No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
ATLANTIC LEGAL FOUNDATION
2039 PALMER AVENUE, #104
LARCHMONT, NEW YORK 10538
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for Amicus Curiae Atlantic Legal Foundation

QUESTION PRESENTED

Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation (the "Foundation" or "Atlantic Legal") is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, educators, parents, and other individuals and trade associations. Among other things, Atlantic Legal's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound policy.

Atlantic Legal's leadership includes distinguished legal scholars and practitioners from across the legal community, including members of national and international law firms and general counsel or retired general counsel of major multinational and smaller companies. The Foundation's leadership collectively has decades of experience in the practice of corporate and

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[1] Pursuant to Rule 37.2(a), *amicus* states that all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

commercial law, including securities law. The Foundation has served as *amicus curiae* or counsel for *amicus curiae* in a variety of cases involving the constitutional implications of corporate civil and criminal liability, as well as the interplay between U.S. and international law.

The Atlantic Legal Foundation consequently understands that the delicate web of international business relations depends in large measure on the respect that nation states show each other.[2] When United States courts assert jurisdiction over foreign corporations, they risk interfering with the

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[2] *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) in which Atlantic Legal represented 28 distinguished former public servants – including then ex-President Gerald R. Ford and former Secretaries of State, Defense, Treasury, and Commerce, senior members of Congress responsible for United States foreign policy and trade policy, former National Security Advisors, Presidential chiefs of staff, and U. S. Trade Representatives as *amici* supporting respondent in case involving the foreign affairs power of the federal government; *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) in which the Foundation filed an *amicus* brief supporting respondent-appellant in a successful appeal of district court's grant of habeas corpus petition of alien convicted felon, involving issues of customary international law; and, most recently, *Bond v. United States*, No. 12-158 (2013), in which the Foundation filed an *amicus* brief in support of a petition for certiorari in a case concerning the interplay between the treaty power and federal legislative power.

sovereignty of another country, and in doing so reject an international consensus, and the United States may be considered by its trading partners and diplomatic allies to be an unreliable international partner.

In this case, Atlantic Legal is concerned that the Ninth Circuit's vague "agency" test could impose vicarious general jurisdiction on any foreign parent company based solely on the fact that it has a subsidiary that conducts business in a forum State. This expansive assertion of general jurisdiction offends due process because it ignores the fundamental principles of separate corporate identity and limited liability, which have been relied upon by foreign corporations doing business in the United States and U.S. companies doing business abroad.

PRELIMINARY STATEMENT[3]

Plaintiffs (respondents here) are 22 Argentine residents who allege that they, or their relatives, were subject to human-rights abuses while they were employed in Argentina by Mercedes-Benz Argentina, a subsidiary of Daimler AG (hereafter "Daimler") and that Mercedes-Benz Argentina "collaborated with the Argentine government to kidnap, detain, torture, or kill [plaintiffs] or their

[3] *Amicus* adopts the Statement of Petitioner.

relatives during Argentina "Dirty War" from 1976 to 1983. Pet. App. 2a-3a, 81a.

Respondents filed suit against Daimler in the Northern District of California under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note. They also asserted claims under the laws of California and Argentina.

Respondents concede that Daimler and Mercedes-Benz USA LLC ("MBUSA"), a Delaware corporation, and an *indirect* subsidiary of Daimler, are separate corporate identities, and Respondents "do not seek to demonstrate that MBUSA is an alter ego" of Daimler. Pet. App. 114a. Instead, Respondents assert that Daimler is subject to general personal jurisdiction in California because MBUSA was acting as Daimler's "agent" in California. Pet. App. 113a.[4]

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[4] Daimler is a German public stock company. It manufactures Mercedes-Benz vehicles in Germany. It does not manufacture or sell products, employ personnel or own property in the United States. Pet. App. 95a. MBUSA distributes Mercedes-Benz vehicles to dealerships in California and elsewhere in the United States. Pet. App. 7a-8a. MBUSA takes title to the vehicles in Germany and distributes them in California and other states pursuant to general policies established by Daimler. *See Bauman* v. *DaimlerChrysler Corp.*, 579 F.3d 1088, 1092 (9th Cir. 2009) (withdrawn opinion). The General Distributor Agreement

(continued...)

