No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to *general* personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—because it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities.

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gregory Grieco, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro de Belmonte, Hector Ratto, Eduardo Olasiregui, Richardo Martin Hoffman, Eduardo Estiville, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, and Alejandro Daer were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Daimler AG, formerly known as DaimlerChrysler AG, is an *Aktiengesellschaft* or German public stock company. It has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler AG (now known as Daimler AG) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 644 F.3d 909. Pet. App. 1a. The court of appeals' order denying rehearing and rehearing en banc, along with the opinion of eight judges dissenting from the denial of rehearing en banc, has not yet been published but is available at 2011 WL 5402020. Pet. App. 134a. A now-withdrawn opinion of the court of appeals is reported at 579 F.3d 1088. Pet. App. 46a. The court of appeals' order granting rehearing and withdrawing its earlier opinion is reported at 603 F.3d 1141. Pet. App. 146a. The opinions of the district court are available at 2007 WL 486389, Pet. App. 80a, and 2005 WL 3157472. Pet. App. 94a.

JURISDICTION

The court of appeals filed its opinion on May 18, 2011, and denied a timely petition for rehearing and rehearing en banc on November 9, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

The Ninth Circuit held that Daimler AG, a German company with no facilities or employees in the United States, is subject to general personal jurisdiction in California—and can therefore be sued in the State by foreign plaintiffs for alleged human-rights violations committed in a foreign country by a foreign corporate subsidiary acting to assist a foreign government—because Daimler AG has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. As recognized by the eight judges who dissented from the Ninth Circuit's refusal to rehear the case en banc, that holding "represents a breathtaking expansion of general personal jurisdiction" that is impossible to reconcile with the decisions of this Court or other circuits and that poses "a gratuitous threat to our nation's economy, foreign relations, and international comity." Pet. App. 145a (O'Scannlain, J., dissenting from denial of rehearing en banc). This Court's review is warranted to clarify the circumstances in which due process permits a court to exercise general personal jurisdiction over a foreign corporation based on a subsidiary's in-state conduct—a question that has produced at least three conflicting approaches among the circuits—and to ensure that all courts are uniformly enforcing the constitutionally mandated restrictions on the exercise of personal jurisdiction.

1. This Court has long recognized that the "Due Process Clause . . . operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum con-

tacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 414 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Where the requisite "minimum contacts" exist, the exercise of personal jurisdiction over the defendant must also be "reasonable[ ]" in light of factors such as "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

"[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. Where a cause of action does not arise out of a defendant's forum-state connections, a court may still be able to exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (internal quotation marks and alterations omitted). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business." *Id.* at 2853-54.

The personal-jurisdiction inquiry is generally the same whether a case is filed in state or federal court.

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

2. Respondents are 22 Argentine residents who allege that they, or their relatives, were subject to human-rights abuses in the 1970s while employed in Argentina by Mercedes-Benz Argentina, a subsidiary of Daimler AG's predecessor-in-interest. Pet. App. 2a-3a. According to respondents, Mercedes-Benz Argentina "collaborated with the Argentine government to kidnap, detain, torture, or kill [respondents] or their relatives during Argentina's military regime of 1976 to 1983, known as the 'Dirty War.'" *Id.* at 81a. Respondents filed suit against Daimler AG in the Northern District of California under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note. They also purported to bring claims "under the laws of California . . . and Argentina." First Amended Compl. ¶ 79, D.E. 11; *see also id.* ¶ 57(k).

Daimler AG is a German *Aktiengesellschaft*, or public stock company, that manufactures Mercedes-Benz vehicles in Germany; it does not own property, manufacture or sell products, or employ workers in the United States. Pet. App. 95a. Respondents nevertheless alleged that Daimler AG was subject to general personal jurisdiction in California because Mercedes-Benz USA LLC ("MBUSA"), an indirect subsidiary of Daimler AG that is incorporated in Delaware, distributes Daimler AG-manufactured vehicles to dealerships in California. *Id.* at 7a-8a. Pursuant to a General Distributor Agreement between the companies—which expressly disavows any agency relationship—MBUSA takes title to the vehi-

cles in Germany and then distributes them in California and other States pursuant to general policies established by Daimler AG. *Id.* at 8a-15a.

