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 ECONOMIESUISSE, THE SWISS BANKERS ASSOCIATION, ICC SWITZERLAND, ASSOCIATION OF GERMAN BANKS, AND THE EUROPEAN BANKING FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are associations representing international businesses, global financial institutions, and other companies headquartered outside the United States. They share a strong interest in encouraging stable and predictable legal regimes that promote international trade and investment.[1] The extraterritorial reach of U.S. laws—including U.S. courts' exercise of personal jurisdiction over non-U.S. businesses with respect to those companies' activities outside the United States—creates tremendous uncertainty that deters investment in and trade with the United States. *Amici* regularly file amicus briefs in cases such as this one that raise issues of vital concern to the non-U.S. business community.

The Swiss Bankers Association (SBA) is the leading professional organization of the Swiss financial center; its members include the vast majority of banks and other financial institutions operating in Switzerland. In consultation with Swiss regulatory authorities, the SBA sets standards that govern the operation of banks in Switzerland. It also represents the interests of Swiss banks in dealings with both Swiss and international authorities.

Economiesuisse is the largest umbrella organization representing the Swiss economy. Economiesuisse is comprised of more than 100,000 businesses

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. No party has made a monetary contribution to this brief other than the *amici curiae*, its members, or its counsel. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of all sizes, employing a total of 2 million people in Switzerland. Economiesuisse's mission is to create an optimal economic environment for Swiss business, to continuously improve Switzerland's global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

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The Association of German Banks is the voice of the private banks in Germany. As a leading trade association, it stands for a market-based economy and a strong German and European financial center. The Association of German Banks represents the common interests of the private banks at regional, national, and international levels. It mediates between banks, policymakers, authorities, consumers, and the business sector.

The European Banking Federation (EBF) is the leading professional organization of European banks. It provides a forum for European banks to discuss best practices and legislative proposals and to adopt common positions on matters affecting the European banking industry. EBF also actively promotes the positions of the European financial services industry, and the banking industry in particular, in international fora.

SUMMARY OF ARGUMENT

The exercise of general personal jurisdiction over an out-of-forum defendant is an extraordinary judicial power, as it permits a court to entertain a claim

against the foreign defendant *arising from conduct anywhere in the world*. Accordingly, due process restricts exercise of general jurisdiction to circumstances where the defendants' contacts with the forum are so "'continuous and systematic' as to render them ***essentially at home*** in the forum State." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011) (emphasis added). Only once has this Court found that exceptionally demanding standard satisfied.

The court below circumvented this analysis by imputing the jurisdictional contacts of a wholly-owned subsidiary to the corporate parent. But that approach is necessarily at odds with the principle of corporate separateness fundamental to the parent-subsidiary relationship, and it ignores that due process requires a court to establish jurisdiction over each defendant individually. It is only where the subsidiary's corporate veil may be pierced that the subsidiary's in-forum contacts may establish general jurisdiction over an out-of-forum defendant.

This rule has significant implications for international comity. The exercise of extraterritorial jurisdiction over a foreign defendant touches precisely the same concerns as the extraterritorial application of U.S. statutes. International commerce requires clear rules that settle where a foreign company is subject to suit. And appropriate limitations on the assertion of U.S. jurisdiction abroad are essential to preclude conflict with the legal systems of countries around the world.

ARGUMENT

I. Appropriate Limits On Personal Jurisdiction Are Essential To Ensure International Cooperation And Encourage Cross-Border Trade And Investment.

The increasingly globalized and interconnected nature of the world economy significantly heightens the risk of collision among the legal systems of individual nations. Companies engaged in international commerce are likely to be subject to the legislative and judicial jurisdiction of dozens of countries, threatening imposition of conflicting, duplicative, and unjustifiably burdensome legal obligations.

Given this reality, broad assertions of extraterritorial jurisdiction—whether legislative or judicial—will inevitably injure both international comity and international commerce. Intruding on what another nation reasonably views as its sphere will produce, and has produced, a form of legal warfare among nations, with countries acting to protect their authority by retaliating against the nation, often the United States, that is perceived to have exceeded its legitimate authority. And imposing multiple and inconsistent burdens on companies that engage in international commerce will increase the costs associated with such activities, deterring valuable commerce that otherwise would take place.