After Respondents conducted "jurisdictional discovery . . . on whether an agency relationship exists between [Daimler] and MBUSA and the ability of [respondents] to pursue their claims in Germany . . . or Argentina," the district court dismissed the complaint for lack of personal jurisdiction. Pet. App. 93a, 132a-33a. The district court concluded that MBUSA was not an "agent" of Daimler for purposes of personal jurisdiction because MBUSA's services were not "sufficiently important" to Daimler that "but for the existence of the subsidiary, [Daimler] would have to undertake itself." Pet. App. 84a. The district court also found that the exercise of personal jurisdiction over Daimler would be constitutionally "unreasonable" because, *inter alia*, "both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims." Pet. App. 85a.

The Ninth Circuit initially affirmed the district court in a 2-1 decision, with Judge Reinhardt dissenting. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1098 (9th Cir. 2009). The Ninth Circuit held that MBUSA was not Daimler's "agent" because respondents had "failed to make a prima

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[4](...continued)
between Daimler and MBUSA expressly disavows any agency relationship. Pet. App. 8a-15a.

facie showing that [Daimler] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler did not exercise "pervasive and continual control" over MBUSA. *Id.* at 1096.

The Ninth Circuit granted Respondents' petition for rehearing and vacated its opinion, Pet. App. 146a, and, without further oral argument, issued a new opinion. *Bauman v. DamlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (hereafter "*Bauman*").

The new opinion, written by Judge Reinhardt, held that Daimler in fact was subject to general personal jurisdiction in California because:

> Under the controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum. The first test, not directly at issue here, is the "alter ego" test. It is predicated upon a showing of parental *control* over the subsidiary.[5]

Bauman, 644 F.3d at 920.

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[5] Respondents had not alleged that MBUSA and Daimler were alter egos.

> The second test, which is applicable here, is the "agency" test. That test is predicated upon a showing of the *special importance* of the services performed by the subsidiary:
>
> The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services.

Id. (Emphasis in original; citations and internal quotation marks omitted).

The Ninth Circuit panel used a special definition of "agency," applicable only to determining jurisdiction. *Bauman*, 644 F.3d at 923. The first prong of the "agency" test is whether "the services provided by MBUSA are sufficiently important to [Daimler] that, if MBUSA went out of business, [Daimler] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative." *Id.* at 920. The panel concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to

[Daimler] that they would almost certainly be performed by other means if MBUSA did not exist." *Id*. at 922.

The second prong of the agency test articulated by the Ninth Circuit was whether Daimler had the "right to control" MBUSA's operations. 644 F.3d 922-24. The panel stated that "actual control was not necessary,"while acknowledging that there were "cases that might be read to require a more stringent showing of control." *Id*. at 920 n. 12 and 923. Relying primarily on a distribution agreement that gives Daimler contractual rights against MBUSA, the panel concluded that Daimler "had the right to substantially control MBUSA's activities," *id*. at 924, even though the distribution agreement provides that MBUSA controls its own operations.

The Ninth Circuit panel thus concluded that exercising general personal jurisdiction over Daimler was reasonable. 644 F.3d 924.

The Ninth Circuit then determined that neither Argentina nor Germany was an "adequate forum," accepting Respondents' contentions that their claims would be time-barred in those jurisdictions (644 F.3d at 928-29) and the Ninth Circuit's "substantial doubt as to the adequacy of Argentina as an alternative forum." 644 F.3d at 930. Moreover, in the view of the Ninth Circuit panel, "American federal courts, be they in California or

any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Id.* at 927. The Circuit Court concluded that it "comports with fair play and substantial justice" for a federal court in California to adjudicate a dispute between foreign plaintiffs and a foreign defendant based on alleged conduct abroad by a foreign subsidiary of the defendant's corporate predecessor. *Id.* at 929-30.[6]

Daimler petitioned for rehearing and rehearing en banc. The Ninth Circuit denied the petition, over a dissent by Judge O'Scannlain and seven other judges. *Bauman v. DaimlerChrysler*, 676 F.3d 774 (9th Cir. 2011), despite this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011) (hereafter "*Goodyear*").[7]

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[6] The panel acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but stated that "we do not agree" with those concerns. *Bauman*, 644 F.3d at 926.

[7] Judge O'Scannlain, citing *Goodyear* as "directly applicable here," (676 F.3d at 776 n.1) (O'Scannlain dissenting) criticized the Ninth Circuit for being "at odds again with the dictates of the Supreme Court". . . perpetuat[ing] a split with at least six of [its] sister circuits," 676 F.3d at 775, and for "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal

(continued...)