Respondents did not dispute that Daimler AG and MBUSA adhere to all the requirements of their separate corporate identities. *See* Pet. App. 114a ("Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]."). They instead asserted that Daimler AG was subject to general personal jurisdiction in California, and therefore could be sued on causes of action with no relationship to the State, because MBUSA was acting as Daimler AG's "agent" in California. *Id.* at 113a. In response, Daimler AG argued that Ninth Circuit authority recognizing "agency" as a basis for imputing a subsidiary's jurisdictional contacts to a parent corporation is inconsistent with this Court's precedent and that, in any event, MBUSA was not the agent of Daimler AG. *See*, *e.g.*, Reply Mem. in Support Mtn. to Dismiss at 6 n.2, D.E. 60.

After permitting "jurisdictional discovery . . . on whether an agency relationship exists between [Daimler AG] and MBUSA and the ability of [respondents] to pursue their claims in Germany . . . or Argentina," the district court dismissed respondents' complaint for lack of personal jurisdiction. Pet. App. 132a-33a; *see also id.* at 93a. The court concluded that MBUSA was not an "agent" of Daimler AG for purposes of personal jurisdiction because MBUSA's services were not "sufficiently important" to Daimler AG: "evidence that alternative automobile distribution channels were used by [Daimler AG] in the past and are currently used by Toyota show that distribution is not a task that but for the existence of the subsidiary, [Daimler AG] would have to undertake itself." *Id.* at 83a, 84a (internal quotation marks

omitted). The court also determined that the exercise of personal jurisdiction over Daimler AG would be constitutionally "unreasonable" because, among other reasons, "both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims." *Id.* at 85a.

3. The Ninth Circuit initially affirmed in a 2-1 decision, over a dissent by Judge Reinhardt. Pet. App. 61a. Relying on then-settled Ninth Circuit precedent, the court of appeals held that MBUSA was not Daimler AG's "agent" because respondents had "failed to make a prima facie showing that [Daimler AG] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler AG did not exercise "pervasive and continual control" over MBUSA. *Id.* at 58a.

Nine months later, however, the Ninth Circuit granted respondents' petition for rehearing (without permitting Daimler AG to respond) and vacated its opinion. Pet. App. 146a. The court of appeals initially set the case for reargument, but thereafter canceled the argument and issued a new opinion. *Id.* at 1a. That opinion, authored by Judge Reinhardt, reached the opposite conclusion and held that Daimler AG in fact was subject to general personal jurisdiction in California because MBUSA was its "agent." *Id.* at 3a.

The Ninth Circuit explained that, under its "controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." Pet. App. 21a. "The first test," the court stated, "is the 'alter ego' test," which is "predicated upon a showing

of parental *control* over the subsidiary." *Id.* "The second test . . . is the 'agency' test," which "is predicated upon a showing of the *special importance* of the services performed by the subsidiary." *Id.*

Because respondents had not alleged that MBUSA and Daimler AG were alter egos of each other, the Ninth Circuit turned to the agency test and applied a two-pronged standard for determining whether an agency relationship existed between the two corporations for purposes of personal jurisdiction. Pet. App. 21a-22a. In so doing, the court acknowledged that it was invoking a unique definition of "agency" that it applies only in the jurisdictional setting, and that it was "not examining the rules governing the test for vicarious liability, or for holding [Daimler AG] financially liable for the actions of MBUSA." *Id.* at 28a.

The Ninth Circuit first asked whether "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] 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. The court concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist." *Id.* at 25a.

The Ninth Circuit next inquired whether Daimler AG had the "right to control" MBUSA's operations. Pet. App. 26a. The court of appeals explained that "actual control was not necessary"—while acknowledging that there were "cases that might be read to require a more stringent showing of control."

