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 OF *AMICA CURIAE* PROFESSOR LEA BRILMAYER SUPPORTING PETITIONER

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INTEREST OF *AMICA CURIAE*[1]

Professor Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. In almost forty years of law teaching, she has taught either as permanent or visiting faculty at Columbia Law School, the University of Texas Law School, the University of

[1] Pursuant to this Court's Rule 37.6, *amica* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amica* and her counsel made such a monetary contribution. Petitioner's and respondents' letters consenting to the filing of all *amicus* briefs are on file with the Clerk's office.

Chicago Law School, Harvard Law School, New York University Law School, Michigan Law School, as well as Yale. She has taught the law of personal jurisdiction dozens of times, as part of courses on Conflict of Laws and Civil Procedure.

Professor Brilmayer is probably America's most widely cited contemporary scholar writing on personal jurisdiction. She has also carved out this country's most distinctive voice on choice of law and federal extraterritoriality. Her interest in the problem of "veil piercing" in the personal-jurisdiction context is predominantly academic, and she works for greater clarity and intellectual integrity for the role of the Due Process Clause in accommodating both plaintiffs and defendants within our federal system of adjudication. But her interest is also practical. She acted as lead counsel for the respondent in *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and she works with a keen awareness of the importance of these conceptual doctrines for individual and corporate plaintiffs and defendants whose lives and financial interests depend on the smooth functioning and predictability of the American judicial system.

This Court has relied on Professor Brilmayer's numerous articles on the subject in a number of major general-jurisdiction cases. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851, 2854, 2857 (2011) (relying upon Brilmayer et al., A General Look at General Jurisdiction, 66 Tex. L. Rev. 721 (1988), and Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1 (1986)); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.9 (1984) (citing Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80-81).

SUMMARY OF ARGUMENT

While vocally professing allegiance to the standards for general jurisdiction that this Court has developed with consistency and care over the last half-century, the Ninth Circuit quietly disregarded those standards at key junctures. Most importantly, its unprecedented and illogical extension of the concept of "agency" caused its departure from established law. By relying on its inflated agency theory, the Ninth Circuit circumvented this Court's requirement that jurisdiction must be proven as to *each defendant*. To do otherwise—to assert jurisdiction over one defendant based on the forum contacts of a *different* defendant or even a non-party—the Court must be confident that the two are sufficiently fused to satisfy alter-ego or merger requirements. There is no justification for permitting courts to treat two entities as identical in jurisdictional contexts because of a purported "agency" relationship if that relationship would not justify treating the two entities alike in other contexts, such as shared legal responsibility for alleged wrongs.

If affirmed by this Court, the Ninth Circuit's approach would remake the law of general jurisdiction, providing plaintiffs with almost unlimited opportunities to sue defendants with few, if any, connections to the forum. The Ninth Circuit's justification included expanding jurisdiction to accommodate what it considered to be contemporary conditions of transportation and communication. But this Court has expressly rejected that exact line of reasoning as inconsistent with the Due Process "minimum contacts" standard. This Court has also emphasized predictability, a value that would be sacrificed by the Ninth Circuit's "enlightened" approach. The only "predictable" result of that approach would be an unprecedented but almost random expansion of general jurisdiction.

ARGUMENT

This Court has reiterated that jurisdiction requires a showing of minimum contacts. More than fifty years of general-jurisdiction cases has generated a fairly simple and relatively stable approach that includes listing the dispute's contacts with the forum; determining which of these contacts are attributable to the defendant; and then comparing the resulting list to important general-jurisdiction precedents. The Ninth Circuit's opinion fails at all three of these, most particularly the second. Attribution is not an *ad hoc* process of searching for excuses to count against the defendant events for which it bore no substantive responsibility. It is the principled application of pre-existing substantive rules, such as corporate-veil piercing and liability of principals for the actions of agents. For these reasons, the Ninth Circuit's approach contravenes this Court's precedents and the jurisdictional values of the Due Process Clause. It should be reversed.

A. Because the Ninth Circuit found general jurisdiction without satisfying a "merger" or "alter ego" standard, it departed from what due process permits

Even the Ninth Circuit recognized that petitioner (Daimler) and its subsidiary (MBUSA) were distinct entities, with contractual relationships binding them, Pet. App. 8a-15a, and that it would be improper to subject one to liability for the deeds of the other, *id.* at 21a-22a & n.12. It should have ended its inquiry there, because unless the two entities were sufficiently united to share responsibility, they could not be sufficiently united to share forum contacts.