SUMMARY OF ARGUMENT

The Ninth Circuit held that a foreign company is subject to general personal jurisdiction in California – and can therefore be sued in that State by foreign plaintiffs for alleged human rights violations in a foreign country by a foreign corporate subsidiary allegedly acting to assist a foreign government – notwithstanding that the foreign defendant has no facilities or personnel in the United States. The Ninth Circuit held that there is general jurisdiction over Daimler because MBUSA, a U.S. corporation that distributes Daimler vehicles in California, and a different indirect subsidiary than the one accused of human rights violations, is an "agent" of Daimler.

The Ninth Circuit's application of its concept of "agent" to expand the reach of general personal jurisdiction are in direct and substantial conflict with this Court's precedents and with logic. The

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[7](...continued)
systems.'" *Id.* at 777 (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," and induce foreign countries to "enact[ ] retaliatory jurisdictional laws" to reach American corporations with foreign subsidiaries. *Id.* at 779 (internal quotation marks omitted). The court's holding, Judge O'Scannlain wrote, "is an affront to due process." *Id.* at 775.

Ninth Circuit's assertion of expansive general jurisdiction has profoundly disruptive consequences for international and interstate commerce.

The "Due Process Clause . . . limit[s] the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that 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.* at 414 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

When the requisite "minimum contacts" exist, the exercise of personal jurisdiction over the defendant must also be "reasonable[ ]" in light of factors such as "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

"[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the

defendant." *Helicopteros*, 466 U.S. at 414 n.8. When a cause of action does not arise out of a defendant's contacts with the forum State, a court may exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S.Ct. 2846, 2853 (2011) (internal quotation marks and alterations omitted). If the defendant is a corporation, it is appropriate that a State in which the corporation can be fairly regarded as "at home," such as its "domicile, place of incorporation, and principal place of business" exercise general personal jurisdiction. *Id.* at 2853-54.[8]

The Ninth Circuit's analysis and holding are fatally flawed. The Ninth Circuit panel ignored the consistent teaching of this Court on the extent of contacts that warrant assertion of general jurisdiction, ignored well-established principles of corporate separateness, and was oblivious to the realities of commercial relations. Further, the Ninth Circuit's notion of general jurisdiction

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[8] In the absence of a relevant federal statute governing personal jurisdiction, a federal district court looks to whether the defendant is subject to personal jurisdiction in the State in which the court is located. Fed. R. Civ. P. 4(k)(1)(A).

thwarts the settled expectations of foreign (both international and out of state) companies that serve markets in the United States through heretofore well-settled distributorship arrangements, ignores settled law of agency and employs an idiosyncratic notion of "agent," and invokes an "interest" of United States courts in remedying human rights violations universally, in opposition to this Court's recent teaching on the limits of federal jurisdiction in this area.

ARGUMENT

I.

THE NINTH CIRCUIT'S "AGENCY" TEST IS INCONSISTENT WITH DUE PROCESS.

The right to Due Process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-472 (1985) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945)). A court may subject a person to jurisdiction only when that person has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe*, 326 U.S. at 316. The requirement of minimum contacts ensures

that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction. *Burger King,* 471 U.S. at 472. Consequently, a court's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). "[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of "fair play and substantial justice."' *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S.Ct. 2780, 2783 (2011).

Unlike "general jurisdiction." "specific jurisdiction" is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). "Specific jurisdiction," which gives a State authority to adjudicate disputes that "arise out of or are connected with the activities within the state." *Int'l Shoe*, 376 U.S. at 319. Here it is undisputed that there is no basis for the assertion of specific jurisdiction over Daimler because plaintiffs' claims

do not arise out of or relate to any Daimler activities in, or contacts with, California.[9]

In *Goodyear* this Court explained that a court has general jurisdiction over a defendant when its affiliations with the State are so "continuous and systematic as to render them essentially at home in the forum State." *Goodyear*, 131 S.Ct. at 2851. For a corporation, it is a place equivalent to a person's domicile, such as its "place of incorporation, and principal place of business." *Id.*, at 2854. This Court reiterated that a corporation's " continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Id.* at 2849 (quoting *Int'l Shoe*, 326 U.S. at 318 (1945)).

If a State has "general jurisdiction," its courts have the power to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros*, 466 U. S. at 414, and n.9. But "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its

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[9] There is no claim in this case that the criteria for exercising specific jurisdiction, *i.e.*, that the causes of action arise from the parent company's acts within California or from the sale or use of the parent company's products in California. *Bauman*, 644 F.3d at 919.

courts as a general matter." *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. at 2787.