Id. at 22a n.12, 27a. Relying primarily on a distribution agreement that gives Daimler AG contractual rights against MBUSA but leaves MBUSA in charge of its day-to-day operations, the court concluded that Daimler AG "had the right to substantially control MBUSA's activities." *Id.* at 30a.

Finally, the Ninth Circuit concluded that exercising jurisdiction over Daimler AG was reasonable. Pet. App. 43a. The court acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but stated that it "d[id] not agree" with those concerns. *Id.* at 34a. The court determined that neither Argentina nor Germany was an "adequate forum," crediting respondents' arguments that their claims would be time-barred in those jurisdictions and questioning the integrity of Argentina's judicial system. *Id.* at 38a, 40a; *see also id.* at 39a n.18. Moreover, according to the Ninth Circuit, *all* "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Id.* at 36a. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary of that defendant's corporate predecessor more than 30 years ago. *Id.* at 41a.

4. Daimler AG petitioned for rehearing and rehearing en banc. Despite this Court's intervening decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, the Ninth Circuit denied the petition, over a dissent authored by Judge O'Scannlain and joined by seven other judges. Pet. App. 135a. Judge O'Scannlain criticized the Ninth

Circuit for "plac[ing itself] at odds again with the dictates of the Supreme Court"; "perpetuat[ing] a split with at least six of [its] sister circuits"; and "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal systems.'" *Id.* at 136a, 141a (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," as well as on "our nation's economy," by, for example, inducing foreign countries to "enact[ ] retaliatory jurisdictional laws" to reach American corporations with foreign subsidiaries. *Id.* at 144a, 145a (internal quotation marks omitted). The court's "holding," Judge O'Scannlain declared, "is an affront to due process." *Id.* at 135a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision vastly expands the circumstances in which general personal jurisdiction can be exercised over a foreign corporation based solely on the forum-state contacts of a corporate subsidiary. In so doing, the decision deepens an already longstanding split among the circuits, which have adopted at least three different tests for determining whether due process permits a court to exercise personal jurisdiction over a defendant by imputing the jurisdictional contacts of a subsidiary corporation to an out-of-state parent. The Ninth Circuit's holding is also at odds with the principles of fundamental fairness and respect for corporate separateness that animate this Court's personal-jurisdiction jurisprudence. Moreover, the Ninth Circuit's dramatic extension of American courts' reach over foreign corporations jeopardizes the United States' international

relations, as well as the ability of American companies to transact business overseas, because, among other things, it encourages foreign countries to apply similarly expansive jurisdictional rules to American corporations with foreign subsidiaries.

As this Court has emphasized, "the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). That predictability will never be achieved, however, as long as the lower courts remain divided regarding the due process requirements for imputing a subsidiary's jurisdictional contacts to a corporate parent—and as long as the Ninth Circuit and other courts continue to disregard the fundamental due process limitations on the exercise of personal jurisdiction. This Court's review is urgently required.

I. THE DECISION BELOW DEEPENS A SPLIT REGARDING THE DUE PROCESS LIMITS ON IMPUTING A SUBSIDIARY'S JURISDICTIONAL CONTACTS TO A PARENT CORPORATION.

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. Decisions in at least five circuits, including the Fourth, Fifth, Sixth, Seventh, and Eighth, have categorically *rejected* the agency framework applied by the Ninth Circuit below and held 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. *See*, *e.g.*, *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011). Under that jurisdictional framework, a showing of an agency relationship between two corporations is a constitutionally inadequate basis for imputing jurisdictional contacts to an out-of-state defendant.

