No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

Terrence P. Collingsworth
Counsel of Record
Christian Levesque
Rachel Sheridan
CONRAD & SCHERER, LLP
1156 15th Street NW
Suite 502
Washington, DC 20005
(202) 543-5811
tc@conradscherer.com

QUESTION PRESENTED

Did the Ninth Circuit err in holding that the Due Process Clause permitted a court in California to exercise personal jurisdiction over petitioner based on the facts of this particular case, where petitioner, among other things, created a wholly owned subsidiary whose only purpose is to sell billions of dollars' worth of petitioner's vehicles in the state for petitioner's sole benefit, subject to petitioner's pervasive authority?

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STATEMENT OF THE CASE

Petitioner makes billions of dollars every year selling its luxury cars in California. Rather than sell those cars through a division of its company, petitioner created a wholly owned subsidiary that operated in materially the same way as a subdivision would: the subsidiary and parent company had the same chairman; the subsidiary sold cars solely for the parent company; the parent company set prices for the cars and had authority over virtually all aspects of the subsidiary's operations; and all profits went to the parent. The Ninth Circuit held that in light of the specific facts of this case, courts in California had general jurisdiction over both subsidiary and parent.

1. Respondents are former employees and representatives of deceased employees of the González Catán plant of Mercedes-Benz Argentina, a wholly owned subsidiary of DaimlerBenz, petitioner's predecessor-in-interest. Pet. App. 3a. During the period of terror perpetrated by Argentina's military dictatorship between 1976 and 1983 – known as the "Dirty War" – Mercedes-Benz Argentina identified respondents as "subversives" or "agitators" to state security forces stationed within its plant, knowing that respondents would be kidnapped, detained, tortured, or murdered as a result. *Id.* 3a-4a & n.3. After respondents were arrested or "disappeared," Mercedes-Benz Argentina hired the police chief behind the raids as its Chief of Security, and provided him with legal representation when he was subsequently accused of human rights abuses. *Id.* 3a-4a.

2. Respondents brought suit in 2004 in the Northern District of California, raising claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. First Am. Compl. ¶ 57. Respondents also brought claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. *Id.* ¶ 72-79. They alleged that petitioner was responsible for the acts of its Argentinean subsidiary, and that suit was properly brought in California in light of the substantial and systematic business petitioner conducts in that state through its wholly owned subsidiary, Mercedes-Benz USA (MBUSA). Pet. App. 95a, 104a.

Respondents originally attempted to serve process at petitioner's headquarters in Stuttgart, Germany. A German trial court allowed service, but its order was stayed pending an appeal. Pet. App. 4a & n.4. Respondents then attempted to serve petitioner in the United States in light of its 1998 merger with American auto manufacturer Chrysler Corporation, which formed DaimlerChrysler AG (DCAG). *Id.* 5a. In a proxy statement to its shareholders following the merger, DCAG stated that it would "maintain two operational headquarters – one located at the current Chrysler headquarters . . . [in] Auburn Hills, Michigan . . . and one located at the current Daimler-Benz headquarters . . . [in] Stuttgart, Germany." *Id.* The company's website further announced that the former Chairmen/CEOs from Chrysler and Daimler-Benz were "Co-Chairmen and Co-Chief Executive Officers." *Id.* Each

maintained "offices and staff in both" the Auburn Hills and Stuttgart headquarters. *Id.* 6a.

Respondents therefore served petitioner at its headquarters in Auburn Hills, Michigan. Petitioner attempted to quash service but withdrew its motion after respondents produced documents showing that the Michigan and Stuttgart offices were "dual operational headquarters." Pet. App. 5a-6a.

3. In the Northern District of California, petitioner moved to dismiss for lack of personal jurisdiction. Although the court found it a "close question," it granted petitioner's motion. Pet. App. 15a-17a.

4. On appeal, the Ninth Circuit reversed. The court of appeals observed that "[t]here are two types of personal jurisdiction: general and specific." Pet. App. 19a. Because DCAG's contacts with California did not "give rise to the cause of action before the court," the Ninth Circuit considered only general jurisdiction. *Id.* 19a-20a. The court explained that the basic question was whether petitioner's "continuous corporate operations within [the] state are . . . so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely distinct from those activities." *Id.* 20a (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). In this case, the court held that by establishing a wholly owned subsidiary in California to conduct a core aspect of its business and by retaining pervasive authority over its operations, petitioner manifested sufficient presence in the state to permit the exercise of jurisdiction. *Id.* 43a-44a.

The court noted that both parties agreed that the subsidiary, MBUSA, maintained sufficient contacts with California to permit the exercise of general jurisdiction over it. Pet. App. 21a n.11. The question was whether those contacts also supported general jurisdiction over petitioner, MBUSA's parent company. The court of appeals explained that under circuit precedent, "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." *Id.* 21a (emphasis in original). First, the "alter ego" test – not at issue here – applies when "there is such unity of interest and ownership that the separate personalities of the two entities no longer exist." *Id.* (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)).