This Court has recognized these risks in the context of legislative jurisdiction. "Foreign conduct is generally the domain of foreign law" and United States law presumptively "governs domestically but does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455, 454 (2007) (quotation & alteration omitted). This well-established presumption

against extraterritorial application of federal statutes "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004).

The Court has applied the presumption against extraterritorial application consistently in recent years. *E.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); *Microsoft Corp.*, 550 U.S. at 455; *F. Hoffmann-La Roche*, 542 U.S. at 164; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *EEOC* v. *Arabian Am. Oil, Co.*, 499 U.S. 244, 248 (1991).

This case brings before the Court questions regarding the extraterritorial scope of *judicial* jurisdiction, and the very same considerations are relevant. After all, "[j]urisdiction is power to declare the law." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). See also *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2786-2787 (2011) (plurality) (recognizing similarity of "the power of a sovereign to resolve disputes through judicial process" and "the power of a sovereign to prescribe rules of conduct for those within its sphere"—"[a]s a general rule neither statute nor judicial decree may bind strangers to the State").

The Court therefore should apply in the judicial jurisdiction context the same approach that it has utilized with respect to legislative jurisdiction—recognizing appropriate, well-defined limits on extraterritorial assertion of judicial jurisdiction to promote and protect international comity and avoid imposition of unjustified burdens on international commerce.

Indeed, the close relationship between extraterritorial assertion of legislative jurisdiction and extraterritorial assertion of judicial jurisdiction is demonstrated by this case. The Court's holding in *Kiobel* eliminates respondents' claim under the Alien Tort Statute (ATS), but respondents continue to press a virtually identical claim under state law.

And respondents are not unique. The proponents of ATS lawsuits have made clear that they intend to use broad theories of judicial jurisdiction to continue to litigate claims of "human rights violations" in U.S. courts: "the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts." Donald Childress, *Kiobel commentary: An ATS answer with many questions (and the possibility of a brave new world of transnational litigation)*, SCOTUSblog (Apr. 18, 2013), http://tinyurl.com/-myosjcm.[2] ATS claims will be revamped as garden-variety tort claims coupled with the assertion of general jurisdiction by a U.S. court.

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[2] See also Beth Stephens, *Closing Avenues for Relief*, Opinio Juris (Apr. 23, 2013), http://tinyurl.com/m797jam ("[S]tate courts [are] a likely venue for cases that can no longer be litigated in federal court. Most ATS cases have included related state law claims, and some have already been litigated in state courts."); Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation* (Apr. 17, 2013), http://tinyurl.com/ln6dxwy ("[T]he future of human rights in domestic courts is transnational tort litigation. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. In the quest to provide relief for victims of grave abuse, international human rights violations will now be reframed as transnational torts. Virtually every complaint pleading an ATS violation could allege a traditional domestic or foreign tort.").

But reframing these lawsuits does not alter the fact that, when a foreign plaintiff sues a foreign company for foreign conduct, the United States has no legitimate interest in the suit. In fact, given the position of foreign nations, providing such a cause of action could well "generate[]" "diplomatic strife." *Kiobel*, 133 S. Ct. at 1669. It would "imply that other nations * * * could hale our citizens into their courts" for wrongful conduct "occurring in the United States, or anywhere else in the world." *Ibid*. But "[t]he presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Ibid*.

As Justice Breyer noted, "it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an 'enemy of all mankind.'" *Kiobel*, 133 S. Ct. at 1678 (Breyer, J., concurring in judgment).

A. Limiting Extraterritorial Assertions Of Judicial Jurisdiction Is An Essential Element Of International Comity.

"Comity," the Court has explained, reflects "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale* v. *U.S. Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987). Appropriately limiting the exercise of personal jurisdiction over foreign entities is an essential element of the respect due to the judicial systems of other nations. Thus the "procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien

defendant" and "the Federal interest in Government's foreign relations policies" "will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case." See also *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (plurality).