Even among those circuits that do permit the imputation of jurisdictional contacts upon a showing of "agency," there is substantial disagreement over the minimum due process requirements for establishing an agency relationship for purposes of personal jurisdiction. The First and Eleventh Circuits permit the imputation of jurisdictional contacts between a parent corporation and a subsidiary acting as an agent on its behalf only where the parent and subsidiary are so interrelated that they are not properly considered separate entities—a standard similar in many respects to the alter-ego inquiry undertaken in other circuits. *See*, *e.g.*, *Miller v. Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985). In contrast, the Second and Ninth Circuits hold that an agency relationship can be established for jurisdictional purposes 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—a standard that is seemingly met whenever the subsidiary is performing anything but the most trivial and inconsequential services. *See*, *e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

This Court should grant review to eliminate the unpredictability and unfairness generated by these incompatible jurisdictional standards.

A. ***No Agency Jurisdiction.*** The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have each held that due process prohibits the imputation of a subsidiary's jurisdictional contacts to a parent corporation in the absence of an alter-ego relationship between the two corporations.

In *Viasystems*, for example, the Eighth Circuit rejected a plaintiff's attempt to rely on the Ninth Circuit's "agency" standard to establish general personal jurisdiction over a German company that used an American subsidiary to distribute its products in the United States. 646 F.3d at 596. The plaintiff contended that an "agency relationship should be implied between [the American subsidiary] and [the German parent] because [the American subsidiary] performs services that are 'sufficiently important to [the German parent] that if it did not have a representative to perform them, [the German parent's] own officials would undertake to perform substantially similar services.'" *Id.* (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001) (per curiam)). The Eighth Circuit explained that it was "not free to adopt this 'agency theory' of jurisdiction because it is inconsistent with our precedent," which has "insisted that personal jurisdiction can be based on the activities of [a] nonresident corporation's in-state subsidiary . . . only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the non-residential corporate defendant's alter ego." *Id.* (alterations in original; internal quotation marks omitted). Because the German parent and its American subsidiary were not alter egos of each other, "subjecting [the German parent] to general jurisdiction in Missouri [was] not permitted by the Due Process

Clause." *Id.* at 595; *see also Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) ("a court's assertion of jurisdiction [based on the activities of an out-of-state corporation's in-state subsidiary] is contingent on the ability of the plaintiffs to pierce the corporate veil").

Similarly, in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000), the Seventh Circuit held that, "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates . . . due process." *Id.* at 944. The court therefore refused to impute the Illinois contacts of a corporate subsidiary to a Canadian parent corporation because the subsidiary "conducted business as a corporate entity distinct from [the parent]," "maintained separate books, records, financial statements, and tax returns," and "observ[ed] all corporate formalities." *Id.* at 945. "[C]onstitutional due process," the Seventh Circuit reasoned, "requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary." *Id.* at 943.

The Fifth Circuit has also required an alter-ego relationship to impute the forum-state contacts of a corporate subsidiary to an out-of-state parent. The Fifth Circuit has held that a "court which has jurisdiction over a corporation has jurisdiction over its alter egos." *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010) (internal quotation marks omitted). "The theory," the court has explained, "is that, because the two corporations (or the corporation and its individual alter ego) are the same

entity, the jurisdictional contacts of one are the jurisdictional contacts of the other for the purposes of the . . . due process analysis." *Id.* (alteration in original; internal quotation marks omitted).

Thus, where an alter-ego relationship does *not* exist, the Fifth Circuit has refused to permit the exercise of personal jurisdiction over an out-of-state corporation based on a subsidiary's in-state contacts. In *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir. 1990), for example, the court held that an out-of-state defendant could not "be considered the alter ego of its [Louisiana] subsidiaries"—and therefore was not subject to general personal jurisdiction in the State—because the parent company "observe[d] corporate formalities, ma[d]e[ ] its subsidiaries responsible for daily operations including all personnel decisions, and allow[ed] each subsidiary to keep its records and accounts in separate books and file its own state tax return." *Id.* at 1363.

The Fourth and Sixth Circuits have likewise held that an alter-ego relationship is a due process prerequisite to the imputation of jurisdictional contacts from one corporation to another. Each circuit has held that "it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court." *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (internal quotation marks omitted); *see also Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir.) (same), *cert. denied*, 132 S. Ct. 575 (2011).