The second test, "which *is* applicable here, is the 'agency' test." Pet. App. 21a (emphasis in original). That test, the court explained, has two prongs. The first asks if the tasks performed by the subsidiary "are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Id.* 24a-25a (emphasis omitted) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001)). "The purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence." *Id*. 23a (citing *Int'l Shoe*, 326 U.S. at 318). In this case, the court easily concluded that MBUSA conducted a core aspect of petitioner's business.

"Selling Mercedes-Benz vehicles is a critical aspect of DCAG's business operations," the court observed, and "the United States market accounted for 19% of the sales of Mercedes-Benz vehicles worldwide." *Id.* 25a. "MBUSA's sales in California alone accounted for 2.4% of DCAG's total worldwide sales." *Id.*

But the court explained that the Due Process Clause is not satisfied simply because a subsidiary conducts business that is sufficiently important to the parent company. In addition, "[c]ontrol . . . plays a role in determining whether personal jurisdiction is established because control is a traditional element of agency under common law principles." Pet. App. 26a. In particular, the control prong requires that "both the principal and the agent must manifest assent to the principal's right to control the agent." *Id.* 27a (emphasis omitted).

In this case, the Ninth Circuit determined that DCAG enjoyed the "right to control nearly every aspect" of its subsidiary's operations. Pet. App. 23a. The same person, Dieter Zetsche, was the Chairman of both MBUSA and DCAG. *Id.* 11a. Moreover, under the companies' General Distributor Agreement, MBUSA could not replace key personnel, alter its management control or ownership interests, change its name or the form of its legal entity, or move the location of its principal place of business without DCAG's approval. *Id.* 11a, 13a. DCAG also retained the right to unilaterally set the prices at which MBUSA sold vehicles and to specify the amount of working capital MBUSA must maintain. *Id.* 13a-14a. Its control extended even to minute aspects of MBUSA's operations, including the "type,

design and size" of any signs used by MBUSA. *Id.* 13a.

Finally, the Ninth Circuit held, even if the agency test is met, the court must still independently determine "whether the assertion of jurisdiction is 'reasonable.'" Pet. App. 30a. The court of appeals therefore applied a seven-factor reasonableness test derived from *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). Pet. App. 30a-31a. Among other things, the court considered that DCAG had "purposefully and extensively interjected itself into the California market through MBUSA," and had itself engaged in extensive litigation in the state, established a research and development center in Palo Alto, and listed itself on the Pacific Stock Exchange in San Francisco. *Id.* 31a-32a. The court further explained that it would not be a significant burden on DCAG to litigate in California, since "technological advances" have lessened the cost for a multinational corporation to litigate there and because DCAG already had permanent counsel in California. *Id.* 32a-33a. Nor would the litigation pose a sufficient conflict with German sovereignty, given that petitioner had "manifested an intent to serve and to benefit from the United States market," which accounted for "nearly 50% of DCAG's overall revenue" and "1% of [Germany's] GDP." *Id*. 33a-34a. Finally, the court of appeals found that Argentina and Germany would not provide adequate alternative fora. *Id.* 39a-40a.

5. The Ninth Circuit subsequently denied a petition for rehearing en banc. Pet. App. 135a.

6. While the petition for rehearing was pending, this Court granted certiorari in two cases presenting questions relating to the federal claims in this action.

The Court decided the first, *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), on April 18, 2012, holding that the TVPA "authorizes liability solely against natural persons." *Id.* at 1708. Because petitioner, a corporation, is the only defendant in this case, *Mohamad* extinguished respondents' TVPA claims.

The viability of respondents' remaining federal claims, brought under the ATS, will be resolved in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491. This Court originally heard oral argument in *Kiobel* on February 28, 2012, on the question whether corporations, like petitioner, can be held liable under the ATS. It then restored the case to the calendar for reargument in October Term 2012 on the question whether the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States," as alleged in this case. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012).

REASONS FOR DENYING THE WRIT

Petitioner has long participated in the California market for luxury vehicles through a wholly owned subsidiary that serves no function other than to sell petitioner's vehicles in the United States. The Ninth Circuit held that based on the particular facts of this case, a California district court had general jurisdiction over petitioner. That holding is correct and does not warrant review by this Court. By conducting substantial business in California through a subsidiary it wholly owns and over which it retains comprehensive authority, petitioner has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987). It therefore "does not offend 'traditional notions of fair play and substantial justice,'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), for courts in that state to exercise general jurisdiction over petitioner.

Petitioner claims that in reaching this conclusion, the Ninth Circuit applied a test that "at least five circuits . . . have categorically rejected." Pet. 10 (emphasis omitted). Petitioner further claims that the majority of circuits to have addressed the question have held instead that "in order for one corporation's jurisdictional contacts to be imputed to another corporation, the two corporations must be alter egos of each other that fail to adhere to the requirements of their separate corporate identities." *Id.* 10-11. Neither assertion is correct. Most of the decisions petitioner cites simply hold that satisfaction of the "alter ego" test is *sufficient* to establish general

jurisdiction; they do not consider, much less reject, the possibility that an agency relationship may, in appropriate circumstances, also satisfy the Due Process Clause. When confronted with that question, all but one circuit has sided with the Ninth Circuit.