1. The Ninth Circuit did not dispute that a court asserting jurisdiction over a defendant must, among other

things,[2] ascertain which contacts with the forum are attributable to that defendant. Pet. App. 20a. Ordinarily, there is no serious difficulty about determining which party is responsible for the various forum contacts; the responsible party will have directly engaged in the conduct that led to the forum contacts.

There are, however, various forms of vicarious liability in American law—agency law, conspiracy law, certain rules of corporate law ("piercing the corporate veil"), and others. Is the principal responsible for the actions of the agent (or vice versa)? Is an employer responsible when one employee injures another? Are parents responsible for injuries caused by their children? Are co-conspirators liable for each others' torts or crimes? Is a parent corporation or a stockholder responsible for the delicts of a wholly owned subsidiary (or the other way around)? Each question requires further inquiry as to when and to what extent any vicarious liability applies. Rules answering these questions, in the affirmative in certain circumstances, spread legal responsibility more broadly than simply placing it on the party whose hands were most immediately touching the problem.

Generally speaking, these rules fall into two categories. An act by one party might be "attributed" to another party if there is a substantive rule that distributed legal responsibility between the two of them for *that specific act*. This theory, which no one contends plays any role in this case, Pet. App. 20a, applies to specific jurisdiction, for where the cause of action arises in the forum, only a small number of forum contacts need to have occurred. The plaintiff can sue either or both of the defendants, as he chooses; the primary defendant because he was "hands on" responsible, and the secondary defendant

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[2] See Part B, *infra*, for a discussion of the additional steps that are required for asserting jurisdiction over a defendant.

because of the contribution he made through his relationship with the first defendant.

This case, however, turns on general jurisdiction. The appropriate concept here is "merger." With general jurisdiction, defendants are expected to defend in the forum on *any* cause of action whatsoever; the identification between the two ostensibly differently individuals is complete, not event-specific as with attribution. For this to happen, the connection between the two defendants must be very close—almost a wholesale fusion of the two. With the two defendants so close that one is "a mere instrumentality," or "an alter ego," of the other, it follows that whatever contacts one defendant has with the forum automatically can be charged against the other defendant as well. They are not, in fact, two separate corporations, but one.

In essence, respondents seek to make that argument in this case. They claim that Daimler and MBUSA are tied so closely together that any contacts between MBUSA and California are automatically chargeable to Daimler. There is at least some general agreement on this abstract point. The Ninth Circuit, Daimler, and respondents all recognize that where defendants are extremely close, they might in fact count as only a single entity.

The point of difference, however, is important: What standard should be used to determine whether the two defendants are "close enough"? There are two choices. Either the court employs the same preexisting standard as would be used to answer that question as a matter of domestic law in any other context, or the court creates a new standard to decide whether "jurisdictional veil piercing" is permissible even if it would be impermissible in all other situations. The first choice—requiring consistency in all contexts—is the only one that avoids serious negative consequences to this Court's precedents or to com-

mon sense.

2. Respondents here, or any party seeking to deviate from the common-sense proposition that the standards should be the same, must satisfy a heavy burden of persuasion: Why, in a given situation, is it proper to attribute jurisdictional contacts from one entity to another, despite no substantive rule of law that allows attributing responsibility based on the *same relationship*? Decoupling "jurisdictional" contacts from "responsibility" contacts ultimately generates incoherence. After all, it is the substantive law that creates the justification for imposing a burden on an individual in the first place; until the state adopts a substantive law that distributes responsibility, no plaintiff has any basis for recovery *against anyone*. What makes vicarious responsibility possible at all is the very web of substantive legal rules that prescribe the attribution of responsibility discussed above.[3]

Rules for piercing the corporate veil or for merging two corporations in the jurisdictional setting are justified by, and should reflect, the same policies as the rules for piercing the corporate veil or for merging two corporations in the non-jurisdictional setting. The substantive point in both contexts is the same—it is to allow distinct entities to be treated separately unless they are *not actually separate*. See Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1, 12, 14 (1986). Properly understood, changing the veil-piercing standard

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[3] A state could, conceivably, spread responsibility so far and in such an attenuated fashion that its substantive laws would violate the Due Process Clause. That limitation would, under the approach described here, be coterminous with due-process limitations on attributing jurisdictional contacts. Thus, while there should never be a case in which two entities are identical for liability but not jurisdictional purposes, there is an outer boundary beyond which state law may not pass.

as part of the jurisdictional inquiry amounts to judicial subversion of the substantive law of a state.