Indeed, foreign nations have lodged objections to expansive U.S. jurisdiction. Thus, "applying the American conception of general jurisdiction" "to disputes without any relationship to the United States" often "is viewed with [abhorrence] by many other nations." Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807, 900 (2004). In attempting to draft an international agreement regarding private law, delegates found "American-style 'doing business' general jurisdiction * * * as sufficiently exorbitant to merit blacklisting." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 162 (2001).

This Court has recognized that perceived affronts to sovereign interests will predictably "invite retaliatory action from other nations." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That is what is happening now—and would increase exponentially if the lower court's uniquely expansive standard were upheld.

As Judge O'Scannlain noted, "several countries have enacted 'retaliatory jurisdictional laws.'" *Bauman* v. *DaimlerChrysler Corp.*, 676 F.3d 774, 779 (2011) (O'Scannlain, J., dissenting from denial of rehearing en banc). As one example, "Italian courts will exercise jurisdiction over actions by Italian nationals against foreigners, provided that the foreigner's courts would entertain claims against Italians in like circumstances." Gary B. Born, *Reflections on Ju-*

dicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Other countries, including Austria, Belgium, and Portugal, have also embraced such policies. *Ibid.*

Particular sensitivity to other nations' views on the proper reach of extraterritorial personal jurisdiction is necessary given the "long history of aggressive assertions of jurisdiction and retaliation." Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U.L. Rev. 455, 464 (2004) (discussing "'retaliatory' jurisdiction"). See also William M. Richman, *Understanding Personal Jurisdiction*, 25 Ariz. St. L.J. 599, 642 (1993) ("Expansive exercises of jurisdiction by American courts may trigger political, judicial, or economic retaliation."). It can be no surprise that "[i]nternational tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values." Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J. Int'l L. 44, 46 (2001).

Requiring a foreign company to answer in a U.S. court for conduct in Argentina that allegedly violated Argentinean law thus has adverse implications for international comity no different than subjecting a foreign company to U.S. securities, antitrust, or human rights law. Interests of comity accordingly weigh heavily against the expansive jurisdictional standard adopted below—a rule that has the predictable consequence of exposing foreign entities to claims in U.S. courts that have nothing at all to do with the United States.

B. Broad Assertions Of Extraterritorial Jurisdiction Will Deter Cross-Border Commerce.

This Court has recognized that for rules governing judicial jurisdiction "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Indeed, due process limits on judicial jurisdiction are designed to ensure "a degree of predictability * * * 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." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

A jurisdictional rule that fails to meet this test—and instead produces unpredictable results biased in favor of expansive assertions of jurisdiction—will force foreign businesses to take the steps necessary to ensure that they will not become subject to suit in U.S. courts on every claim arising anywhere in the world. See also *Asahi Metal*, 480 U.S. at 114 (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Indeed, given the uniquely expansive procedural rules governing civil litigation in the United States—including broad discovery; the prospect of large damages awards dwarfing those available in most other countries; contingent-fee representation of plaintiffs; and the virtual prohibition against shifting of litigation costs to a losing plaintiff (*cf. Morrison*, 130 S. Ct. at 2885)—there is no doubt that foreign enterprises would revamp their operations to avoid subjecting themselves to general jurisdiction in U.S. courts, even if that would require relocating or significantly reducing their U.S. operations. *Cf.* Alan O. Sykes,

Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis, 100 Geo. L.J. 2161, 2178 (2012).

To the extent that the decision below states a predictable rule—that imputation is allowed whenever a subsidiary's actions are "sufficiently important" to the parent such that, absent the subsidiary, the parent would find another way to accomplish those tasks, *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909, 920 (2011)—it states a rule so broad that virtually every foreign company with a U.S.-based distribution subsidiary would automatically be swept within its ambit.