That lopsided and nascent conflict does not warrant review and, in any event, this case provides an especially poor vehicle for deciding any general jurisdiction question. This Court's impending decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, could raise complicated jurisdictional questions that may make the Court's resolution of any general jurisdiction question immaterial to the outcome of the case. Those questions are best resolved in the first instance in the district court, to which the case has been remanded for further proceedings. Moreover, interlocutory review by this Court would have little practical consequence for the litigation. Because petitioner maintained a corporate headquarters in Michigan at the time this complaint was filed, a decision in its favor on general jurisdiction would at most result in a transfer of the case from one federal court to another.

I. There Is No Substantial Division Among The Circuits.

There is no basis for petitioner's claim that the circuits are "deeply divided over the circumstances in which due process permits the imputation of the jurisdictional contacts of a corporate subsidiary to an out-of-state parent corporation." Pet. 10. All circuits agree that a parent is subject to general jurisdiction if its subsidiary in the forum state is simply its "alter ego." A majority of circuits to have considered the

question have also held that some forms of an "agency" relationship may provide an additional basis for exercising general jurisdiction over a parent company. Contrary to petitioner's claims, only one circuit has considered and rejected that view, and its decision is less than a year old. Such a recent and shallow conflict does not warrant this Court's review.

A. The Second, Ninth, And Eleventh Circuits Have Adopted An Agency Test.

As petitioner notes, the Second and Ninth Circuits have long held that the alter ego test is not the exclusive means of demonstrating that a corporation has sufficient minimum contacts with the forum state by virtue of its ownership of and authority over a subsidiary. Instead, both have adopted an agency test under which courts may exercise jurisdiction over a foreign parent corporation where, among other requirements, an in-state subsidiary "renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important . . . that the corporation itself would perform equivalent services if no agent were available," *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001);[1] *see also Wells Fargo & Co. v. Wells Fargo Express Co*., 556 F.2d 406, 422-23 (9th Cir. 1977).

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[1] Although the Second Circuit in *Wiwa* adopted this agency test as an interpretation of New York's long-arm statute, it also held that "nothing in the Due Process Clause precludes New York from exercising jurisdiction over the defendants." 226 F.3d at 99.

Petitioner acknowledges that the Eleventh Circuit applies an agency test, but insists that it requires plaintiffs "to meet a stringent standard similar to the alter-ego test." Pet. 15-16 (citing *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000)). But whatever early cases may have suggested, recent decisions in the Eleventh Circuit have expressly embraced the Second Circuit's agency test. *See, e.g.*, *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1275 (11th Cir. 2002) (adopting *Wiwa* test verbatim); *Stubbs v. Wyndham Nassau Resort & Crystal Palace*, 447 F.3d 1357, 1361 (11th Cir. 2006) (explaining that "our precedent . . . has been extended to other principal-agent relationships, when the resident corporation acts on behalf of its foreign affiliates") (citing *Meier*).

B. The First, Fourth, Fifth, Sixth, And Seventh Circuits Have Not Yet Decided Whether To Adopt An Agency Test In Addition To An Alter Ego Test.

Petitioner claims that the majority of circuits to consider the question have "categorically *rejected* the agency framework." Pet. 10 (emphasis in original). That is incorrect. The decisions petitioner cites from the First, Fourth, Fifth, Sixth, and Seventh Circuits have held or suggested that an alter ego relationship between parent and subsidiary may be sufficient to establish general jurisdiction over the parent. But in none of these cases did the court consider, much less reject, the proposition that an agency affiliation short of an alter ego relationship might be sufficient to establish jurisdiction over a foreign parent company based on the contacts of its in-state subsidiary, likely because the parties in those cases appear not to have

raised the issue. *See Miller v. Honda Motor Co.*, 779 F.2d 769, 772-73 (1st Cir. 1985); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433-34 (4th Cir. 2011); *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Central States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943-44 (7th Cir. 2000). In short, while these circuits have held that an alter ego relationship is *sufficient* they have not held that it is *necessary*.

