Secretary of State, that what you have just done is consent  
12 to general jurisdiction in the state - - -

13 JUDGE RIVERA: But that's not necessary given the  
14 understanding and the jurisprudence, right?

15 MR. MAROTTA: Well, I think the understanding and  
16 the jurisprudence was - - -

17 JUDGE RIVERA: I mean the legislature could have  
18 corrected that if that's not what they meant, and they  
19 never did.

20 MR. MAROTTA: Well, I think there's two answers  
21 on that. First is that Bagdon is interpreting a different  
22 statute that hasn't been the law in New York for decades.  
23 And as the New York City Bar Association brief and the  
24 Chamber of Commerce brief lays out in the drafting history  
25 of the Business Corporation Law, you know, what did - - -



1 to the extent you think it matters, what did the  
2 legislature have in its mind at the time it passed the  
3 Business Corporation Law? It had researched memos. It had  
4 researched memos showing one, there are some states whose  
5 Business Corporation Laws do address personal jurisdiction;  
6 two, that under International Shoe, that had abrogated the  
7 fictions of consent by registration; and third, a lot of  
8 the drafting history shows that the back and forth about  
9 who do you serve, the Secretary of State, a private agent -  
10 - -

11 JUDGE RIVERA: Let's say we don't agree with you  
12 on that, but let me ask you this. Do you agree that this  
13 question about whether or not registration gets you  
14 consent, valid consent? Do you agree that that's an open  
15 question when it comes to the Supreme Court? The Supreme  
16 Court has not decided that issue.

17 MR. MAROTTA: They have never said Bagdon is  
18 overturned. I will give you that.

19 JUDGE RIVERA: Well, no they - - - no, I agree  
20 with that.

21 MR. MAROTTA: But I think when you look at the  
22 trilogy of, you know, my friend talks about one trilogy, I  
23 have a different trilogy, which is International Shoe,  
24 Shaffer, Daimler, and BNSF.

25 JUDGE RIVERA: Um-hum.



1 MR. MAROTTA: International Shoe says we're - - -  
2 we're repudiating the fictions. Shaffer says, you know,  
3 International Shoe - - -

4 JUDGE RIVERA: To the end of expanding  
5 jurisdiction. Go ahead.

6 MR. MAROTTA: Right. Expanding this new world of  
7 specific jurisdiction.

8 JUDGE RIVERA: Yeah, correct.

9 MR. MAROTTA: Shaffer says, and I was looking at  
10 the old quasi in rem jurisdiction.

11 JUDGE RIVERA: Yes. Correct.

12 MR. MAROTTA: And it said, you know,  
13 International Shoe is really the paradigm now, and it has a  
14 footnote, footnote 39 that says we're not going to bother  
15 to go back to every case that was decided under Pennoyer  
16 and tell you whether that those cases are rightly decided  
17 because there's lot of them. But it said to the extent  
18 these inconsistent with International Shoe, they are  
19 overturned.

20 JUDGE RIVERA: Um-hum.

21 MR. MAROTTA: I mean that's abrogation. And then  
22 in Daimler and in BNSF, the Supreme Court said cases  
23 decided in the Pennoyer era, "should not attract heavy  
24 reliance today."

25 JUDGE RIVERA: No, they also say that consent is



1 not at all something that they're addressing, and they make  
2 very clear that the rules being developed in that case law  
3 is separate and apart from consent. Because you agree, of  
4 course, that a corporation could consent, like any party  
5 could consent - - -

6 MR. MAROTTA: I - - - I think that's right, Your  
7 Honor - - -

8 JUDGE RIVERA: There's no doubt about that.

9 MR. MAROTTA: - - - but I think what I'd say is  
10 there's consent and there's consent.

11 JUDGE RIVERA: All right. So do you not think  
12 it's an open question?

13 MR. MAROTTA: I think it is a closed - - - I  
14 think a fair and full reading of all of the Supreme Court's  
15 cases show that it is decided. I will agree with you that  
16 there is no single sentence - - -

17 JUDGE RIVERA: Why was there mention of consent  
18 then?

19 MR. MAROTTA: Well, because, again, I think that  
20 - - -

21 JUDGE RIVERA: And carving that out?

22 MR. MAROTTA: Right. I think what they're  
23 carving out is the true consent. The consent from things  
24 like Insurance of Ireland where they say, you know, if you  
25 have a contract that says, we will consent to the

1 jurisdiction of the New York courts for causes of action  
2 arising from this contract, of course, you don't have a  
3 personal jurisdiction defense, even if you otherwise would.