The standard for establishing *general* jurisdiction is more exacting than that applied to specific jurisdiction for good reason: unlike specific jurisdiction, general jurisdiction allows *any* claim to be asserted against a defendant, even if that claim is, as here, completely unrelated to the defendant's contacts with the forum. *Goodyear*, 131 S.Ct. at 2851. The distinction between general and specific jurisdiction was central to this Court's opinion in *Goodyear*, which unanimously reversed a State court's finding of general jurisdiction over Turkey, France, and Luxembourg corporations which had no presence of their own in the United States.

The Ninth Circuit articulated two bases for exercising general jurisdiction over a foreign parent company due to its relationship to a subsidiary: the "alter ego" test and the "agency" tests. *Bauman*, 644 F.3d at 920. The "alter ego" test has two elements: (1) the unity of interest and ownership between the company and its subsidiary make the two essentially the same entity, and (2) failing to disregard the separate identities would lead to fraud or injustice. *Id.*[10] As noted *supra*,

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[10] The "alter ego" test is limited to those situations (continued...)

Respondents disavowed any "alter ego" theory of jurisdiction, and the Ninth Circuit did not apply that test. *Id*.

A. The Ninth Circuit's Agency Test Is Fundamentally Flawed and Is Contrary to This Court's Precedents.

The Ninth Circuit's "agency test" has two elements: (1) the services provided by the subsidiary are "sufficiently important" that, if the subsidiary went out of business, the foreign parent company would continue the operation either by selling the product itself or through a new

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[10](...continued)
in which the court finds such a close connection between a company and its subsidiary that they are essentially the same entity and thus treating them differently for jurisdictional purposes would lead to fraud or injustice. *See Bauman*, 644 F.3d at 929 and cases cited. The alter ego test satisfies due process requirements because the two corporations (or the corporation and an individual) are the same entity. The primary purpose of the "alter ego" test is to prevent fraudulent evasions of jurisdiction, and States should be able to exercise general jurisdiction over any corporation "essentially at home in the forum State" regardless of the corporation's attempt to conceal its activities in the forum State. *See Goodyear,* 131 S.Ct. at 2851.

representative[11] and (2) the parent company has a "right to control" the subsidiary, whether or not it actually exercises the right. *Bauman*, 644 F.3d at 920.

When both of these elements are fulfilled, the Ninth Circuit then considers if the assertion of jurisdiction is fair and reasonable, weighing factors such as the extent of the defendant company's purposeful activity in the forum State, the burden on the defendant, the extent of conflict with sovereignty of the defendant's state, and the forum's interest in adjudicating the dispute. *Bauman,* 644 F.3d at 924-25.

The panel concluded that MBUSA qualifies as Daimler's agent because MBUSA performed activities of "special importance" to Daimler and Daimler had the right to control some aspects of those activities. *Id.* at 924. In reaching that conclusion, the panel ignored established agency law and undisputed evidence in the record refuting the existence of an agency relationship.

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[11] The Ninth Circuit adopted this criterion directly from *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

B. The "Special Importance" Criterion Is Virtually Meaningless Because It Does Not Show that the Corporation Is "Essentially at Home in the Forum State."

The "special importance" prong is virtually meaningless. The commercial reality is that most manufacturers want to sell their products in any market in which it is lawful and profitable to do so.[12] In most markets, both inside and outside the manufacturer's home country or State, a manufacturing company will most often use a distributor to sell its products.

The "special importance" element is too sweeping; there is no principled reason why virtually all arrangements between businesses would not, under the Ninth Circuit's test, confer general jurisdiction because almost all businesses would find a different way to conduct business in a particular geographic market if the party with whom they originally contracted as the distributor ceased operating. If the distributor ceased to exist, the manufacturer would undoubtedly seek another

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[12] Of course, a manufacturer is likely to have a stronger desire to sell in a large market than in one where sales will be negligible, but why the size of the market in a forum should confer greater jurisdiction on the courts of that State is not explained by the Ninth Circuit.

distributor to sell its products, or, less likely, attempt to do so itself.

The tautological "special importance" rationale formed the core of the Ninth Circuit's analysis of the issue: Because Daimler wants to sell vehicles in California, any means of distribution that helps it do so is of "special importance" and therefore the forum contacts of any entity that serves as a channel of distribution will be deemed Daimler's contacts with the forum under Ninth Circuit's the "agency" jurisdiction theory.