There is no basis to speculate that any of these courts, when confronted with the question, would reject the rule applied by the Ninth Circuit in this case. Indeed, the First and Seventh Circuits have previously indicated that they are open to theories beyond the alter ego test. In *Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990), the First Circuit held that due process can permit the assertion of jurisdiction over corporate parents due to the contacts of their subsidiaries even when "corporate entities are distinct and their veils unpierced." *Id.* at 465. The court noted by way of example that "[s]ometimes, the parent has utilized the subsidiary in such a way that an agency relationship between the two corporations can be perceived – and that is enough" to warrant the

exercise of general jurisdiction. *Id.* at 466 (citing *Wells Fargo*, 556 F.2d at 420).[2]

Likewise, in *IDS Life Insurance Co. v. SunAmerica Life Insurance Co.*, 136 F.3d 537 (7th Cir. 1998) (Posner, C.J.), the court found no jurisdiction over a foreign parent corporation but stated that "[i]f the subsidiaries were acting as [the parent's] Illinois agent in the sense of conducting [the parent's] business rather than their own business, the parent could be sued." *Id.* at 541. The court explained that "a corporation should not be able to insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *Id.*

C. The Eighth Circuit Is Alone In Explicitly Rejecting The Agency Test.

The only court of appeals to have directly considered and rejected the agency test is the Eighth Circuit – and its rule is less than a year old. *See Viasystems, Inc. v. EBM-Pabst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011). Further, because *Viasystems* involved a highly attenuated

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[2] The First Circuit's earlier decision in *Miller v. Honda Motor Co.*, 779 F.2d 769 (1st Cir. 1985), does not suggest, as petitioner claims, that the First Circuit would construe the Due Process Clause to "require a plaintiff seeking to establish 'agency' to meet a stringent standard similar to the alter-ego test." Pet. 15. In *Miller*, the court denied the plaintiff's request to "find that American Honda is in fact an agent of its Japanese parent" on state-law, not federal due process, grounds. *Id.* at 772.

parent-subsidiary relationship that was "confined to a two-steps-removed 28-percent interest," *id.* at 597, it is possible that the Eighth Circuit would find the Due Process Clause satisfied in a case such as this, where the parent company retained a higher "degree of control and domination" over the subsidiary, *id.* at 596.

II. This Case Is An Exceptionally Poor Vehicle For Deciding Any Question Of General Personal Jurisdiction.

Even if petitioner presented a conflict meriting this Court's review, this case would be an exceptionally poor vehicle for resolving it. This Court "generally await[s] final judgment in the lower courts before" granting review. *Va. Military Inst. v. United States*, *cert. denied*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). That practice is particularly warranted in this case. At this time, and on the current record, there is substantial doubt that a decision on the question presented would have any material impact on the outcome of this litigation.

A. This Court's Decision In *Kiobel v. Royal Dutch Petroleum Co.* Could Raise Significant Jurisdictional Questions That Should Be Settled In The Lower Courts And May Render Any Decision On Personal Jurisdiction Immaterial To The Outcome Of This Case.

1. In *Kiobel*, this Court will decide two pertinent questions: (1) whether corporations can be held liable under the ATS, and (2) whether, or under what circumstances, the ATS extends to violations that

occur outside the territory of the United States. Because the sole defendant in this case is a corporation sued for conduct occurring overseas, if this Court rules in the defendant's favor on either issue in *Kiobel*, the Court will eliminate the only remaining federal question in the case.[3]

2. In the absence of continuing federal question jurisdiction, the issue would arise whether the district court nonetheless has diversity jurisdiction to resolve the remaining claims based on state and Argentinean law, and, if not, whether it should exercise its discretion to retain supplemental jurisdiction over the remaining claims. Both issues should be decided in the first instance by the lower courts and, if resolved in petitioner's favor, would render the Ninth Circuit's personal jurisdiction holding immaterial to the outcome of the case.

The existence of diversity jurisdiction turns on legal and factual questions about whether petitioner maintained a "principal place of business" in Michigan after its merger with Chrysler. 28 U.S.C. § 1332(c)(1) (providing that, for purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."). The Ninth Circuit noted, but did not resolve, that question below. Pet. App. 6a n.6. If the courts in this

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[3] Petitioner's other federal claim, under the TVPA, was extinguished by this Court's recent decision in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), which held that the TVPA does not apply to corporations, *id.* at 1706.

case determined that petitioner is a citizen on Michigan, there would be diversity jurisdiction to resolve respondents' state and Argentinean law claims, even if *Kiobel* eliminates respondents' ATS claims. Petitioner would be free to seek certiorari on the question of personal jurisdiction after final judgment, if the issue still mattered.

If, on the other hand, there was no diversity jurisdiction, there could still be supplemental jurisdiction over the remaining non-federal claims. *See* 28 U.S.C. § 1367. But whether to exercise that jurisdiction would be a discretionary decision for the trial court. *See id.* § 1367(c) ("The *district courts* may decline to exercise jurisdiction if" the federal claims in a case have been dismissed) (emphasis added); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). That discretionary decision could render the question of personal jurisdiction irrelevant – the district court's refusal to exercise supplemental jurisdiction would end any further litigation in the Northern District of California just as effectively as a decision by this Court finding no personal jurisdiction.