4 JUDGE RIVERA: That's happened in one of the  
5 cases. I think it wasn't preserved. It was about the  
6 Minnesota statute on consent, which is really kind of what  
7 we're talking about as opposed to what you're talking  
8 about, which I think is not disputed. No one's disputing  
9 that.

10 MR. MAROTTA: Right. That's right. So in - - -

11 JUDGE RIVERA: So I'm not so sure you can limit  
12 it to that.

13 MR. MAROTTA: I mean, I think that is - - - I do  
14 think there is a difference between the kind of consent  
15 that is brought about even in states where you do have  
16 consent by registration.

17 JUDGE RIVERA: Um-hum.

18 MR. MAROTTA: This sort of forced, implied,  
19 coerced consent, and you know, the true consent that you  
20 enter into between contractual parties. And I think the -  
21 - - when the fourteenth amendment case has carved out  
22 consent, what they're talking about is the second form of  
23 consent, the true consent.

24 JUDGE RIVERA: Um-hum.

25 MR. MAROTTA: Not this - - - I mean, New York has



1 - - -

2 JUDGE SINGAS: And are you saying, counsel,  
3 that's the difference between the Supreme Court when they  
4 say by consent versus what Cardozo was saying in Bagdon is  
5 consent? Because I think that's the crux of this argument.  
6 How are we defining consent? So can you speak to that?

7 MR. MAROTTA: I think that is exactly right, Your  
8 Honor. That the consent that's brought about, it's an  
9 implied consent, if anything. It's like the kind of  
10 consent when you say that, you know, when driver's drive on  
11 the roads, they consent to this, that, or the other thing.  
12 It's implied by the law, I suppose. But it's not the same  
13 kind of consent that you would think of if you - - - I  
14 mean, it's the difference between saying that by driving on  
15 the roads you consent to have the officers pull over, you  
16 know, and give you a breathalyzer test versus the consent  
17 of when you say, you know, officer, feel free to take a  
18 look around my car. The second kind, of course, isn't  
19 subject to the fourth amendment. The first is.

20 Unless the Court has further questions - - -

21 JUDGE CANNATARO: Is the implied consent one that  
22 can - - - does it get any better, or is it easily fixed by  
23 a statutory amendment that just states in our registration  
24 statute that registration is consent to general  
25 jurisdiction?



1           MR. MAROTTA: I think if you amended the statute,  
2 I don't have a statutory argument anymore, but I still  
3 think I have a constitutional argument, and I think that  
4 gets, and I think Ms. Risk will address this to some  
5 extent, that the unconstitutional conditions and commerce  
6 clause arguments that we have, which is that to put a  
7 company between the choice of doing business in the State  
8 of New York or being subject to all claims against all the  
9 country.

10           I mean, my friend on the other side points out  
11 these are New York plaintiffs and New York cars, and  
12 everything else, but remember, general jurisdiction is if  
13 you're somebody in Texas who has a slip and fall case  
14 against Ford, there would be jurisdiction over the  
15 companies here in New York. That's what general  
16 jurisdiction is, and I don't think there's any reason to  
17 bring that - - - those number of cases onto the New York  
18 courts.

19           JUDGE RIVERA: If I can get back to this language  
20 in Bagdon, okay, it says the stipulation is a true  
21 contract, a true agent, consent that's real consent,  
22 contract deals with jurisdiction of the person. I mean,  
23 why - - - why is the court talking about contracts and  
24 agents if it's not - - - if it's not the kind of consent  
25 your adversary is referring to and many scholars refer to



1 as opposed to what you're talking about? Because you're -  
2 - - the consent you're talking about is not in dispute.  
3 Parties negotiate, they go back and forth, and they agree  
4 to something. That is not what Bagdon was about. That's  
5 not what this case is about, and I - - - I - - - I'm hard  
6 pressed to see if your way. I understand why you want us  
7 to see it your way, but if the court is referring back to  
8 contracts, then what is a true contract, a true agent? It  
9 strikes me as very different than what you are trying to  
10 say.