For example, in *Rush* v. *Savchuk*, Savchuk, who had been injured in Indiana in an accident while Rush was driving, wished to sue in Minnesota, a forum which (unlike Indiana) would not bar his claim. 444 U.S. 320, 322, 325 n.8 (1980). Rush had no connection to Minnesota to support *in personam* jurisdiction. *Id.* at 322, 327. Savchuk therefore proposed a jurisdictional theory closely analogous to the Ninth Circuit's here—that he could sue Rush in Minnesota because Rush's insurance company did business, and was subject to suit, in Minnesota. *Id.* at 322-324, 326, 328, 330. In short, as to jurisdiction, Savchuk proposed in effect simply to ignore Rush, the *actual defendant,* and look to the contacts of an insurance company which had contracted with Rush in Indiana, and which merely happened to do unrelated business in Minnesota.

This Court rejected the argument that courts could proceed without showing that Rush had sufficient forum contacts *of his own*.[4] In so doing, it rejected Savchuk's proposal to rewrite the substantive law that made the individual defendant the real party in interest. Accordingly, this Court refused in *Rush* to allow attribution, using reasoning that is directly relevant to this case. The Court expressly rejected the Minnesota courts'

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[4] "[I]t is unlikely," the Court dryly noted, "that [Rush] would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move. In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, merely because his insurer does business there." *Rush*, 444 U.S. at 329 (citations omitted).

> attemp[t] to attribute State Farm's contacts to Rush by considering the 'defending parties' together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the *assertion of jurisdiction over Rush based solely on the activities of State Farm*. Such a result is *plainly unconstitutional*.

Rush, 444 U.S. at 331-332 (emphases added). As discussed in greater detail below, the guiding principle is that "[t]he requirements of *International Shoe* * * * must be met as to *each defendant* over whom a state court exercises jurisdiction." *Id.* at 332 (emphasis added).

Admittedly, there are those who believe that formal corporate boundaries are mere nuisances to be brushed aside when inconvenient—just as there are those who regard alleged tortfeasors like Rush as merely "nominal defendants." Cf. *Savchuk*, 444 U.S. at 330 (rejecting that characterization). To those holding either view, requiring individual defendants even to be part of the case, let alone requiring their own minimum contacts with the forum, may seem like foolish policies. But they are the policies that the state's own legislature adopted, and it is not for the local federal courts to undercut those policies *sub silentio* under the guise of altering the law of personal jurisdiction.

3. Absent a specific-jurisdictional basis, therefore, nothing short of the "merger" or "alter ego" standard can satisfy the Due Process Clause's requirement that jurisdiction over each defendant be shown individually. See Part B.1, *infra* (further discussing this Court's refusal to permit aggregation of contacts). Thus, unless Daimler and MBUSA are essentially identical, sufficient contacts with the forum must be shown *for Daimler*, and not simply for MBUSA.

But even the Ninth Circuit cannot realistically contend that Daimler and MBUSA are identical. That court was well aware of the differences between the novel attribution rule it was proposing for jurisdictional purposes and the familiar domestic substantive law of attribution. It openly acknowledged that, under conventional domestic law of agency and corporations, Daimler would not be held responsible along with MBUSA; nor would corporate law, under these circumstances, allow the plaintiffs to "pierce the corporate veil." Pet. App. 21a-22a & n.12 (discussing law of agency and observing that the "alter ego" test is not satisfied).

This should be enough to resolve this case, and the Ninth Circuit's decision to proceed further on the dubious pathway described below is reason enough to reverse. This Court has a clear choice. It can follow its own carefully developed precedents, or it can adopt the Ninth Circuit's new standard. Because those precedents are consistent with due process, and the Ninth Circuit's test is not, the Court should reverse the judgment below.

B. Personal jurisdiction should turn on actual forum contacts for which defendants are responsible

Although the most expedient resolution of the case is described in Part A, *supra*, the failings and negative consequences of the Ninth Circuit's decision are far more extensive. The rest of this brief shows how that opinion is flawed from the vantage point of well-established law.