3. Although the Court's decision in *Kiobel* could have important consequences for the disposition of this case, that is not a reason to hold this petition pending the Court's decision in *Kiobel*. Because the petition is interlocutory, the district court will already be empowered to give effect to *Kiobel* without the need for a remand from this Court. Moreover, vacating the Ninth Circuit's personal jurisdiction decision for further consideration in light of *Kiobel* would serve no purpose, as *Kiobel* involves no question of personal jurisdiction. As a consequence, if the Court vacated and remanded the decision in

this case for reconsideration in light of *Kiobel*, the Ninth Circuit would reasonably reinstate its prior jurisdictional ruling and allow the district court to resolve *Kiobel*'s effect on other aspects of the case – precisely the same outcome as a denial of certiorari.

B. A Decision On The Question Presented Would At Most Determine Only Which Federal Court Will Hear Respondents' Claims.

The petition should be denied for the additional reasons that even if this Court granted certiorari and held that there was no personal jurisdiction over petitioner in California, that would not end the case. Instead, the case would be transferred to Michigan, where personal jurisdiction would be available even setting aside petitioner's relationship with its subsidiaries.

If a federal district court

> finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631; *see also id*. § 1406 (similar for lack of venue).[4]

In this case, if this Court were to hold that California lacks personal jurisdiction over petitioner, the case would appropriately be transferred rather than dismissed because Michigan does have such jurisdiction.[5] For corporations, having a "principal place of business" within a state "indicates general submission to a State's powers," and therefore establishes the state's general jurisdiction over the corporation. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011). And in this case, even disregarding the jurisdictional contacts of petitioner's subsidiaries, at the time this litigation commenced, petitioner *itself* had established a principal place of business in Michigan as a result of its merger with Chrysler Corporation. *See* Pet. App. 5a-6a & n.6.[6]

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[4] Whether the transfer is seen as correcting a lack of jurisdiction (addressed in Section 1631) or venue (addressed in Section 1406), as respondents argued below, is immaterial as the transfer rule in either case is materially the same.

[5] The district court rejected respondents' transfer request on the ground that they should have raised the issue earlier in the litigation, Pet. App. 92a, and because a transfer "would not 'be in the interest of justice' because personal jurisdiction is lacking over DCAG," *id*. 93a. Respondents challenged both determinations on appeal but the Ninth Circuit did not reach either question. *See* Pet. App. 17a n.9.

[6] The fact that DCAG also maintained a headquarters in Germany does not change the analysis. For example, in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the

III. Petitioner Has Failed To Show That Any Alleged Difference In Courts' Tests For General Jurisdiction Over Corporate Parents Has A Significant Practical Effect.

The petition does not warrant review in any event because petitioner's claim of dire consequences resulting from the Ninth Circuit's alleged "boundless notion of general personal jurisdiction" is unfounded. Pet. 25.

A. Petitioner Mischaracterizes The Ninth Circuit's General Jurisdiction Test As Far Broader Than It Is.

Petitioner repeatedly mischaracterizes the Ninth Circuit's test as providing that "an agency relationship can be established . . . whenever the subsidiary is performing services on behalf of the parent corporation that the parent would perform through some other means if the subsidiary were no longer available." Pet. 11; *see also id.* i. But that description omits two significant additional requirements that in practice eliminate most of the objectionable hypotheticals petitioner raises.

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president and general manager of a Philippine mining operation maintained an office in Ohio in which he kept files, conducted operational meetings, and otherwise carried on "a continuous and systematic, but limited, part of its general business." *Id.* at 438. This "limited" business was enough to allow Ohio to exercise general jurisdiction consistent with due process. *Id.*; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (citing *Perkins* with approval). Here, DCAG's presence in Michigan is much more significant than the defendant's in *Perkins*.

First, the Ninth Circuit requires not only that the subsidiary perform a sufficiently important function, but also that the parent has a "right to control" the subsidiary. Pet. App. 27a. Accordingly, when a distributor is truly independent, its contacts do not subject a parent company to general jurisdiction, even if it performs a critical function. Here, the Ninth Circuit found personal jurisdiction only because DCAG retained an extraordinary degree of authority over "*nearly all aspects* of MBUSA's operations." *Id.* 29a (emphasis added). To start, petitioner's Chairman also served as the Chairman of MBUSA. *Id.* 11a. In addition, DCAG had authority over, among other things, "which management personnel are appointed to run MBUSA"; "which management personnel positions shall exist at MBUSA"; "the prices that MBUSA must pay to DCAG"; "the prices that MBUSA may charge to its Authorized Resellers"; and "the working capital level and financing capability level that MBUSA must maintain." *Id.* "If that exhaustive list were not enough, DCAG also has the right to require MBUSA to execute '*any agreement relating to . . . any other matter related to this Agreement* . . . as long as those new Agreements are not an 'unreasonable burden' on MBUSA." *Id.* 30a.

Second, the Ninth Circuit has recognized that the forum state would not normally have an interest in adjudicating a suit when "the events at issue did not take place in California and . . . the plaintiffs are not California residents." Pet. App. 35a (citation omitted). To guard against inappropriate exercises of jurisdiction, therefore, even after finding a sufficient agency relationship, a court must also determine that

"the assertion of jurisdiction is 'reasonable.'" *Id.* 30a (citation omitted). Among other factors, the Ninth Circuit considers "the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; [and] the forum state's interest in adjudicating the suit." *Id.* 31a.