11 MR. MAROTTA: Well, I think because Bagdon in the  
12 Pennoyer era had to talk that way. I mean you had to talk  
13 about agents and contracts and appointments and consent  
14 because that's how you worked when Pennoyer was the law.  
15 And I think what International Shoe said is, you know,  
16 those consent theories don't really work anymore. I mean,  
17 we - - - we hammered them in because that's how we thought  
18 we should do it in Pennoyer - - -

19 MR. MAROTTA: Why do you have to say it's a  
20 contract to say that if - - - if you're getting served  
21 within the territory of the state, within its boundaries,  
22 that now the courts of that state have jurisdiction over  
23 your company?

24 MR. MAROTTA: Well, I think the reason - - -

25 JUDGE RIVERA: I'm not really sure I'm



1 understanding that.

2 MR. MAROTTA: - - - you had to do that is because  
3 of the awkwardness of the corporate form. It's not like  
4 individuals. Burnham talks about this. And so that's why  
5 they talked in contract language, and what, I mean the  
6 innovation of International Shoe, although it also expanded  
7 jurisdiction, was to say that let's not talk about consent  
8 anymore. Like it wasn't - - - it wasn't, I don't think,  
9 entirely satisfying then because it wasn't a true consent,  
10 but that's how - - - that's how judges did it then.

11 CHIEF JUDGE DIFIORE: Counsel, getting back to  
12 the language of the statute for a moment, does the due  
13 process analysis differ depending on whether the statute  
14 clearly writes in consent by registration or it's implied  
15 read into it?

16 MR. MAROTTA: I don't necessarily think so, Your  
17 Honor.

18 CHIEF JUDGE DIFIORE: Um-hum.

19 MR. MAROTTA: I mean I think some of the  
20 arguments that have been brought up by other courts that  
21 you wouldn't know when you enter into the registration. Of  
22 course, those would drop away to a certain extent, but I  
23 think actually a line from Shaffer is pretty important here  
24 where there it was the attachment principle, where  
25 essentially the state court would attach your intangible



1 property that was viewed to have a Delaware situs unless  
2 you entered an appearance, and what the court said was, it  
3 said, in such cases if a direct assertion of personal  
4 jurisdiction, in other words, separate from this attachment  
5 fiction, would violate the constitution, then it would seem  
6 that an indirect assertion of that jurisdiction should be  
7 equally impermissible. And I think that would be my  
8 argument, which is to say that if you couldn't just reach  
9 out and directly say Ford and Goodyear you are subject to  
10 general jurisdiction here, trying to do it indirectly  
11 through this mechanism of we put the consent into the  
12 statute should also be impermissible.

13 And I think that would be true of any number of  
14 constitutional rights. I mean, if they were to write into  
15 the corporation law by registering to do business in the  
16 State of New York, you agree that your delivery vehicles  
17 could be searched by the state troopers at any reason for  
18 any time (sic), you can certainly consent to a search of  
19 your vehicle, but I don't think that would pass fourth  
20 amendment muster just because they put it in a statute. I  
21 think the same is true with the fourteenth amendment.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel - - -

23 JUDGE RIVERA: But in your example - - - I'm  
24 sorry, Chief. I just - - -

25 CHIEF JUDGE DIFIORE: Yes.



1 JUDGE RIVERA: In your example, since you've  
2 raised this hypothetical, there's not a benefit you're  
3 getting, is there?

4 MR. MAROTTA: I think in my example - - -

5 JUDGE RIVERA: I mean, isn't - - - isn't that the  
6 argument - - - isn't that in part the Court of Appeals in  
7 Bagdon and Justice Cardozo's argument that that's why it's  
8 a true contract because the corporate entity is getting a  
9 great deal of benefit from this relationship, and that's  
10 why it's a consent?

11 MR. MAROTTA: Oh, it's - - -

12 JUDGE RIVERA: Because they're getting something  
13 in return.

14 MR. MAROTTA: I think in my hypothetical, it  
15 would be the same benefit, that if you want to do business  
16 in the State of New York, you consent to us searching your  
17 delivery vehicles at any time for any reason.