1. *To establish general jurisdiction, plaintiffs must show "continuous and systematic" contacts between* each defendant *and the forum*

The Court of Appeals introduced its discussion of personal jurisdiction with the conventional distinction between general and specific jurisdiction, acknowledging that "when the cause of action does not arise out of or re-

late to the foreign corporation's activities in the forum State, the State is exercising general jurisdiction over the defendant." Pet. App. 19a-20a (internal quotation marks and citation omitted). Indeed, "plaintiffs press *only* general jurisdiction over [Daimler]." *Id.* at 20a (emphasis added). That is unsurprising, given that the cause of action had arisen in Argentina and the facts have no apparent bearing on anything that ever happened in California. See Pet. App. 2a-4a. In this case, therefore, either there is general jurisdiction, or no jurisdiction at all.

Establishing general jurisdiction requires a substantial effort. This Court has repeatedly held that the Due Process Clause requires a showing of "continuous and systematic" contacts between the defendant and the forum. The "continuous and systematic" test for assertion of general jurisdiction is generally ascribed to *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 438, 445 (1952). Although formulated six decades ago, the *Perkins* standard remains authoritative. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2856-57 (2011); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415-416 (1984).

The court below applied the "continuous and systematic" test to the relationship that California had with MBUSA, holding the standard satisfied. Pet. App. 20a-21a. But MBUSA was not even a party. The Ninth Circuit's test left the *actual defendant* unaccounted for. It was not MBUSA, but Daimler, that the plaintiffs wanted to sue.

This deficiency should be fatal, because this Court mandates that contacts be shown for *every defendant* over whom jurisdiction is sought. As noted above, *Rush* v. *Savchuck* removed all doubts: "The requirements of *International Shoe* * * * must be met as to each defendant over whom a state court exercises jurisdiction." 444 U.S. at 332.

Several years later, the Court spoke even more directly to cases, like this one, raising questions about corporate structure: "[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary," because "[e]ach [corporation's] contacts with the forum State must be assessed individually." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). This principle follows directly from Justice Brandeis's opinion for the Court in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, which made clear that maintaining corporate formalities between a parent and a subsidiary prevents automatic attribution of the subsidiary's forum contacts to the parent, even when the parent exercises far more control, and even domination, of the subsidiary than has been alleged here. 267 U.S. 333, 336-337 (1925).

It was therefore incumbent on plaintiffs, and the Ninth Circuit, to show sufficient contacts with California for Daimler, and not simply for MBUSA. But there are almost *no* contacts tying Daimler to California. The Ninth Circuit evaded the consequence of that lacuna by devising an entirely different approach. Focusing on the relationship between Daimler and MBUSA (rather than Daimler and California), the panel below held that *MBUSA's* contacts with California were sufficient to establish general jurisdiction, and that MBUSA's contacts could be attributed to Daimler. Accordingly, as if by transitive logic that no one could refute, the court of appeals held that MBUSA's contacts were sufficient to establish general jurisdiction over Daimler on an "agency" theory. Pet. App. 3a, 23a.

2. *The court below relied on dubious definitions and assumptions about agency to subject Daimler to general jurisdiction*

The Ninth Circuit was not swayed by the fact that Daimler and MBUSA had scrupulously maintained all

corporate law formalities necessary to ensure MBUSA's independent legal status. It simply declared there to be an "agency" relationship that short-circuited the need for further analysis. But its "agency" theory relied upon a series of dubious assumptions, including a novel definition of "agency" centered on the "importance" of the services that the "agent" performs. As shown below, each link in the entire chain of reasoning, from start to finish, is inconsistent with the Due Process safeguards that this Court has recognized as protecting defendants from having to litigate in forums with which they have no minimum contacts.

a. The Ninth Circuit's definitions of "agency," "control," and the "importance" of services provided, are unprecedented and illogical

The Ninth Circuit's definition of "agency" is highly counterintuitive from the outset. A subsidiary such as MBUSA, it explained, could count as an "agent" for jurisdictional purposes when it performed "important" services. Pet. App. 22a. Services were "important," in turn, if (should the agent become unable to provide them) a substitute source would have to be found or the principal would provide them itself. *Ibid.*[5]

It is not at all clear what, if anything, the "importance" of the services provided should have to do with the question of whether or not an "agency" relationship exists. The term "agency" is not usually defined by substantive criteria about the significance of the stakes. Surely principal/agent relationships can exist where the stakes are relatively trivial—just as there might be no agency rela-

[5] "For the agency test, we ask: Are the services provided by MBUSA 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?" Pet. App. 22a.

tionship in a dispute where the stakes are large. In any event, this approach to agency finds no support in this Court's personal jurisdiction jurisprudence.