The "special importance" element is tantamount to a "corporate stream of commerce" test, and is not really distinguishable from the stream of commerce theory used in specific jurisdiction cases. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).[13] Whereas *World-Wide Volkswagen* holds that a State can exert specific jurisdiction up the stream of commerce from a consumer purchase to the maker of the product, the Ninth Circuit's "special

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[13] For purposes of determining specific jurisdiction, the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" for claims that arise directly from the sale of those products in the forum State. *World-Wide Volkswagen*, 444 U.S. at 297-98.

importance" justification would allow a State to exert general jurisdiction over *any and all* claims up the corporate stream of commerce from a service provider to the corporation for which it provides the service.

But this logic runs head-on into this Court's language in *Goodyear*:

> The distribution of petitioners' tires in North Carolina, respondents maintained, demonstrated petitioners' own 'calculated and deliberate efforts to take advantage of the North Carolina market.' As already explained, *even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales*.

Goodyear, 131 S.Ct at 2857 n.6 (internal citations omitted, emphasis added).

In *Goodyear*, this Court unanimously determined there was no general personal jurisdiction over Goodyear subsidiaries which manufactured, distributed, and sold tires in Europe and Turkey, in a case involving a tire that failed in France and caused the death of two American passengers, finding that there was no jurisdiction even though the plaintiffs had a connection with the forum State. *Id*. at 2857 n.5. In *Goodyear*, this Court held that the state court

erred by invoking "stream-of-commerce" concepts developed in the *specific* jurisdiction context to support *general* jurisdiction over the foreign manufacturers.131 S.Ct. at 2851. In the case at bar, unlike in *Goodyear*, not even the plaintiffs have a connection with the forum State or with any State.

The appropriate standard for general jurisdiction is not whether a company has ties of "special importance" within a State, but whether the corporation is "essentially at home" within the State, which the broad Ninth Circuit's test fails even to approximate. *See id.* The "special importance" element of the Ninth Circuit's agency test draws its support primarily from cases dealing with specific jurisdiction, essentially making it a restricted corporate stream of commerce analysis, which this Court has rejected as a basis for general jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 297-98.

In fact, the Ninth Circuit's "special importance" element appears to be nothing more than a market-size test: Because California (or Texas, New York, Illinois, Michigan (pick any State) is a large market, the foreign company will want to participate in it, and when it does so, it subjects itself to general jurisdiction in that State. But where to draw the line? Is Virginia a large enough

market? Is Maryland? Is Rhode Island? Is Alaska?

The Ninth Circuit's decision does not define how direct the connection be between the foreign corporation and the activities in the forum State must be. Assume individuals living in California bought Mercedes cars at dealerships in Arizona that in turn bought them from MBUSA, and assume further that there were no Mercedes dealers in California (because Daimler does not want to subject itself to California jurisdiction), but Daimler supplies replacement parts and accessories to independent repair shops and auto parts stores in California. Assume further that MBUSA did not have its own sales or repair facilities in California, but at a facility in Texas MBUSA trained mechanics employed by independent shops in several Western States to install replacement parts and repair Mercedes vehicles so as to ensure that the repaired cars were safe, that MBUSA used training materials supplied by Daimler for this purpose, and that the MBUSA-trained mechanics became entitled to display an "authorised Mercedes mechanic" sign in the window of the repair shop, but that they would lose that privilege if they did not take refresher courses periodically; would that not be a right to "exercise control?" Under the Ninth Circuit's test would that not be a sufficient basis for asserting general jurisdiction? Surely, we submit, such

activities should not permit California courts to exercise general jurisdiction over Daimler.

The Ninth Circuit's test seems to be "If the foreign company benefits 'significantly' from the activities of a separate person in the State, the activities of that other person will be deemed those of the in-state actor." As Judge O'Scannlain, dissenting from the denial of rehearing en banc, acutely observed, "[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 777 (9th Cir. 2011) (O'Scannlain, J., dissenting).

Such a criterion is far too broad to satisfy Due Process requirements.

C. Implied Agency Is Not a Proper Basis for General Jurisdiction Over a Foreign Manufacturer Based Solely on Contacts of a U.S. Distributor.

The type of relationship between the foreign manufacturer, such as Daimler, and the domestic distributor, such as MBUSA, is not uncommon. There is no dispute that they are separate corporate entities. Nor is there any suggestion of any illegal or fraudulent misuse of their corporate

structures. Yet, the Ninth Circuit decision holds that Argentinean plaintiffs may sue a German corporation in California for harm allegedly sustained in South America based on a theory of agency.