If that standard were upheld, significant numbers of non-U.S. companies would abandon, or choose not to invest in, U.S. based-subsidiaries. *Cf.* Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161, 192 (2006) (in light of U.S. regulatory measures, corporations have "relocate[d] abroad" and "some foreign corporations avoid the United States"). Instead of a wholly-owned subsidiary that engages in U.S. distribution, a non-U.S. manufacturer would likely move to an independent distribution network in the United States.

Some companies may choose to withdraw from the U.S. market entirely rather than running the risk of exposure to general jurisdiction in U.S. courts.

These consequences would inflict significant harm upon the U.S. economy. They would decrease foreign direct investment, which contributes significantly to our economy. Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), http://tinyurl.com/3fcoons. They would remove the tax base that those subsidi-

aries generate. (In 2009, foreign-controlled domestic corporations accounted for nearly 14% of total corporate income tax collected. See IRS, *SOI Tax Stats—Foreign-Controlled Domestic Corporations*, Tbl.1, http://tinyurl.com/nxepsas). And they would discourage foreign entities from opening U.S.-based operations that employ American workers. See Charles G. Schott, U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 5-6 (Oct. 2008), http://-tinyurl.com/bnyzc8m.

Indeed, a 2007 report commissioned by Mayor Bloomberg and Senator Schumer found that a key hindrance to U.S. competitiveness is "America's general propensity for litigation" and "the increasing extraterritorial reach of US law." *Sustaining New York's and the US' Global Financial Services Leadership*, at 73 (2007), http://tinyurl.com/bzkr44n. Likewise, the Department of Commerce's report tied concerns about the U.S. legal system to foreign direct investment. Schott, *supra*, at 1-2. "There is an international perception that the pervasive nature of litigation in the United States and other related aspects of the legal system increase the costs of doing business and add uncertainty." *Id.* at 1. Predictable legal rules, by contrast, provide a climate conducive to foreign investment. *Id*. at 2.

Respect for international comity and appropriate limitations on the reach of U.S. jurisdiction over conduct occurring abroad is critical to promote the interests of foreign commerce and investment.

II. A Subsidiary's Jurisdictional Contacts May Be Imputed To The Corporate Parent Only When It Is Permissible To Pierce The Corporate Veil.

Respondents acknowledge that their claim hinges on the exercise of general jurisdiction over an out-of-forum defendant. Such an exercise of judicial power is extraordinary, requiring a foreign defendant to answer in U.S. courts for *any* claim arising *anywhere* in the world. As this Court has made clear, such power is reserved for only the most exceptional circumstances.

Respondents cannot circumvent the strict limitations on general jurisdiction by imputing the jurisdictional contacts of an in-forum subsidiary to an out-of-forum parent. That theory turns the principle of corporate separateness on its head, and it is incompatible with basic notions of due process.

For these reasons, the Court has rejected such efforts on multiple occasions. Instead, imputation of contacts is permissible only where a court may pierce the corporate veil of the subsidiary, which eliminates the legal separateness of the two entities.

A. A Court May Assert General Jurisdiction Over An Out-Of-Forum Defendant Only In Extraordinary Circumstances.

The standard governing a court's exercise of personal jurisdiction has long been settled: "A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *J. McIntyre Mach.*, 131 S. Ct. at 2787 (plurality) (quoting *Int'l Shoe Co.* v. *Wash.*, 326 U.S. 310,

316 (1945)). General "jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them" is appropriate only "when their affiliations with the State are so 'continuous and systematic' as to render them ***essentially at home*** in the forum State." *Goodyear*, 131 S. Ct. at 2851 (emphasis added).

Since *International Shoe*, the Court has on three occasions addressed whether an out-of-forum defendant could be subjected to general judicial jurisdiction. These decisions demonstrate that the exercise of such jurisdiction is permissible only in exceptional circumstances.