After all, whenever this "test" is invoked, it is likely to generate a pro-jurisdiction outcome. It is difficult to conceive what, if anything, this definition of agency excludes. If a service was cost-effective enough to have been arranged in the first place, why *wouldn't* Daimler want to either establish in-house capacity or else hire a replacement? And what possible light could these questions shine on the existence of Daimler's supposed "continuous and systematic" activities in California? More generally, it is difficult to see why the "importance" of the subsidiary's duties under its arrangement with the parent would show anything at all about whether the parent was present in California.

The Ninth Circuit listed a second criterion for the agency test—the element of control. Pet. App. 22a-23a, 26a-30a. The opinion made quite clear that "control" was secondary. "[W]hen we consider control here," it wrote, "it is as part of a test that primarily considers whether the services are of 'sufficient importance.'" *Id.* at 28a. "[T]he principal focus of our agency test for purposes of personal jurisdiction is the importance of the services provided to the parent corporation." *Id.* at 26a.

The control that the Ninth Circuit required was insubstantial and as illusory as its "importance" requirement. The court expressly stated that the level of control required to subject a parent to general jurisdiction was far less than that required for the "alter ego" theory of personal jurisdiction. Pet. App. 22a & n.12. In addition, the principal did not have to *actually exercise control*, or even be *in a position* to do so; it was enough that the parties recognized that the principal had a theoretical right to control the agent. Pet. App. 26a-29a.

The opinion also stated clearly that the "control" that in theory had to exist could come from a *contract* rather than from the corporate-law relationship of parent to subsidiary.[6] It announced that

> whether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant. Independent contractors may be considered representatives, and contracting with an independent contractor to achieve the same end—distributing cars in the United States—means, in practice, obtaining a representative to undertake substantially similar services.

Pet. App. 25a (internal quotations omitted). In other words, the evidence of "control" necessary to satisfy the requirement can be nothing more than *standard contractual obligations*—merely the supposed "agent's" obligation to perform under a contract.[7]

b. The Ninth Circuit's "agency" approach cannot square with this Court's precedents

This Court addressed a version of this problem in *Helicopteros*. The defendant, "Helicol," was a Colombia corporation that provided helicopters for oil and con-

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[6] The Ninth Circuit does not justify substituting a *contractual* relationship when the issue of *agency* is ostensibly comparable to the corporate-law question of piercing the corporate veil.

[7] The consequences of even this step in the Ninth Circuit's analysis are remarkable. Because contract partners as well as corporate affiliates can qualify as "agents" under the Ninth Circuit's definition, jurisdiction over the defendant would be permitted not only where the *defendant's* subsidiaries are subject to general jurisdiction, but also where some of its suppliers and other contract partners are subject to general jurisdiction. The problem cascades—each of *those* "agents" has "agents" of its own. Every time that Daimler—or anyone else—takes on a new contract partner, it would risk unintentionally subjecting itself to general jurisdiction, perhaps in many states, without any ability to order its affairs to preclude that result.

struction companies. It had signed a contract with Consorcio, a Peruvian company, and Consorcio's Texas alter-ego, WSH, for helicopter services in Peru. The cause of action arose out of a crash in Peru, and the question was Helicol's amenability to suit in Texas. 466 U.S. at 409-413.

If the Ninth Circuit's reasoning below was correct, then a central issue in *Helicopteros* should have been the attribution to Helicol of the Texas connections of WSH and Consorcio. Both WSH and Consorcio would have been subject to general jurisdiction in Texas, because the headquarters of WSH was in Houston and Consorcio was not merely a parent, but WSH's "alter ego." 466 U.S. at 410. Under the Ninth Circuit's analysis, Helicol had "control" of an entity that was unquestionably subject to general jurisdiction in Texas, whose responsibilities were undeniably "important." The combination of the contractual relationship between Helicol and Consorcio/WSH with the fact that the latter joint venture was subject to general jurisdiction in Texas would have provided the plaintiffs in *Helicopteros* with a strong argument for general jurisdiction in Texas over Helicol. No such argument seems even to have been made at any point in that case.