Here, the Ninth Circuit found jurisdiction to be reasonable based on factors that are unlikely to lead to the "boundless" expansion of personal jurisdiction petitioner predicts, Pet. 25. In contrast to the Australian contractor example raised by petitioner, *id.*, or the small businesses hypothesized by amicus,[7] the Ninth Circuit explained that "DCAG has purposefully and extensively interjected itself into the California market through MBUSA" – a market which alone "account[s] for 2.4% of DCAG's total worldwide sales," Pet. App. 32a. Moreover, DCAG was no stranger to the forum state, having "initiat[ed] lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests." *Id.* 31a (quotation marks omitted). Indeed, "DCAG has retained permanent counsel in California." *Id.* This case was also unusual, the court pointed out, because respondents' claims are based in international law and "federal courts . . . have a strong interest in adjudicating and redressing human rights abuses" that is absent in ordinary business disputes or tort litigation. *Id.* 36a.

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[7] *See* Chamber of Commerce Br. 11-12.

Given these limitations, the question presented by the petition – "[W]hether 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*," Pet. i (emphasis added) – does not arise on the facts of this case. That in itself is reason enough to deny review.

B. Other Principles Work In Tandem With Limitations On General Jurisdiction To Protect Against Unwarranted Exercise Of Jurisdiction Over Foreign Defendants.

Even beyond the significant protections built into the agency test, other principles ensure that few foreign defendants will be haled into court under the agency test for events occurring abroad based on ownership of a U.S. subsidiary.

First, *forum non conveniens* enables a court to dismiss a suit, even where jurisdiction and venue requirements are met, "on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). Federal courts frequently invoke *forum non conveniens* in declining to exercise jurisdiction over a foreign defendant, including large international corporations. *See, e.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 202 (2d Cir. 1987) (affirming dismissal of tort suit arising out of industrial accident in India when Indian courts provided a "reasonably adequate alternative forum"); *Fagan v. Deutsche Bundesbank*,

438 F. Supp. 2d 376, 384 (S.D.N.Y. 2006) (same, for a defamation suit arising out of statements made in Germany to a German newspaper). Thus, even if courts could exercise general jurisdiction over the European patent dispute or Asian products liability case, Pet. 25, courts often would abstain from exercising jurisdiction in such cases under *forum non conveniens* principles.

Second, courts have declined to exercise jurisdiction out of concerns for international comity – that is, respect for the laws and interests of another sovereign. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-20 (1993) (Scalia, J., dissenting). For example, in the antitrust context, several courts of appeals have "tempered the extraterritorial application of the Sherman Act with considerations of 'international comity.'" *Id.* at 817 (citing five cases from four circuits); *cf. also Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 65 (S.D. Tex. 1994) (dismissing a suit brought by Ecuadoreans regarding an environmental disaster in Ecuador for comity and *forum non conveniens* reasons).

Third, some U.S. courts have recognized the customary international law doctrine of the exhaustion of local remedies. Under that principle, plaintiffs generally "must have exhausted any remedies available in the domestic legal system" before bringing suit in the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Thus, if a foreign plaintiff sues a foreign defendant for breach of a contract executed in another country,

the exhaustion doctrine could enable an American court to dismiss the suit even if it found general jurisdiction over the defendant.[8]

C. The Agency Test Has Been In Place For Decades Without Triggering The Dire Consequences Predicted By Petitioner.

Given all these limitations, petitioner has no basis for its predictions that courts within the Ninth Circuit will soon be exercising jurisdiction over "an intellectual property dispute regarding infringement of a European patent in Europe, a dispute involving a contract made and performed in Australia, or a products-liability claim arising out of an accident in Asia." Pet. 25. Moreover, petitioner's need to construct its parade of horribles from hypotheticals is itself telling. Courts in the Second and Ninth Circuits have applied the agency test for many years. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419-20 (9th Cir. 1977). Yet, petitioner has not pointed to a single other *actual* case illustrating what it insists is an inevitable jurisdictional disaster.

In fact, by respondents' count, only a handful of more than seventy district court cases in the Second Circuit citing *Wiwa* and considering an agency argument have found general jurisdiction over a

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[8] The lower courts have yet to determine whether any of these doctrines preclude the litigation in this case, another reason why interlocutory review is premature.

foreign company. At the same time, courts within the Ninth Circuit regularly dismiss suits against foreign defendants for lack of personal jurisdiction. *See, e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (9th Cir. 2001); *Dougherty v. Lincare, Inc.*, No. CV10-0978 PHX DGC, 2010 U.S. Dist. LEXIS 83993, at *8-9 (D. Ariz. Aug. 13, 2010); *Cargnani v. Pewag Austria G.m.b.H.*, No. CIV. S-05-0133 WBS JFM, 2007 U.S. Dist. LEXIS 8210, at *20-23 (E.D. Cal. Feb. 2, 2007); *Amirhour v. Marriott Int'l, Inc.*, No. C 06-01676 WHA, 2006 U.S. Dist. LEXIS 100290, at *5-8 (N.D. Cal. Dec. 4, 2006).