Perkins v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), is the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear*, 131 S. Ct. at 2856 (quotation omitted). There, the defendant was a Philippine mining corporation, but it had ceased activities in the Philippines during World War II. *Perkins*, 342 U.S. at 447-448. Instead, the company's president "maintained an office" in Ohio at which he kept "office files of the company;" he distributed "salary checks on behalf of the company" from Ohio; he "used and maintained in * * * Ohio, two active bank accounts carrying substantial balances of company funds;" an Ohio bank "acted as transfer agent for the stock of the company;" "[s]everal directors' meetings were held at his office or home" in Ohio; and the president "supervised policies" relating to the company's Philippine operations from Ohio. *Ibid.*

The company president thus maintained "in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."

Perkins, 342 U.S. at 448. General jurisdiction was appropriate, because Ohio had become "the corporation's principal, if temporary, place of business." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 779-780 n.11 (1984).

Perkins is in substantial contrast with the limited activity present in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984). There, the estates of U.S. citizens who died in a helicopter crash in Peru brought suit in Texas against the Colombian corporation that operated the helicopter. *Helicopteros*, 104 U.S. at 412. A representative of the Colombian company had met in Houston to negotiate a contract for the provision of helicopter services in Peru; the company purchased helicopters and parts in Texas; it sent employees there for training; and a customer wired it money from Texas. *Id*. at 411-412. The Court concluded that these contacts, taken together, were not "continuous and systematic general business contacts" (*id*. at 416) and thus they "were insufficient to satisfy the requirements of the Due Process Clause" (*id*. at 418-419).

Most recently, in *Goodyear*, plaintiffs brought claims in North Carolina against subsidiary corporations based in Luxembourg, Turkey, and France. 131 S. Ct. at 2851-2852. These entities were "not registered to do business in North Carolina;" they did "not design, manufacture, or advertise their products in North Carolina;" they did "not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers," but "a small percentage" of their products "were distributed within North Carolina." *Id*. at 2852. These contacts, the Court concluded, "fall far short of the 'the continuous and systematic general business contacts' necessary to em-

power North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at 2857. The companies were "in no sense at home in North Carolina." *Ibid.*

The general jurisdiction standard "is demanding because the consequences can be severe: if a defendant is subject to general jurisdiction in a state, then it may be called into court there to answer for any alleged wrong, committed in any place, no matter how unrelated to the defendant's contacts with the forum." *uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421, 426 (7th Cir. 2010).

Under the holding below, a California court would have personal jurisdiction over *any* claim against Daimler AG arising *anywhere* in the world: an individual who slipped and fell at Daimler AG's Stuttgart headquarters could bring suit in California. See *ibid.* That broad rule is fundamentally inconsistent with this Court's precedents.

B. Piercing The Corporate Veil Is An Essential Prerequisite To Imputing A Subsidiary's Jurisdictional Contacts To Its Parent.

Respondents do not attempt to support the assertion of general jurisdiction on the basis of direct contacts between Daimler AG and California. They instead rely on the conclusion of the court below that the contacts of a U.S.-based subsidiary may be imputed to Daimler AG because the subsidiary's services are "sufficiently important" to the parent. See *Bauman*, 644 F.3d at 920. The court defined "sufficiently important" as those services which "the parent would undertake to perform * * * itself *if it had no representative at all* to perform them." *Id.* at 921.

That holding is wrong. Because a court must establish jurisdiction over each defendant independently, the jurisdictional contacts of a domestic subsidiary are relevant to an out-of-forum parent only when the corporate veil between parent and subsidiary may be pierced. Indeed, this Court's precedent compels that conclusion and basic requirements of "fair play and substantial justice" confirm this approach. Respondents defend the result below by claiming it is necessary to prevent a parent from shielding itself against claims *from the forum*, but that argument misunderstands the distinction between specific and general jurisdiction.

First, jurisdiction over a party must rest upon that party's own contacts with the forum. The "unilateral activity of another party or a third person" cannot establish personal jurisdiction because exercise of a court's authority is proper only "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475-76 (1985) (quotation omitted). Constitutional due process requirements, accordingly, "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980).

It also is beyond dispute that a parent corporation and its subsidiary are separate entities. "'A corporation and its stockholders are generally to be treated as separate entities;'" thus it is "deeply 'ingrained in our economic and legal systems' that a parent corporation * * * is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (quoting *Burnet* v. *Clark*, 287 U.S. 410, 415, (1932) and William O. Douglas & Carrol M.