Nor would there have been any reason to make that argument. As illustrated in this case, none of these definitional requirements about "control" or "importance" ensure *any* connection—even the most minimal—between Daimler and the forum. For example, regarding the requirement of "control," the Ninth Circuit does not even state that the parent company must exercise control, or be able to exercise control, over the subsidiary's conduct *in California*. To the extent that any control is required, that control can be located *anywhere*. Similarly, requiring that the subsidiary provide "important" services does not, by itself, constitute a contact with Cali-

fornia, because the "important services" that the subsidiary supposedly provides need not be provided in California. So far as the Ninth Circuit's standard goes, if the subsidiary is subject to general jurisdiction in the forum, then no other contacts with the forum need be shown; in particular, the parent corporation need not have done anything, provided any services (important or otherwise), given any instructions, or asserted any control *in the forum*. Thus, far from ensuring constitutionally required minimum contacts with the forum, the Ninth Circuit obviates the need for any link whatsoever between the defendant and the forum.

This Court has used "agency" reasoning to justify personal jurisdiction, as when a defendant has consented to specific jurisdiction by appointing an agent for service of process for suits relating to a particular transaction. See, *e.g.*, *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964) (discussing and upholding use of agency reasoning where agreement to appoint an agent for service of process was contained in the contract underlying the dispute).[8] A state may condition the use of its highways upon agreement to appoint the state's attorney general as agent for receipt of service of process for accidents arising out of that use. See *Hess* v. *Pawloski*, 274 U.S. 352 (1927); *Kane* v. *New Jersey*, 242 U.S. 160 (1916). But none of this Court's cases have used "agency" to impose *general* jurisdiction under circumstances remotely approaching this case's.

3. *The Ninth Circuit should have determined general jurisdiction by identifying forum contacts, assessing responsibility, and comparing the facts of the case to authoritative precedent*

The Ninth Circuit's logic is misguided and unworkable, but that does not negate the appeal of its decision in

[8] One could presumably consent to general jurisdiction as well.

one respect. Its focus on "agency" and "control" is at least partially motivated by the awareness that, in certain cases, more than one entity may be responsible for the occurrence of certain events, as noted above. See Part A, *supra*. There are numerous ways in which responsibility for the forum contacts is shared among the defendant and others. When the named defendant is at least in part responsible, the question arises whether that partial responsibility constitutes a sufficient reason to attribute to it the forum contacts.

The most straightforward and intuitively simple method for assessing the adequacy of contacts is the one most in keeping with existing precedent. It consists of only three steps. First, all of the connections with the forum (here, California) should be identified. Second, it should be ascertained which of these contacts are attributable to the defendant (here, Daimler). Third, it should be determined whether the contacts that *are* attributable to the defendant (Daimler) are sufficient to meet the "continuous and systematic" standard derived from foundational cases like *Perkins*, *Helicopteros*, *Goodyear*, and other general-jurisdiction precedents.

The second step is the key one in this case, and it was addressed in Part A, *supra*, because it could resolve the case standing alone. The first and third steps are not unique to cases like this one; they are, in fact, identical in almost all personal jurisdiction cases that this Court has decided over the last half century. Yet the Ninth Circuit did not even properly undertake those steps. It proceeded without evidence of forum contacts and ultimately found that jurisdiction exists because of a relationship between MBUSA and Daimler, rather than by reference to existing precedent.

The tell-tale sign that the Ninth Circuit strayed from this Court's precedents is its avoidance of the question of Daimler's contacts with California. Daimler undeniably

had structured its conduct so that there were not enough direct contacts between it and California to satisfy the "continuous and systematic" test.[9] This is hardly atypical or illegitimate, as this Court has long recognized.[10] The Ninth Circuit avoided this problematic fact by devising a test that has nothing to do with contacts between the forum and the defendant, instead merely taking into account some or all of the contacts that tied MBUSA to California. The court's method focuses wholly on directly comparing the two entities. Instead of basing jurisdiction on events occurring in the forum, its attention was largely preoccupied with listing rights and duties that MBUSA and Daimler *owed one another* under the contract. There are several reasons that this is problematic.