Indeed, with many other kinds of manufactured goods, especially consumer products, it is common for foreign manufacturers to establish local subsidiaries, retain independent distributors, or sell through established and recognized domestic wholesale or retail resellers, rather than to engage in the domestic distribution business themselves. These kinds of relationships serve legitimate, important and beneficial purposes. For example, Daimler is a designer and manufacturer of motor vehicles and MBUSA is a distributor of vehicles in the United States. Distribution in numerous and diverse markets requires knowledge of the local markets and consumer preferences, local laws and regulations, logistics on the ground, and myriad other aspects of doing business; it requires personnel familiar with local culture and conditions, personnel with different training, experience and skills than those expert in design and manufacturing.

A responsible manufacturer must also seek to maintain the reputation of its products and to ensure that the actions of a distributor of its products, whatever its corporate relationship with

the manufacturer, do not jeopardize the manufacturer's brand, and that the distributor comply with local laws (*see, e.g.* "General Distributor Agreement" between Daimler and MBUSA, §13.6 (J.A. 181a, *et seq*.) and be financially sound (*see, e.g.* "General Distributor Agreement" between Daimler and MBUSA, Art. 12 (J.A. 186a)) . The terms of the Daimler-MBUSA Distribution Agreement are consistent with those interests. The Daimler-MBUSA distribution agreement, upon which the panel opinion so heavily relies as evidence of "control," are typical and does not evidence an especially close relationship between Daimler and MBUSA.

D. The "Right to Control" Test Exceeds the Limits of Due Process.

The Ninth Circuit added a "right to control" element to its "agency" test: "the principal need not *exercise* control at all in order to preserve an agency relationship; the relevant inquiry, rather, is whether the principal has the *right* to control." *Bauman,* 644 F.3d at 923 (emphasis in original).

While this "right to control" element of the agency test limits the breadth of the "special importance" element applied alone, it does not comport with Due Process requirements because this element focuses on an inchoate *right* to control rather than *actual* control. The "right to control" element of the "agency" test is overbroad because

a State may only exercise general jurisdiction over a corporation when it may "fairly be regarded as at home" – such as the corporation's place of incorporation or principal place of business – and *not* merely where the corporation has the *right* to be at home. *See Goodyear*, 131 S.Ct. at 2853-54.

As a matter of logic, a corporation's activity within a State is not "continuous and systematic" merely because it has the *right* to engage in "continuous and systematic" activity in that State if it chooses not to exercise that right. *See id.* at 2851.

We respectfully submit that more than an inchoate "right to control" is needed. A court must engage in careful fact-finding as to the actual activities of the foreign parent in the forum State before asserting general jurisdiction.[14]

The Ninth Circuit's concept of "agency" is *sui generis* and in conflict with principles of agency law. The two distinctive elements of a true agency relationship are that the agent acts on behalf of

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[14] Exercising jurisdiction merely because a foreign corporate defendant has an ownership interest in an affiliate in the forum State when the cause of action does not arise from any actions by the defendant or its forum State affiliate "stretches the boundaries of jurisdictional theory beyond any discernable limit." *See* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1092-93 (2004)).

the principal and the agent has the power to bind the principal. *See Commissioner v. Bollinger*, 485 U.S. 340, 346-47 (1988) (in determining whether an entity is the "true corporate agent . . . of [an] owner-principal," the Court looks to whether the entity "binds the principal by its actions") (internal quotation marks omitted).[15] The "General Distributor Agreement" between Daimler and MBUSA provides that MBUSA has "no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER," J.A. at 179a, Art. 11.1(2). *See also*, Art. 11.1(1) which states that MBUSA is an "independent contractor[]" that "shall buy and sell Contract Goods . . . as an independent business for [its] own account" and that the agreement does not make MBUSA "a general or special agent, partner, joint venturer, or employee" of Daimler and does not create any fiduciary relationship. *Id*.

The implication of the Ninth Circuit's reasoning is that every distributor, and indeed every independent contractor, satisfies the Ninth Circuit's agency test so long as the manufacturer has a contractual right to take steps to ensure that

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[15] *See* Restatement (Second) of Agency § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

its distributor acts to promote the products and that the manufacturer can protect the integrity of its products and its reputation.

E. The Ninth Circuit's Decision Impermissibly Disregards the Distinction Between Separate Corporate Entities and the Due Process Requirement that Minimum Contacts with the Forum State Must Be Assessed for Each Defendant Individually.