Applying that standard to facts indistinguishable from those in this case, the Sixth Circuit held that Toyota Motor Corporation Worldwide, a Japanese corporation, was *not* subject to general personal jurisdiction in Ohio based on the forum-state contacts of its U.S. subsidiary, Toyota Motor Sales, U.S.A., Inc., which imported Toyota vehicles into the United States, because the two companies were "not alter egos." *Toyota Motor Corp.*, 545 F.3d at 363. In reaching that conclusion, the court emphasized that the companies "ha[d] separate books, financial records, [and] bank accounts," "file[d] their own taxes," and "ha[d] separate boards of directors and workforces," and that the "[the American subsidiary], not [the Japanese parent], control[led] the distribution of vehicles into the United States." *Id.*

B. *Limited Agency Jurisdiction.* The First and Eleventh Circuits have held that due process permits the imputation of jurisdictional contacts upon a showing of an "agency" relationship between two corporations—but require a plaintiff seeking to establish "agency" to meet a stringent standard similar to the alter-ego test.

In *Miller v. Honda Motor Co.*, 779 F.2d 769, the First Circuit held that it would violate due process to exercise general personal jurisdiction in Massachusetts over Honda Motor Co., a Japanese company, based on the U.S. contacts of its domestic subsidiary, American Honda, which took title to Honda Motor's vehicles in Japan and then distributed them to dealers in Massachusetts and other States. *Id.* at 772-73. Although the First Circuit framed its jurisdictional inquiry as whether "American Honda [was] in fact an agent of its Japanese parent," the court evaluated the existence of an agency relationship by determining whether "the affairs of Honda and American

Honda were . . . so intertwined as to demonstrate that the two corporations are, in reality, a single entity." *Id.* at 772. The First Circuit concluded that "permitting the acquisition of *in personam* jurisdiction over Honda in this case would offend all notions of fair play and due process" because, among other reasons, "the day to day operational decisions of each company are made by separate groups of corporate officers" and "American Honda controls its own advertising and marketing schemes, and the types of goods it feels are appropriate for the American market." *Id.* "[T]here is nothing fraudulent or against public policy," the court emphasized, "in limiting one's liability by the appropriate use of corporate insulation." *Id.* at 773.

Similarly, in *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000), the Eleventh Circuit held that it would not comport with due process to exercise general personal jurisdiction over a Canadian corporation where a corporate subsidiary marketed the defendant's products in the United States. *Id.* at 1294. The court explained that, "[f]or [the plaintiff] to persuade us that the district court had general personal jurisdiction over [the Canadian corporation] because of [the subsidiary's] activities in the United States, it would have to show that [the subsidiary's] corporate existence was simply a formality, and that it was merely [the Canadian corporation's] agent." *Id.* at 1293-94. The plaintiff "ha[d] not carried its burden" because the domestic subsidiary had "its own officers and boards of directors, determine[d] its own pricing and marketing practices, [and] ha[d] its own bank accounts[,] offices, and employees." *Id.* at 1294.

C. *Expansive Agency Jurisdiction.* In conflict with both of the preceding standards, the Second and Ninth Circuits have adopted an expansive approach to agency jurisdiction that permits the imputation of jurisdictional contacts whenever a corporate subsidiary is performing "important" services on behalf of the parent—without regard to whether the companies are adhering to the requirements of their legally separate corporate identities.

In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88—a case arising out of alleged human-rights violations in Nigeria—the Second Circuit held that Dutch and U.K. corporations were subject to general personal jurisdiction in New York because an investor-relations office in the State that was formally part of an American corporate subsidiary "perform[ed] investor relations services on the defendants' behalf." *Id.* at 96. Because the Second Circuit deemed these services to be "sufficiently important to the foreign entit[ies] that the corporation[s] [themselves] would perform equivalent services if no agent were available," it concluded that the New York investor-relations office was an "agent[ ] of the defendants for jurisdictional purposes." *Id.* at 95. The Second Circuit reasoned that these imputed "contacts go well beyond the minimal" and that there was accordingly "nothing in the Due Process Clause [that] preclude[d] New York from exercising jurisdiction over the defendants." *Id.* at 99. The court reached this conclusion even though there was no allegation that the foreign defendants and their domestic affiliate were alter egos of each other.