First, the court did not dispute that it was provided no evidence that these abstract rights and duties corresponded to actual occurrences; these were merely hypothetical rights and duties. The court suggested that in this context, what mattered was not what actually happened, but what *might have* happened.[11] As the court put it, with its own added emphasis, "the principal need not *exercise* control at all in order to preserve an agency re-

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[9] For example, the relationship between Daimler and MBUSA specified by contract that MBUSA would take title to the autos before they left Germany. Pet. App. 8a.

[10] See, *e.g.*, *Cannon*, 267 U.S. at 336 ("The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. * * * It preferred to employ a subsidiary corporation. 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.").

[11] *E.g.*, Pet. App. 27a ("A principal has control when it 'has the right to give interim instructions or directions to the agent once their relationship is established.").

lationship; the relevant inquiry, rather, is whether the principal has the *right* to control." Pet. App. 28a. Considering that numerous Supreme Court precedents frame the jurisdictional inquiry in terms of minimum contacts, this open lack of concern for identifying the events connecting the forum to the defendant is highly suspect from the outset.

Moreover, even if the contingencies mentioned in the contract did take place, there is no indication that any of them took place in California. The contract structured the relationship between MBUSA and Daimler for the entire United States, and the extensively quoted contract sections in the opinion, see Pet. App. 9a-15a, never specifically single out California. If more than almost nothing at all happened in California, it is not evident from anything in the Ninth Circuit's factual description.[12]

These two points come together in an important way. To determine general jurisdiction, a court needs to know (1) which events actually occurred and (2) that they occurred in the forum. Events occurring elsewhere, or events that may never have taken place at all, are no substitute. General jurisdiction depends on the mass, or quantum, of contacts between the forum and the defendant. If the court knows that a certain number of events took place under the contract in the U.S. as a whole, but does not know how many took place in California, then it *cannot* arrive at a sound conclusion about whether the "continuous and systematic" test was met. Conversely, if the events were all limited to California's territory, but it was not known how many were real and how many were simply abstract rights, it would also be impossible to say whether the "continuous and systematic" standard had been met. To answer that question, it must be known

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[12] The few connections that were adduced are listed in the opinion below at Pet. App. 31a-32a.

how many things had actually happened in California. And, tellingly, the Ninth Circuit has little to say on that score.

C. Contrary to this Court's oft-expressed due-process values, the Ninth Circuit's test generates a vast, unpredictable, but almost limitless expansion of general jurisdiction

If this Court were to adopt the Ninth Circuit's test, the resulting expansion in general jurisdiction would be unprecedented. Moreover, it would be impossible for any entity to say with confidence at any point *precisely where* it was subject to general jurisdiction. This prospect does not trouble the Ninth Circuit, but it contravenes the due-process values that this Court has repeatedly articulated.

1. *The Ninth Circuit's test presages a vast expansion of general jurisdiction*

The magnitude of the expansion of jurisdiction that would follow from the Ninth Circuit's judgment can be illustrated by considering a sample transaction. Hiring a law firm is one category of transactions that, under the Ninth Circuit's definition, must be classified as "important." The element of control is satisfied, as well. Clients undoubtedly have the legal right to be informed and to make their own decisions, and generally to assert control over their lawyers with respect to the matters for which the lawyers were retained.

Assume, then, that Daimler retains ABC, a typical large modern law firm; this most probably makes ABC an "agent" of Daimler, according to the Ninth Circuit's reasoning. As a "typical large modern law firm," ABC almost certainly does business (and is subject to general jurisdiction) in a number of states around the country. Under the Ninth Circuit's logic, the simple act of retaining ABC could immediately subject Daimler to general jurisdiction everywhere that ABC is subject to general

jurisdiction. It would not matter whether Daimler did any business of its own in any of the states where ABC was subject to suit, because jurisdiction would be based on ABC's contacts, imputed to Daimler via the "agency" relationship that supposedly connects Daimler to its legal service providers.

This approach would make it difficult or impossible to structure one's conduct and affairs so as to avoid subjection to general jurisdiction, which would become almost entirely unpredictable. Under the Ninth Circuit's reasoning, there is no way of knowing, when entering into a contract, what obligations to defend will follow. This is especially the case given that the other party will almost certainly continue to enter into new contracts, or may well engage in tortious conduct, after its contract with the defendant is already finalized.