This Court has made clear that the relevant jurisdictional contacts are to be assessed for the defendant individually. *See, e.g.*, *Burger King,* 471 U.S. at 475 ("Jurisdiction is proper...where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum" (citation omitted, emphasis in original); *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

That test is not satisfied in this case. Daimler did not carry on "continuous and systematic" activities in California. It is irrelevant to the whether there is general jurisdiction over Daimler that MBUSA, an indirect subsidiary of Daimler, may be "present" and engage in business in California because "unilateral activity of another party or a third person is not an appropriate

consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 417.

In contrast to the Ninth Circuit's rationale for finding general jurisdiction, this Court's test for general jurisdiction focuses on two factors: the purposeful actions of the defendant itself in the forum State and the nature of the defendant's contacts with the forum State, both of which the Ninth Circuit disregards. The Ninth Circuit's finding of general jurisdiction over Daimler because of contacts which its indirect subsidiary MBUSA has with California is based on that court's erroneous finding that MBUSA is an agent of Daimler for all purposes.

The Ninth Circuit's holding, which fails to employ a stringent minimum contacts test, violates this Court's teaching that the requisite minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction." *Rush v. Savchuk,* 444 U.S. 320, 332 (1980) (emphasis added); *see also Keeton*, 465 U.S. at 791 n.13 ("Each defendant's contacts with the forum State must be assessed *individually*.") (emphasis added).

The Ninth Circuit's test violates this Court's recognition that "respect for corporate distinctions" is a fundamental principle "deeply engrained in

our economic and legal systems." *United States v. Bestfoods,* 524 U.S. 51, 61-62 (1998) (citations omitted). A corporation generally will not be liable for the acts of its subsidiaries or other affiliated corporations. *Id*.; *see also*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (It is "a basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities."); *Janus Capital Group, Inc. v. First Derivative Traders,*131 S.Ct. 2296, 2304 (2011) (investment advisor not liable for statement made by its mutual fund client, even though there was a close corporate relationship between the advisor and the mutual fund: "We decline this invitation to disregard the corporate form"). The panel's reasoning is also contrary to *Consol. Textile Corp. v. Gregory*, 289 U.S. 85 (1933), which held that sales through a subsidiary in the forum do not render the parent "present" in that forum, even though the subsidiary was "wholly controlled by" as well as "an agent of" the parent. *Id*. at 88.

The Ninth Circuit's decision, which found general jurisdiction based on the actions in and contacts with the forum of an entity other than the defendant, cannot be reconciled with this Court's repeated admonitions regarding the need for a separate due process analysis as to each defendant "individually" and the need to respect corporate distinctions. *See, e.g.*, *Bestfoods, supra*; *Keeton, supra*.

The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). By using a separate corporate entity as its U.S. distributor, Daimler has shown a clear intention *not* to avail itself of the protections and benefits of California law. The Ninth Circuit's opinion stretches agency law to reach the opposite result, and by treating two legal entities as one the Ninth Circuit denies Due Process.

F. The "Reasonableness" Test Confuses Specific and General Jurisdiction Criteria.

When either the "alter ego" or the "agency" test is satisfied, the Ninth Circuit evaluates the fairness and reasonableness of the assertion of jurisdiction, considering factors such as the extent of the purposeful interjection, the burden on the defendant, the extent of conflict with sovereignty of the defendant's State, and the forum's interest in adjudicating the dispute. *Bauman*, 644 F.3d at 920, 924-25. Under the reasonableness test, the burden shifts to the defendant, who must provide compelling reasons that the exercise of jurisdiction is unreasonable. *Id.* at 924.

A reasonableness test makes sense when a court asserts specific jurisdiction because a large corporation likely can more easily litigate in a distant forum, whereas a small company with limited resources may have significant difficulties litigating in a distant forum. *Burger King*, 471 U.S. at 477. But the "agency" test claims to demonstrate that a corporation is "at home" within the State, *see Goodyear,* 131 S.Ct. at 2851, and if the agency test really showed the subsidiary to be the manifestation of the parent company's presence in the forum State, the reasonableness test would be superfluous because a place where a defendant is "home" must, *ipso facto*, be a reasonable place for it litigate. The positing of the "reasonableness" requirement when considering general jurisdiction suggests that the Ninth Court is "hedging" and does not really believe the foreign corporation to be at home in the forum.

II.

THE "STRONG INTEREST IN ADJUDICATING AND REDRESSING INTERNATIONAL HUMAN RIGHTS ABUSES" PROVIDES NO BASIS FOR EXPANDING GENERAL JURISDICTION.