The Ninth Circuit applies a similarly expansive agency standard that permits a subsidiary's jurisdictional contacts to be imputed to a corporate parent even in the absence of an alter-ego relationship. In

the decision below, the Ninth Circuit held that, although Daimler AG and MBUSA adhere to all the requirements of their separate corporate identities, Daimler AG was subject to general personal jurisdiction in California based on the in-state contacts of MBUSA because "MBUSA was [Daimler AG's] agent . . . for personal jurisdictional purposes." Pet. App. 3a. The court premised this "agency" relationship on its conclusion that "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] would continue selling cars in [California] either by selling them itself, or alternatively by selling them through a new representative," as well as its determination that Daimler AG had a "right to control" MBUSA's operations. *Id.* at 22a, 27a. Thus, according to the Ninth Circuit, a domestic subsidiary's jurisdictional contacts can be imputed to a foreign parent whenever the parent would use some other entity—whether an independent contractor, another subsidiary, or its own workforce—to perform the services in question if the subsidiary were no longer available and has the right to control the subsidiary (whether that right is exercised or not).

* * *

The choice among these conflicting due process standards can have an outcome-determinative effect in many cases in which a plaintiff premises general personal jurisdiction over an out-of-state defendant on the forum-state contacts of a subsidiary corporation. In fact, as Judge O'Scannlain recognized, if this case had been brought anywhere other than the Second or Ninth Circuits, it almost certainly would have been dismissed due to the absence of personal jurisdiction over Daimler AG. *See* Pet. App. 143a

(O'Scannlain, J., dissenting from denial of rehearing en banc) ("it is clear that the exercise of jurisdiction found to be proper here would be improper in many other circuits"). In the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, respondents' jurisdictional argument would have been dismissed out of hand because there is no allegation that Daimler AG and MBUSA are alter egos of each other that failed to adhere to the requirements of their separate corporate identities. *See*, *e.g.*, *Toyota Motor Corp.*, 545 F.3d at 363 (no personal jurisdiction over a foreign automobile manufacturer based on the forum-state contacts of its domestic distributor because the companies were not alter egos of each other). The case would similarly have been dismissed in the First and Eleventh Circuits. Although those circuits nominally recognize an "agency" theory of jurisdiction, they require a showing of corporate interrelatedness akin to an alter-ego relationship to impute jurisdictional contacts based on "agency." *See*, *e.g.*, *Miller*, 779 F.2d at 772 (no personal jurisdiction over a foreign automobile manufacturer based on the U.S. contacts of its domestic distributor because the companies' affairs were not "so intertwined as to demonstrate that the two corporations [were], in reality, a single entity").

This Court should grant review to ensure that foreign defendants are subject to the same constitutionally based jurisdictional standards wherever they are sued in the United States, and to restore the "predictability" that the Due Process Clause is designed to afford "potential defendants." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court's review is also warranted because the Ninth Circuit's willingness to disregard the corporate form in order to expand the jurisdictional reach of American courts cannot be squared with this Court's precedent.

This Court has repeatedly emphasized that a "'corporation and its stockholders are generally to be treated as separate entities'" and that "the exercise of the control which stock ownership gives to the stockholders" is not a basis for disregarding corporate separateness. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (some internal quotation marks omitted)). Accordingly, the fact that an out-of-state defendant has an in-state subsidiary is insufficient, standing alone, to establish personal jurisdiction over the out-of-state parent. *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."). "Each [corporation's] contacts with the forum State must be assessed individually." *Id.*; *see also Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.").

Thus, in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), this Court held that the in-state contacts of a subsidiary corporation that did business in North Carolina were an insufficient basis for that State to exercise personal jurisdiction over an out-of-state parent corporation that itself had no North Carolina contacts. *Id.* at 338.