Indeed, Daimler could not know where it will be required to defend even if it determined where its contractual partner has contacts. Just as Daimler would be subject under the Ninth Circuit's analysis to general jurisdiction in places where it had no contacts, so also would Daimler's agents already be subject to general jurisdiction in places where *they* had none. MBUSA, for example, has its own suppliers, contracting partners, and (perhaps) subsidiaries. Just as general jurisdiction over MBUSA would (under the judgment below) create general jurisdiction over Daimler, so also jurisdiction over MBUSA's contracting partners and subsidiaries—whoever they are—would give rise to jurisdiction over MBUSA. This cascading problem—what might be called "second generation" agents, or the agent of one's agent—illustrates that the uncertainty in the Ninth Circuit's analysis is both inherent and extreme. The closest it comes to certainty is the certainty that everyone is now subject to jurisdiction in far more places than ever previously imagined.

2. *The Ninth Circuit's test omits reference to this Court's basic due-process values*

The Ninth Circuit's indifference to the real-world implications of its method of determining jurisdiction—especially its vast but erratic expansion of jurisdiction—is inconsistent with this Court's longstanding due-process policies and values. Predictability continues to be central to this Court's jurisdictional due-process analysis. "'[T]he foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980)).

But if Daimler were subject to suit in California, based on the present facts, then it would likely be subject to suit in many other states, and presumably at numerous venues world-wide. Its only sensible assumption would be that it *is* subject to general jurisdiction everywhere—an assumption that defeats the entire point of requiring predictability. Short of giving up and submitting to global jurisdiction, Daimler would have no way of anticipating, and no way of preventing, widespread subjection to jurisdiction in fora with no substantive connection to the dispute.

The inherent unforseeability of the Ninth Circuit's approach is not that court's only departure from longstanding constitutional values. The Ninth Circuit placed extensive reliance on changing conditions of business and transportation, and the significance that these (supposedly) possessed for determinations of jurisdiction:

> In 1990, we held that "[i]n this era of fax machines and discount air travel, requiring the partnership to defend itself in California * * * would not be so un-

> reasonable as to violate due process." * * * Today, for better or for worse, we have moved past that era of fax machines to the current era of electronic-filing in which judges of this court must make a special request if we wish to receive the paper copy of some documents filed with our court. Now, in addition to discount airline travel, parties have the option of conducting video conferences with their clients, and can even, in some instances, conduct video depositions. These technological advances significantly lower the costs, financial and otherwise, of foreign corporations litigating cases in American courts.

Pet. App. 32a-33a (citation omitted).

The impact of changing technology on the due-process calculation of whether the defendant ought to be compelled to litigate in the plaintiff's chosen forum has been a perennial theme before this Court. As this Court first noted in 1957, "[i]n part this is attributable to the fundamental transformation of our national economy over the years." *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). It continued:

> [M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-223. Thus, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

But while the Court still acknowledges the impact of

these changes on the practicality of litigation, these concerns of convenience have been held to be subordinate to the sovereignty aspects of due process. As the Court wrote in *World Wide Volkswagen*, "[t]he limits imposed on state jurisdiction by the Due Process Clause" may well "have been substantially relaxed over the years," 444 U.S. at 292, but

> [n]evertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. * * * [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293. Of course, not everyone is convinced. The emphasis on convenience and practicality—and the impact of modern technology on both of these—persists in dissenting opinions[13] and in opinions from lower courts

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[13] See, *e.g.*, *Helicopteros*, 466 U.S. at 422 (Brennan, J., dissenting) ("The vast expansion of our national economy * * * provide[s] the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. * * * [O]ur economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.").

later reversed by this Court.[14] This Court's opinions, however, never have elevated "modern conditions of transportation and communication" above territorial sovereignty in the jurisdictional calculus. There is no reason that this should change.

CONCLUSION

For any number of reasons, as described above, the Court should reverse the Ninth Circuit's judgment.

Respectfully submitted.

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[14] See, *e.g.*, *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring in judgment) (noting the Supreme Court of New Jersey's "broad understanding of the scope of personal jurisdiction based on its view that '[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade'") (citation omitted).