The dissent from the denial of rehearing en banc suggested that this may change because, in its view, the panel below "drastically expand[ed] our test for personal jurisdiction." Pet. App. 137a. There is no basis for that claim. *See id.* 20a-23a & n.12. And in fact, since the decision in this case, district courts have continued to decline to exercise general jurisdiction over foreign parent corporations under the agency test. *See Troll Busters LLC v. Roche Diagnostics GmbH*, No. 11cv56-IEG(WMc), 2011 U.S. Dist. LEXIS 98441, at *40-43 (S.D. Cal. Aug. 31, 2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07–1827 SI, 2011 U.S. Dist. LEXIS 96739, at *9-20 (N.D. Cal. Aug. 29, 2011); *Bixby v. KBR, Inc.*, 3:09-CV-632-PK, 2011 U.S. Dist. LEXIS 79156, at *15-18 (D. Or. June 16, 2011). But in any event, should the en banc dissenters' predictions of expanded exercise of jurisdiction come to pass, this Court will have ample opportunity to grant review in a later case.

IV. The Decision Below Is Correct.

Finally, certiorari is not warranted because the court of appeals correctly determined that exercising general jurisdiction over petitioner is consistent with the Due Process Clause.

The Ninth Circuit, like all courts, begins its jurisdictional inquiry with a presumption of corporate separateness. Thus, as a general matter, the mere "existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001). At the same time, the Ninth Circuit has correctly discerned that it sometimes comports with "traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S 310, 316 (1945) (quotation marks omitted), to exercise jurisdiction over a foreign parent when it has the right to control a wholly owned subsidiary, operating in the forum state solely for the benefit of the parent company. And the court correctly decided that such jurisdiction was appropriate on the particular facts of this case.

A. The District Court's Exercise Of General Personal Jurisdiction Over Petitioner Comports With Traditional Notions Of Fair Play And Substantial Justice.

1. Under this Court's "canonical opinion" in *International Shoe*,[9] the Due Process Clause permits a court to exercise jurisdiction over an out-of-state corporation if it "ha[s] certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" 326 U.S. at 316. "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined *in each case*." *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (emphasis added).

When a company has "continuous and systematic general business contacts" in a forum state, it is reasonable for the state to exercise general jurisdiction over it, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), because that the corporation has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (quoting

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[9] *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846, 2853 (2011).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

2. Under these precedents, the Ninth Circuit correctly held that in some circumstances, a company may create sufficient contacts with a forum state by forming and controlling a wholly owned subsidiary to conduct essential operations in the state entirely for the benefit of the parent corporation.

When a foreign company establishes a permanent *subdivision* within a foreign state – a sales office, for example – it is uncontroversial that the foreign company's contacts are "sufficiently continuous and systematic" to justify general jurisdiction, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011). The Constitution does not demand that states recognize the formal division of operations within a corporation for purposes of personal jurisdiction. However the company chooses to organize its operations, it nonetheless has purposely availed itself of the benefits and protections of the state, including its laws and economic markets. It would be entirely unfair to allow the company to enjoy those benefits without accepting the concomitant responsibility of submitting to the jurisdiction of the state's courts.

Moreover, even petitioner acknowledges that the greater separation entailed by turning the subdivision into a wholly owned subsidiary does not inevitably strip a state of its authority to exercise jurisdiction over the parent. Petitioner admits that the Due Process Clause permits a state to ignore this formal division when the foreign parent company and its in-state subsidiary are "the same entity," such that the two are alter egos. Pet. 13-14. While the

two entities may be legally distinct for other purposes, because the distinction has no relevance for the purposes of the Due Process Clause, states are not bound by any principles of "corporate separateness" to forgo jurisdiction. *Id.* 9.

Those same constitutional purposes permit a court to exercise jurisdiction when a company conducts an essential part of its business in the state through a wholly owned subsidiary over which it retains pervasive authority. In this case, petitioner sent a wholly owned subsidiary to California to conduct business on its behalf. The subsidiary was owned entirely by petitioner; it operated only for the benefit of petitioner; and petitioner had the pervasive right to control its subsidiary's operations. For all practical – and constitutional – purposes, the subsidiary operated no differently than would a subdivision. Any separation between parent and subsidiary was purely formal. And as a result, petitioner, through its subsidiary, maintained "continuous and systematic general business contacts," *Helicopteros*, 466 U.S. at 416, that make exercise of jurisdiction over it entirely fair. Indeed, DCAG persistently reaped significant benefits and protections from California's laws, including bringing suit in its courts and making billions of dollars of sales in that state alone. *See supra* III.A.