18 JUDGE RIVERA: Okay. Thank you.

19 CHIEF JUDGE DIFIIORE: Counsel?

20 MS. RISK: Good afternoon. May it please the  
21 court, Jayne Risk, on behalf of The Goodyear Tire & Rubber  
22 Company.

23 Goodyear joins in this appeal with Ford to affirm  
24 the Appellate Division's ruling. The so-called consent by  
25 registration is unconstitutional for a separate and

1 distinct reason than was relied upon by the Appellate  
2 Division, but one that this Court can rely upon. The so-  
3 called consent by registration doctrine is an  
4 unconstitutional condition. And what does that mean? The  
5 Koontz court - - - in Koontz, the United States Supreme  
6 Court described the unconstitutional conditions doctrine is  
7 one that vindicates the constitution because it prevents a  
8 state from coercing people into giving up their personal  
9 constitutional rights.

10 JUDGE RIVERA: What's the constitutional right  
11 you're talking about? I'm over here, sorry.

12 MS. RISK: Personal jurisdiction is a  
13 constitutional right as - - - as an individual liberty  
14 interest and constitutional right that was preserved by the  
15 due process clause, and that's enumerated in Insurance  
16 Corporation's - - -

17 JUDGE RIVERA: Right. You've got the right to  
18 due process before a court deems itself able to exercise  
19 jurisdiction and pull you into its jurisdiction for  
20 purposes of - - - of a lawsuit, but if you're consenting,  
21 you agree that that would not violate due process, right.  
22 It's a due process argument.

23 MS. RISK: Your Honor, it is a due process  
24 argument that personal jurisdiction is a constitutional  
25 right, both of a corporation and an individual. I would



1 agree that if an individual or - - -

2 JUDGE RIVERA: I just want to be clear. I don't  
3 - - - I may be misunderstanding you. I think what you're  
4 arguing, and correct me if I'm wrong, is that it - - - it's  
5 the constitutional right is not to be dragged into a  
6 jurisdiction without appropriate due process, as  
7 interpreted by the Supreme Court, which is that whole  
8 International Shoe analysis.

9 MS. RISK: Correct. And Your Honor, the Dentons  
10 case, upon which Koontz relies, is particularly  
11 illustrative of that - - - of that point. In Dentons, if a  
12 Texas state law required - - - as a condition to doing  
13 business in the State of Texas, required that a defendant  
14 corporation give up its right to remove a case to federal  
15 court. If this case would proceed, it would be similarly  
16 impermissible. This - - - in this case, a New York law  
17 that would, as a condition to doing business in the State  
18 of New York, would stop or restrict a - - - a corporation  
19 from actually - - - from saying - - - from resisting state  
20 court general jurisdiction over all matters before it.

21 JUDGE RIVERA: Do you agree, though, that - - -  
22 that it's an open question with respect to the Supreme  
23 Court whether or not our statute, statutes like this, are  
24 unconstitutional?

25 MS. RISK: No, Your Honor. I don't believe that.



1 I believe, and I agree with Mr. Marotta on this point, in  
2 the totality of all of the jurisprudential, of all the  
3 jurisprudence from the United States Supreme Court, and of  
4 the altered jurisprudential landscape since Daimler, I  
5 believe that, in fact, Bagdon has been abrogated.

6 JUDGE RIVERA: But what - - - then why does the  
7 court, the Supreme Court, sorry, carve out consent? I  
8 mean, if you're right, they would just say, and you can't  
9 have coerced consent.

10 MS. RISK: Oh, Your Honor, because there is  
11 actual consent. I mean, there are - - - and Your Honors  
12 spoke earlier about different types of consent being  
13 enumerated in Supreme Court cases. There are people who  
14 consent to jurisdiction every day, and companies who do  
15 also. But in this case - - -

16 JUDGE GARCIA: Counsel, can I ask a question  
17 here. So I understand how this has changed with respect to  
18 a company, like your client or Ford, right, because before  
19 even if you didn't read this the way plaintiffs would like  
20 us to read it here, and Bagdon arguably interprets it, this  
21 consent statute, you are here under the old pre Daimler  
22 test doing business here. You are here. Now, you're  
23 arguably not here under Daimler, so this statute becomes  
24 critical to get general jurisdiction over Ford or over your  
25 client. But before Daimler, if I was a Texas company, very