The Court emphasized that, even though the defendant "dominate[d]" its subsidiary "immediately and completely" "[t]hrough ownership of the entire capital stock and otherwise," "[t]he existence of the [subsidiary] company as a distinct corporate entity [was] . . . in all respects observed." *Id.* at 335. Accordingly, "the corporate separation carefully maintained" could not "be ignored in determining the existence of jurisdiction" over the parent company because the "separation, though perhaps merely formal, was real." *Id.* at 336, 337; *see also id.* at 337 ("we cannot say that for purposes of jurisdiction, the business of the [subsidiary] corporation in North Carolina became the business of the defendant").

The Ninth Circuit's holding that it comports with due process to exercise personal jurisdiction over Daimler AG based on the California contacts of MBUSA cannot be reconciled with *Cannon* or with this Court's later decisions emphasizing the necessity of respecting corporate separateness. Respondents have never contended that Daimler AG and MBUSA disregard the requirements of their separate corporate identities. Nor could they plausibly do so. Like the two affiliated corporations in *Cannon*, Daimler AG and MBUSA are legally distinct entities: They have separate boards of directors and employees, separate officers, and separate books and records, and each corporation is responsible for its own day-to-day decision-making. *See* Decl. of Peter Waskönig ¶ 8, D.E. 38. In the absence of those imputed contacts, Daimler AG—a German company that owns no property, sells no vehicles, and employs no workers in California—cannot "fairly [be] regarded as at home" in the State. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011); *see also id.* at 2851 ("A court may assert gen-

eral jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

The Ninth Circuit's contrary conclusion is likely attributable, at least in part, to the absence of a decision from this Court squarely addressing the imputation of jurisdictional contacts since *Cannon* was decided nearly ninety years ago. In *Goodyear*, this Court *declined* to address the respondents' belated assertion of "a 'single enterprise' theory," which "urge[d] disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a 'unitary business.'" 131 S. Ct. at 2857. While the Court did not consider the merits of that argument, it did suggest, consistent with *Cannon*, that the imputation of jurisdictional contacts between two affiliated corporations is appropriate only where the corporations have failed to adhere to the requirements of their separate corporate identities. *See id.* ("merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil'") (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14, 29-30 (1986)). This case affords the Court the opportunity to eliminate lower courts' lingering confusion about this basic due process constraint on the exercise of personal jurisdiction.

The Ninth Circuit's holding also conflicts with this Court's decisions in a second respect. This Court has held that, even where a defendant has minimum contacts with a forum, due process still requires that the exercise of jurisdiction over the defendant be

"reasonable[ ]." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King*, 471 U.S. at 477-78 ("minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities"). Thus, in *Asahi*, this Court held that it would be constitutionally unreasonable for California to exercise personal jurisdiction to adjudicate an indemnity claim between a Taiwanese and a Japanese company because the requirement to litigate in California would impose a substantial burden on the Japanese defendant and California had only a "slight interest[ ]" in this contractual dispute between foreign parties. 480 U.S. at 116.

Here, it would be equally unreasonable for a federal court in California to exercise personal jurisdiction over a German defendant in a case brought by Argentine plaintiffs concerning the alleged conduct in Argentina of one of the defendant's Argentine subsidiaries. The allegations in this case have nothing to do with California (or the United States, for that matter), and litigating in California—which is not home to any of the parties, witnesses, or evidence—would unduly burden Daimler AG. Moreover, "German courts have expressed some concern that this suit may impinge upon German sovereignty"—a concern that the Ninth Circuit simply refused to give credence (Pet. App. 34a)—and, as the district court found, "both Argentina and Germany provide [respondents] with an adequate alternative forum for their claims." *Id.* at 85a. Accordingly, "[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff[s] and the forum State, the exercise of personal jurisdiction by a California court over [Daimler AG]

in this instance would be unreasonable and unfair." *Asahi*, 480 U.S. at 116.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO FOREIGN AND DOMESTIC CORPORATIONS ALIKE.