A. The Ninth Circuit's Holding Is Directly Contrary to This Court's Recent Precedent.

According to the Ninth Circuit, *all* "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Bauman*, 644 F.3d at 927. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary in a foreign country. *Id.* The Ninth Circuit's assertion of United States courts' "strong interest in adjudicating and redressing international human rights abuses" as a reason for exercising general jurisdiction is, we submit, directly contrary to the teaching of this Court and a *non sequitur*.

In *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) this Court held that there is a strong

presumption against extraterritorial application of U.S. law. "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, *id.* at 1669. More directly relevant to this case, this Court said in *Kiobel* "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.*

In the predecessor to *Kiobel*, Royal Dutch Petroleum had been found by the Second Circuit to be subject to general jurisdiction under the Second Circuit's "agency test" which is similar to the Ninth Circuit's test. The Ninth Circuit relied heavily on the Second Circuit's reasoning in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 542 U.S. 941 (2001). In *Wiwa*, Netherlands and United Kingdom corporations were held to be subject to general personal jurisdiction in New York because an investor-relations office in that State, formally part of a U.S. subsidiary, "perform[ed] investor relations services on the [foreign] defendants' behalf." *Id.* at 96. Because the Second Circuit deemed these services to be "sufficiently important to the foreign entit[ies] that the [foreign] corporation[s] would perform equivalent services if no agent were available," it concluded that the New York investor-relations office was an "agent[

] of the defendants for jurisdictional purposes." *Id.* at 95. The Second Circuit found that these imputed "contacts go well beyond the minimal" and that there was "nothing in the Due Process Clause [that] precludes New York from exercising jurisdiction over the defendants." *Id.* at 99. As here, there was no allegation in *Wiwa* that the foreign defendants and their domestic affiliate were alter egos.

We submit that *Kiobel* implicitly overruled *Wiwa*. In *Kiobel* the corporate defendant was not deemed present for purposes of application of the Alien Tort Statute, and it is only logical that if the Court had considered the general jurisdiction question, it would have found Royal Dutch Petroleum not to have been "at home" and it would have found there not to be general jurisdiction. *Kiobel* strongly suggests that United States courts do not have jurisdiction based on an interest in vindicating human rights where none of the parties are United States entities, the underlying events giving rise to the claims occurred within the territory of a foreign sovereign, and courts of other nations have jurisdiction over the parties.[16]

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[16] In addition, Respondents' claims under the Torture Victims Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note are no longer viable under this Court's holding in the *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702 (2012) (continued...)

The Ninth Circuit's predicate for finding jurisdiction to "adjudicat[e] and redress[ ] international human rights abuses," *i.e.*, that "the claims in this case are "predicated upon the ATS and TVPA," *Bauman*, 644 F.3d at 927), no longer exists because of this Court's decisions in *Kiobel* and *Mohamad*.

B. The Exercise of General Jurisdiction Over Foreign Corporations in the Circumstances Presented Here Would Undermine the United States' Foreign Trade and Foreign Affairs Interests.

Under the Ninth Circuit's expansive assertion of general jurisdiction, a foreign company would be amenable to suit in the United States on a claim brought by a foreign plaintiff based on foreign conduct as long as the company has a domestic subsidiary that, subject to the parent's right of control, is providing services that the parent would secure "by other means" if the subsidiary were not available. Under this standard, adopted by the Ninth Circuit to enable United States courts to "adjudicat[e] and redress[ ] international human rights abuses" (*Bauman*, 644 F.3d at 927), many foreign companies could be subject to general personal jurisdiction in the United States. This

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[16](...continued)
that the TVPA does not apply to corporations.

Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (quoting *United States v. First Nat'l Bank,* 379 U.S. 378, 404 (1965)) (internal quotation marks omitted).

In a similar case, the Executive Branch has emphasized that a "State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests." Br. for the United States as *Amicus Curiae* Supporting Petitioners at 12, in *Goodyear*, 131 S.Ct. 2846 (2011). Such claims of expansive jurisdiction by American courts "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade," and might "equally dissuade[ ] . . . United States corporation[s] concerned about facing a similar rule abroad . . . from exporting [their] products." *Id.* Further, "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* at 33.

CONCLUSION

The Ninth Circuit's assertion of jurisdiction over a party that has consciously structured its commercial relationships to avoid general jurisdiction in the United States, in a case that arises from events that took place entirely abroad and was brought by parties with no connection to the United States, is an unwarranted extension of general jurisdiction. It is based on a desire to vindicate human rights that, although idealistic, is not appropriate and vilolates the foreign defendant's Due Process rights.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

Martin S. Kaufman
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue, #104
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org