Shanks, *Insulation From Liability Through Subsidiary Corporations,* 39 Yale L.J. 193, 193 (1929)).

Applying these fundamental principles, this Court's decisions make clear that a parent's in-state subsidiary—no matter how "important" the subsidiary's services are, and no matter how tightly the parent controls the subsidiary—cannot overcome the necessity of establishing jurisdiction on the basis of the parent's own, independent contacts with the forum.

In *Cannon Manufacturing Co.* v. *Cudahy Packing Co.,* 267 U.S. 333, 334-335 (1925), for example, the Court considered whether a Maine-based company "was doing business" in North Carolina "in such a manner and to such an extent as to warrant the inference that it was present there." The plaintiff relied on the jurisdictional contacts of the defendant's wholly-owned subsidiary—the Cudahy Packing Company of Alabama. *Id.* at 335. That entity "is the instrumentality employed to market [defendant's] products within" North Carolina. *Ibid.* The Court found that the defendant "dominates the [subsidiary], immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the [defendant's] products in other states." *Ibid.*

The separate corporate forms, however, were "in all respects observed:" the "books are kept separate," and "[a]ll transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations." *Cannon*, 267 U.S.

at 335. "This corporate separation," the Court concluded "was doubtless adopted solely to secure to the defendant some advantage under the local laws." *Ibid.*

Nevertheless, the Court flatly rejected imputation of the subsidiary's jurisdictional contacts to the parent. The defendant "did not choose to enter the state in its corporate capacity" (*Cannon*, 267 U.S. at 336); it "preferred to employ a subsidiary corporation" (*ibid.*). It is "settled," the Court reasoned, that "such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction." *Ibid.* Although the separation between parent and subsidiary was "perhaps merely formal," it was nonetheless "real" and "not pure fiction." *Id.* at 337. Thus, where there is "no attempt to hold the defendant liable for an act or omission of its subsidiary"—i.e., to pierce the corporate veil—the subsidiary's contacts are not relevant to the parent. *Ibid.*[3]

Just eight years later, the Court again held that the presence of a subsidiary in the forum—even if the subsidiary is at its parent's beck and call—is irrelevant to the forum's ability to assert jurisdiction over the parent. *Consolidated Textile Corp.* v. *Gregory*, 289 U.S. 85, 87 (1933), involved a suit in Wiscon-

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[3] *Cannon* was not the first decision of this Court to reject imputation of a subsidiary's contacts to a parent. See, *e.g.*, *People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U.S. 79, 87 (1918) ("The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there."); *Conley* v. *Mathieson Alkali Works*, 190 U.S. 406, 409 (1903) ("The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purposes of legal proceedings.").

sin that required the court to exercise general jurisdiction over an out-of-state defendant.

To support its position, the plaintiff argued that a "wholly controlled" subsidiary of the defendant sold goods in Wisconsin. *Consolidated Textile*, 289 U.S. at 88. The Court curtly dispatched this alleged jurisdictional contact: "The unimportance of the statement concerning acts of the controlled corporation * * * is clear enough in the light of what we said in *Cannon*." *Ibid.* The Court concluded that "[i]n order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service," and—notwithstanding the presence of a wholly controlled subsidiary—it was "plain[]" that the defendant "was not present within the jurisdiction of Wisconsin as required." *Ibid.*

Recently, in *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 705 n.* (1988), the Court considered the constitutional requirements of service of process and explained that under "the Due Process Clause of the Fourteenth Amendment, it is not self-evident that substituted service on a subsidiary is sufficient with respect to the parent." That was because, in *Cannon* and *Consolidated Textile*, "this Court held that the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction." *Ibid.*[4]

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[4] Although *Cannon*, 267 U.S. at 336, suggested that no question of "constitutional powers" was "directly presented" in that case, *Consolidated Textile*, by way of its reliance on *Philadelphia & Reading Railway Co.* v. *McKibbin*, 243 U.S. 264 (1917) and *International Harvester Co.* v. *Kentucky*, 234

These holdings make clear that only where the corporate veil may be pierced—and the corporate separateness of parent and subsidiary set aside—may a court impute a subsidiary's contacts to a parent. As the Court recently explained, "merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil.'" *Goodyear*, 131 S. Ct. at 2857 (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14, 29-30 (1986)).