1 small Texas company, and I said, hmm, I think I'm going to  
2 do some business in New York, so I'm going to register,  
3 and I registered here, and there's an accident in Oklahoma,  
4 or whatever, and the plaintiffs come to New York, under the  
5 old Bagdon interpretation of consent I would be sued  
6 general jurisdiction in New York, and there was no  
7 alternative doing business jurisdiction in that case,  
8 general. Because I'm a Texas company; I'm not really here.  
9 I've registered; I'm thinking about come here, but I'm not  
10 really here at all, so clearly a due process violation  
11 without the statute, without consent. Why didn't anyone  
12 challenge the statute before?

13 MS. RISK: Your Honor, you mean challenge Bagdon?

14 JUDGE GARCIA: Challenge consent. Yeah.

15 MS. RISK: Consent.

16 JUDGE GARCIA: Like I'm a Texas company. I'm not  
17 in New York. I'm getting sued because I registered to do  
18 business thinking I might someday do business there, but  
19 that's a due process violation absent my consent under this  
20 statute, and that's true before Daimler. So - - -

21 MS. RISK: Well, Your Honor - - -

22 JUDGE GARCIA: - - - why didn't - - - why wasn't  
23 the statute unconstitutional then?

24 MS. RISK: Your Honor, I - - - I can't say why  
25 another corporation didn't challenge Bagdon or the consent



1 by jurisdiction in that - - - in the Pennoyer era because  
2 that was a different era, it was a different way that  
3 courts, state courts, were trying to assert their  
4 jurisdiction over corporations - - -

5 JUDGE GARCIA: But okay, International Shoe comes  
6 along.

7 MS. RISK: Yes, Your Honor, and that - - -

8 JUDGE GARCIA: And then why didn't the Texas  
9 company challenge Bagdon after that?

10 MS. RISK: Your Honor, I can't say that the Texas  
11 company didn't challenge Bagdon after International Shoe  
12 because International Shoe was very specific about its  
13 general jurisdiction and continuous and systemic activities  
14 so that, amounting to presence within the state, because  
15 remember, International Shoe still brought us back to that  
16 presence idea. It wasn't until Daimler that we got to the  
17 continuous and systemic activities - - -

18 JUDGE GARCIA: No, no, I understand that part. I  
19 guess my question is if I wasn't present, and I was a  
20 company, and I was only being hauled into court in New York  
21 because of this statute after International Shoe, why  
22 wouldn't I raise this issue?

23 MS. RISK: Your Honor, I think that that's the  
24 very reason because International Shoe related this to  
25 continuous and systemic activities of a defendant as to be



1 present in the state. The major pivot came, as Your Honor  
2 acknowledged earlier, when Daimler changed that to  
3 continuous and systemic activities of a defendant so as to  
4 making it essentially at home. That's an entirely  
5 different set of circumstances in Rubrecht, and that's when  
6 defendants did question the constitutionality under  
7 Daimler.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
9 Counsel, you have your rebuttal time.

10 MR. BREAKSTONE: Your Honors, make no mistake,  
11 Justice Ginsberg knew precisely what she was doing when she  
12 turned around and used those words "not consent" that her  
13 decision, the decisions that she penned, were not based  
14 upon consent because consent would have raised an entirely  
15 different constitutional issue. The reason that nobody,  
16 Your Honors - - -

17 JUDGE FAHEY: Counsel, can I stop you for one  
18 second.

19 MR. BREAKSTONE: Yes.

20 JUDGE FAHEY: I don't - - - so we can look at  
21 this in one of two ways. I want to just tell me if you  
22 agree or disagree with this analytically. I'm not asking  
23 you to take a side on it. But in one way, we have a  
24 continuum of contacts going from Pennoyer to the minimum  
25 contacts of International Shoe, to the continuous at home



1 contacts of Daimler, and a line of cases that deal with  
2 corporate presence in specific states and basically you're  
3 weighing the amount of contact that you have to determine  
4 whether or not there's jurisdiction. And that specific  
5 jurisdiction, that's set off to one side.