The Ninth Circuit's far-reaching expansion of the jurisdictional reach of American courts—and the circuits' deepening disagreement regarding the due process limits on the imputation of jurisdictional contacts between corporations—has profound implications for both foreign and domestic corporations, as well as for the international relations of the United States.

This Court has emphasized that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted). Yet, under the Ninth Circuit's expansive jurisdictional standard, a foreign company will be amenable to suit in the United States on a claim brought by a foreign plaintiff based on foreign conduct as long as the company has a domestic subsidiary that, subject to the parent's right of control, is providing services that the parent would secure "by other means" if the subsidiary were not available. Pet. App. 25a. Under this virtually limitless jurisdictional standard—adopted by the Ninth Circuit for the express purpose of enabling domestic courts to insert themselves into international affairs by "adjudicating and redressing international human rights abuses" (*id.* at 36a)—there are innumerable foreign companies that are now potentially subject to general personal jurisdiction in the United States. *See also id.* at 140a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("Anything a corporation

does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist.").

Nor is the Ninth Circuit's holding limited to the human-rights setting. The Ninth Circuit's boundless notion of general personal jurisdiction would potentially empower California federal courts to hear all manner of disputes involving foreign corporate defendants with U.S. subsidiaries—including, for example, 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.

The inevitable result will be a proliferation of suits in American courts by foreign plaintiffs suing foreign defendants based on foreign conduct. These suits will enmesh American courts in potentially complex international disputes and provide a strong incentive for foreign companies facing the prospect of such litigation to limit their commercial ties to the United States or pull out of the U.S. market altogether. The sweeping jurisdictional reach of the Ninth Circuit's holding may also breed retaliatory rulings by courts of other nations applying similarly capacious jurisdictional standards to American companies with foreign subsidiaries. As Judge O'Scannlain explained in his dissent from the denial of rehearing en banc, "several countries have enacted 'retaliatory jurisdiction laws'" that "'empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction.'" Pet. App. 144a (O'Scannlain, J., dissenting

from denial of rehearing en banc) (quoting Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987)). Thus, "as a result of [the Ninth Circuit's] holding . . . , an Italian court might be able to assert jurisdiction over a United States parent corporation based on that court's jurisdiction over a wholly owned Italian subsidiary." *Id.*

The United States itself has emphasized that "excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 12, *Goodyear*, 131 S. Ct. 2846 (2011) (No. 10-76). Overreaching by American courts "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade," and "dissuade[ ] . . . United States corporation[s] concerned about facing a similar rule abroad . . . from exporting [their] products." *Id.* In addition, "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* at 33; *see also* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161 ("[T]he broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law.").

Moreover, even setting aside the astounding breadth of the Ninth Circuit's jurisdictional holding and its potentially serious repercussions, it is im-

portant for all corporations, both foreign and domestic, to operate within a framework of clear, uniformly applied jurisdictional rules that permit "defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). The longstanding circuit conflict regarding the due process limitations on the imputation of jurisdictional contacts makes such "assurance" impossible for corporations seeking to determine whether the formation of a new subsidiary will expose them to suit in a State with which they otherwise have no jurisdictional contacts. This uncertainty will inevitably deter valuable economic activity by corporations unwilling to form subsidiaries in new domestic markets without the ability to make a meaningful assessment of the legal risks associated with that commercial expansion.

* * *

The Ninth Circuit's decision "extends the reach of general personal jurisdiction far beyond its breaking point." Pet. App. 135a (O'Scannlain, J., dissenting from denial of rehearing en banc). It exacerbates existing confusion over the constitutional limits on the imputation of jurisdictional contacts, disregards this Court's personal-jurisdiction jurisprudence, and jeopardizes American foreign policy and trade. This Court's review is warranted to restore the uniformly applicable limitations that due process imposes on the exercise of personal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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