Piercing the corporate veil is a demanding standard; it is appropriate in only "exceptional circumstances," *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003), and requires a showing that the corporate form is a "fiction." *Cannon*, 267 U.S. at 337. Alternatively, there must be proof that "the corporate form would otherwise be misused to accomplish certain wrongful purposes" (*Bestfoods*, 524 U.S. at 62)—such as fraud on shareholders or inadequate capitalization. *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944).

So long as the corporate veil cannot be pierced, no imputation is permissible. The Ninth Circuit's rule is wholly antithetical to this Court's clear teachings, and thus it cannot stand.

***Second*,** this conclusion is bolstered by the "'traditional notions of fair play and substantial justice'" that govern the due process inquiry. *Asahi Metal*, 480 U.S. at 113 (quoting *Int'l Shoe*, 326 U.S. at 316).

U.S. 579 (1914), plainly was a constitutional decision. *Schlunk* makes clear that these decisions turn upon due process analysis. 486 U.S. at 705 n.*.

This analysis may consider "several factors" including "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Ibid.* (quotation omitted).

These considerations point decisively against imputing a subsidiary's contacts to a parent for purposes of general jurisdiction without the showing necessary to pierce the corporate veil.

Interest of the forum state. When a court exercises general—rather than specific—jurisdiction, it is considering a circumstance where neither the conduct nor the injury at issue occurred in the forum. See *Goodyear*, 131 S. Ct. at 2854 (specific jurisdiction applies to acts "occurring or having their impact within the forum State"). In these circumstances, the forum will have only a minimal interest in the subject of the suit.

And where the basis for jurisdiction is said to be imputation of a subsidiary's contacts to the parent, the forum state is yet another order of magnitude removed, because it does not even have a direct interest in regulating the conduct of the defendant, as it would if the defendant were its own corporate citizen.

This case provides a paradigmatic example: California has no interest in the adjudication of claims against a non-California company for alleged actions of its non-California subsidiary that occurred outside of California—at least, no interest greater than Vietnam, Serbia, or any other forum chosen at ran-

dom.[5] But Argentina (as the place where the plaintiffs reside and the place where the unlawful events allegedly occurred) and Germany (the domicile of Daimler AG) do have substantial interests in the subject of this suit, the parties to the suit, or both.

Interest in efficient resolution of controversies. Substantial justice requires consideration of "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" in a U.S. forum. *Asahi Metal*, 408 U.S. at 115. Thus, "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Ibid.* (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). Imputing the jurisdictional contacts of a subsidiary to the out-of-forum parent would offend the interstate—and, here, international—interests in efficient resolution of claims. See *id.* at 113, 115. Those interests militate in favor of a forum in Argentina, where the witnesses and evidence are centered (or at least Germany, where the defendant is located).

Burden on Defendant. Finally, the inconvenience for the litigants associated with asserting general jurisdiction over a parent based on little more than the presence of a subsidiary is here "so substantial as to

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[5] Incidentally, Daimler AG has wholly-owned subsidiaries in Vietnam (Mercedes-Benz Vietnam Ltd.), Serbia (Mercedes-Benz Srbija i Crna Gora d.o.o.), and dozens of other countries around the world. Daimler Annual Report 2012 § 7.96, at 266-275, http://tinyurl.com/l5pm9gu (listing of subsidiaries). A substantial majority of the world's population is serviced by a Daimler AG subsidiary. *Ibid.*

achieve *constitutional* magnitude." *Burger King Corp.*, 471 U.S. at 484.