6 Then we have general jurisdiction, and let's say  
7 you get that by either being from - - - from that place or  
8 you can consent to it, and that's a different thing  
9 entirely. Is that the way you're asking us to look at  
10 these analytically and say, simply, it's not a question of  
11 the nature of the contacts? It's not a question of contact  
12 at all; it's a question of what you consent to in the same  
13 way that you would consent to - - - two parties would  
14 consent to jurisdiction in a provision in a contract to the  
15 use of New York law?

16 MR. BREAKSTONE: Yes, Your Honor. I think that  
17 what I'm saying and the way that I'm saying it - - -

18 JUDGE FAHEY: So you - - - if we were to rule in  
19 your favor then, you're not looking for a discussion of  
20 contacts, the amount of contacts, whether or not you met  
21 the amount of contacts, or any of that line of cases back  
22 for 150 years in the United States constitution, you're  
23 looking for an entirely different vein that you're  
24 following, which is the consent vein purely similar to the  
25 contractual vein where we have forum selection clauses?



1 MR. BREAKSTONE: Well, I think the difference is  
2 the other way around, but - - - but - - - yes. But  
3 understand - - -

4 JUDGE FAHEY: I'm not - - - I wouldn't - - - it  
5 would be unfair to ask you where you are on it. You're for  
6 your client, but I - - - I'm just simply saying  
7 analytically, how do you see it?

8 MR. BREAKSTONE: Analytically, I see it, Your  
9 Honor, as almost both ways and leading to the same  
10 conclusion.

11 JUDGE FAHEY: Okay. Tell me how.

12 MR. BREAKSTONE: Because I think the contract  
13 question is easy.

14 JUDGE FAHEY: Um-hum.

15 MR. BREAKSTONE: Why it leads to the conclusion  
16 that my clients need to stay here in New York rather than  
17 litigate it throughout the country in various  
18 jurisdictions.

19 But secondarily, after Ford Motor Company v.  
20 Montana the world chang - - - the world that we thought  
21 changed with the trilogy of cases, took a sidestep. It  
22 said, specific jurisdiction yes, but the relationship  
23 doesn't have to be material to the incident. It's got to  
24 be relevant to the incident, use whatever words you'd like,  
25 but it doesn't have to be material. There's no causation



1 requirement in Ford Motor Company.

2 And if we turned around, and Your Honors have the  
3 ability to do this and search the record and the arguments  
4 are there in the record, my clients would have the ability  
5 to litigate this case in New York even under specific  
6 jurisdiction. And so two amendments are satisfied here  
7 with the right sort of decision. And if not, one of them  
8 is going to be offended.

9 There is no need to change Justice Cardozo and -  
10 - - and the Supreme Court's view in Neirbo and Justice  
11 Ginsberg's view about consent. It's there in this case.  
12 It's obvious. These defendants have been on the  
13 plaintiff's side of captions here in New York. They've  
14 acted just like New York corporations. If a - - - if a  
15 piece of cargo comes into New York Harbor and it's Ford's,  
16 and it's damaged, they sue in New York.

17 So they've acted with all the benefit of New York  
18 corporations, and we've done that. We've done that. We've  
19 given them that wonderful opportunity to be here in the  
20 center of the economic world in the United States.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel. And at  
22 this time, we'll take a break to allow the staff to execute  
23 our cleaning protocol.

24 MR. BREAKSTONE: Your Honor, if I just might have  
25 a moment, please. Not as a matter of reply.



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CHIEF JUDGE DIFIORE: I'm sorry?

MR. BREAKSTONE: Not as a matter of reply, but if Your Honors' decisions is to - - - against my client, I would just bring up the fact and make the request that Your Honors stay your decision until action on the legislative bill. Because otherwise, the situation would be created to the retroactivity portion of that bill that if that bill is signed, no reason to believe it's not going to be - - -

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. BREAKSTONE: - - - my client's case would have been dismissed, and then it would not have the retroactivity.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. BREAKSTONE: Thank you, Your Honor.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Michelle S. Walker, certify that the foregoing transcript of proceedings in the Court of Appeals of Aybar v. Aybar; Ford Motor Company, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Michelle S. Walker*

Signature: \_\_\_\_\_

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