B. The Due Process Clause Does Not Enshrine The Alter Ego Test As The Only Permissible Standard For Exercising General Jurisdiction Over A Parent Corporation.

Petitioner nevertheless asserts that the alter ego standard is the only constitutionally permissible means of establishing general jurisdiction over a parent corporation based on the contacts of a subsidiary. This argument has no basis in this Court's precedent and does not accurately reflect the concerns of fair play and substantial justice underlying this Court's personal jurisdiction jurisprudence.

1. As an initial matter, petitioner's suggestion that *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), adopted the alter ego test under the Due Process Clause is unfounded. *See* Pet. 20-21. First, *Cannon* was decided as a matter of federal common law, not constitutional law. Because Congress had not yet enacted any statute or rule of civil procedure governing personal jurisdiction in federal court, this Court was required to develop a rule as a matter of federal common law. 1 BLUMBERG ON CORPORATE GROUPS § 24.01, at 24-4 (2d ed. 2012) (BLUMBERG). The Court went out of its way to explain that in doing so it was not addressing any "question of the constitutional powers of the State, or of the federal Government." *Cannon*, 267 U.S. at 336. In fact, this Court has never referenced *Cannon* as relevant authority in its discussion of due process limitations to personal jurisdiction in *International Shoe* and its progeny.

Second, and in any event, *Cannon* did not adopt the alter ego test petitioner advances. The only question presented in the case was "whether the corporate separation carefully maintained *must be ignored* in determining the exercise of jurisdiction," 267 U.S. at 336 (emphasis added). The Court held that the answer was "no": the "use of a subsidiary *does not necessarily* subject the parent corporation" to general jurisdiction. *Id*. (emphasis added). It did not hold that use of a subsidiary may *never* subject a parent corporation to general jurisdiction in a forum state, much less establish that principle as a matter of constitutional law.[10]

2. It would be surprising if the alter ego test – a creature of state law developed for a very different purpose – by happenstance also dictated the constitutional outer limits of general jurisdiction under the Due Process Clause.

The policies underlying the alter ego test are quite different from the concerns underpinning this Court's personal jurisdiction decisions. The alter ego concept was developed in the context of corporate veil-piercing as an equitable doctrine focused on

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[10] Indeed, if anything, the Court's decision suggests that the Constitution would permit a broader rule than the one the Court adopted as a matter of federal common law. The Court noted that "Congress has not provided that a corporation of one state shall be amenable to suit in the federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein." *Cannon*, 267 U.S. at 366. That observation would have been entirely irrelevant if the Court believed that such a statute would have been prohibited by the Due Process Clause.

defeating fraudulent corporate activity. *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (2011) (PRESSER); BLUMBERG 10.02[B], at 10-6. Personal jurisdiction law, on the other hand, is rooted in the principle that corporations enjoying the benefits and protections of a state's laws must, in all fairness, also submit to its general jurisdiction. *Int'l Shoe*, 326 U.S. at 319.

3. Nor, in any event, is the alter ego test petitioner advances so firmly ingrained in the law that it provides the only constitutional means of construing the relationship between members of a corporate family. To the contrary, as one leading scholar has noted, "the law has developed a variety of doctrines supporting the attribution of the legal consequences" of a subsidiary's act to the parent. BLUMBERG § 10.01, at 10-4; *see, e.g.*, PRESSER § 3:17 (noting that courts have held that corporate parents may be liable for the copyright violations of their subsidiaries, even absent an alter ego relationship); *id*. § 3:21 (same under Comprehensive Environmental Response, Compensation, and Liability Act); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) (applying, under the WARN Act, an "integrated enterprise test" derived from the National Labor Relations Act that "is demonstrably easier on plaintiffs than traditional veil piercing"); *Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 5 (1st Cir. 2006) (same for Family and Medical Leave Act); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361-62 (10th Cir. 1993) (same for Title VII and Age Discrimination in Employment Act).

4. Finally, as Judge Posner has observed, a narrow alter ego approach would unfairly allow a

corporation (including a U.S. corporation) to "insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 541 (7th Cir. 1998). While the Due Process Clause protects corporations from unfair and unexpected exercises of jurisdiction, it was not enacted to facilitate evasion of responsibility for unlawful conduct in fora in which the corporation otherwise takes full advantage of the state's laws and legal system.

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In the end, restricting jurisdiction to cases that satisfy the alter ego test fails to honor either this Court's repeated admonition that the Due Process test for personal jurisdiction "cannot be simply mechanical or quantitative," *Int'l Shoe*, 326 U.S at 319, or the underlying search for fairness that the Due Process Clause demands. While Congress and the states are free to adopt the alter ego rule as a matter of legislative policy, the Constitution does not command it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Terrence P. Collingsworth
Counsel of Record
Christian Levesque
Rachel Sheridan
CONRAD & SCHERER, LLP
1156 15th Street NW
Suite 502
Washington, DC 20005
(202) 543-5811
tc@conradscherer.com

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