As this case illustrates, a forum that has no connection whatsoever to the claim will often be an enormously inconvenient place to litigate the suit. The inconvenience of this action is manifest—the plaintiffs are residents of Argentina (*Bauman*, 644 F.3d at 912); following *Kiobel*, any claims that remain must turn on Argentinean law;[6] the suit challenges events that occurred in Argentina; and all relevant documents and witnesses are located in Argentina (or, potentially, Germany).

Considering all of the applicable factors, imputation of contacts based on the Ninth Circuit's liberal "agency" test would offend traditional notions of fair play and substantial justice. Only if the corporate veil were pierced, so that the subsidiary merged with the parent into a single juridical entity, could the balance possibly be different.

***Third*,** in contesting this veil-piercing rule, respondents fashion a straw man, suggesting that requiring veil piercing would permit foreign companies to escape liability for wrongful acts. Respondents warn of "evasion of responsibility for unlawful conduct in fora in which the corporation otherwise takes

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[6] The asserted Torture Victim Protection Act claims are no longer viable as a result of *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702 (2012). Although plaintiffs purport to also sue pursuant to the laws of California, it is hard to see how the relevant choice of law principles would point to California law as controlling, given that the allegedly wrongful conduct occurred in Argentina, the alleged injury was in Argentina, all plaintiffs are Argentineans, and the defendant is not a California resident.

full advantage of the state's laws and legal systems." Br. in Opp. 33. They claim that "[i]t would be entirely unfair to allow the company to enjoy" the "benefits" of a forum, "including its laws and economic markets" "without accepting the concomitant responsibility of submitting to the jurisdiction of the state's courts." *Id.* at 28. These concerns are fundamentally misguided in two separate respects.

To begin with, respondents offer no reason why an adequate remedy cannot be had against the in-forum subsidiary for the subsidiary's own actions. The subsidiary will be subject to personal jurisdiction in the forum for any claim of injury resulting from conduct there. A claimant would gain nothing by also suing the parent. Of course, if the subsidiary is undercapitalized against foreseeable exposure and thus judgment-proof, that could support veil-piercing. See *Anderson*, 321 U.S. at 362.

Moreover, the hypotheticals respondents posit all involve injuries occurring *within the forum*. Of course, it is specific—not general—jurisdiction that is relevant when the forum is the site of either the injury or the wrongful conduct. See *Goodyear*, 131 S. Ct. at 2854. And the standards for specific jurisdiction are far more relaxed than are those for general. *Ibid.* This case, however, does not involve specific jurisdiction and the Court need not address respondents' hypotheticals to resolve it.

The subsidiary-parent relationship, including evidence that a parent controls the subsidiary as an agent, may well be relevant for *specific* jurisdiction. For example, if a subsidiary within a forum acts pursuant to the direction of its foreign parent, the out-of-forum actions of the parent may subject it to specific jurisdiction under the "effects" test of *Calder* v.

Jones, 465 U.S. 783, 788-789 (1984). In such a circumstance, the parent, by acting through its subsidiary, may have taken actions "expressly aimed" at the forum. *Id.* at 789. See also *Burger King*, 471 U.S. at 479 n.22.

While a purported agency relationship between a subsidiary and its parent thus might possibly be relevant for a specific jurisdiction theory, "ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant." *Goodyear*, 131 S. Ct. at 2855.

What respondents wish to overlook is that *their* claim has nothing at all to do with conduct or injury *in California*. Instead, their claim necessarily relies on general jurisdiction because they seek to hold Daimler AG liable for things that have no relationship whatsoever with the forum they chose.

There is nothing unfair about preventing California from becoming a global forum for adjudication of every claim against Daimler AG and all of its subsidiaries—otherwise, its courts would be available for a Stuttgart-based accountant to dispute her termination from Daimler AG or an Ankara-based parts supplier to contest the terms of payment on a contract with a Turkish subsidiary.

This Court should reject that conclusion and reaffirm the basic proposition that a subsidiary's contacts with a forum may not be imputed to a parent in the absence of proof permitting the piercing of the corporate veil between parent and subsidiary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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