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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE FEDERATION OF GERMAN INDUSTRIES, THE ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE, AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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## INTEREST OF *AMICI CURIAE* [1]

*Amici* represent a diverse array of companies doing business across state lines and international bound-

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amici curiae*, their members or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

aries. Due to this interstate and international commercial activity, *amici*'s members, both domestic and foreign, have a keen interest in the rules governing when businesses can be subject to adjudicatory jurisdiction in the United States.

*Amici*'s members have a special interest in the rules governing whether, and to what extent, non-resident companies can be subject to jurisdiction in a forum based on the contacts of other entities such as wholly owned subsidiaries. Some members, both foreign and domestic, maintain one or more subsidiaries that are directly affected by the Ninth Circuit's ruling. Others are small, family-owned businesses. Under the logic of the Ninth Circuit's decision, individual owners of these businesses, by virtue of their "right to control" those businesses, might be subject to general jurisdiction *in their individual capacities* in states other than where their businesses are incorporated or operate.

The Ninth Circuit's expansive approach to adjudicatory jurisdiction, coupled with its lenient standards for disregarding the separateness of corporate entities, threatens to disrupt the flow of goods and services across interstate and international boundaries; it also exposes *amici*'s members to unfair burdens in unfamiliar forums. *Amici* file this brief to explain the harm wrought by the Ninth Circuit's decision and to explain why it is irreconcilable with this Court's prior decisions on this important issue.

## SUMMARY OF THE ARGUMENT

The Due Process Clause does not permit the exercise of general jurisdiction over a parent corporation, whether foreign or domestic, based on the in-forum contacts of its wholly owned subsidiary. In addition

to the reasons given in Petitioner's brief, which *amici* fully support, two additional ones justify this outcome.

*First*, general jurisdiction is available only in forums where a defendant is "at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). Corporations, whether foreign or domestic, are "at home" only in the forums where they are incorporated or maintain their principal place of business. This rule flows directly from this Court's prior decisions charting the constitutional limits of general jurisdiction over nonresident corporations. It comports with the historical approach to those limits, which originally confined adjudicatory jurisdiction only to the forums where the corporation was chartered. This categorical rule advances the twin purposes underpinning those constitutional limits—namely the avoidance of conflict among sovereigns and the protection of defendants from unwarranted assertions of authority by sovereigns where they are not "at home." Finally, several practical considerations of special importance to foreign and domestic companies—including the ease of application, the promotion of foreign commerce, and the avoidance of tensions with foreign governments—support this rule.

*Second*, the Ninth Circuit's "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction. Those decisions, especially *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), set an extraordinarily high bar before a nonresident corporation will be deemed amenable to adjudicatory jurisdiction in a forum based on the activities of its subsidiaries there. This high bar

reflects the commonsense principle that each defendant's due process right to be free from unwarranted assertions of sovereign authority, like all constitutional rights, must be individually assessed. It also reflects the presumption of corporate separateness—a principle of great importance to companies, both foreign and domestic, that promotes, among other salutary goals, capital formation, credit extension, and regulatory compliance. The Ninth Circuit's "agency" test thwarts these principles. It upsets the reasonably settled expectations of foreign companies by placing ordinary relations with their American subsidiaries on a collision course with the lower court's diluted "right to control" test. It also exposes owners of this country's small businesses, the engine of job production today, to an unjustifiable risk that they will be haled into faraway forums.

## ARGUMENT

For over a century, the Due Process Clause has constrained assertions of adjudicatory jurisdiction over nonresident defendants. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878).[2] The due process limitations on a court's adjudicatory authority do not depend on

[2] This concept is sometimes also referred to as "personal jurisdiction" or "judicial jurisdiction." This distinguishes it from other conflicts principles like *prescriptive jurisdiction* (also known as legislative jurisdiction), which concerns a legislature's ability to issue substantive rules regulating conduct, or *enforcement jurisdiction*, which concerns the rules governing the ability of a judgment creditor to satisfy a judgment. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (prescriptive jurisdiction); *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) (enforcement jurisdiction).

whether the defendant is an individual or a juridical entity; nor do they depend on the nationality of the defendant. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-89, 299 (1980).

Since *International Shoe*, those constitutional constraints are ordinarily measured in terms of "contacts" between the defendant and the forum state. 326 U.S. at 316. The constitutionally required quantum of contacts varies with the nature of jurisdiction being asserted. When the plaintiff's claims relate to the defendant's forum contacts, specific jurisdiction may lie. *See Goodyear*, 131 S. Ct. at 2855. Here, the parties agree that the plaintiffs' claims lack any relation to the contacts of Daimler AG, a German Aktiengesellschaft ("stock company"), with California. Pet. App. 20a.

When the plaintiff's claims are unrelated to the defendant's forum contacts, adjudicatory jurisdiction can lie only "when there are sufficient contacts between the [forum] and the foreign corporation" to satisfy the requirements of general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Here, Judge Reinhardt's panel opinion held that general jurisdiction would lie based on the contacts of Mercedes-Benz USA, LLC ("MBUSA"), an indirectly held subsidiary of Daimler AG.[3] In Judge Reinhardt's panel opinion, those contacts could properly be treated as Daimler AG's own because MBUSA was its "agent."

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[3] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the original panel opinion that correctly held the Constitution prohibited the exercise of adjudicatory jurisdiction in this case. *See* Pet. App. 46a-61a.

That holding is incorrect—both for the reasons stated by Daimler AG and for two additional reasons explained in this brief. First, it exceeds the constitutional limits on general jurisdiction over corporations, which restrict such jurisdiction to an entity's state of incorporation or principal place of business. Second, and alternatively, the "right to control" test articulated in Judge Reinhardt's panel opinion flouts the constitutional limits of adjudicatory jurisdiction set forth in this Court's prior opinions and is inconsistent with the purposes underlying those limits.

## I. Corporations Are Subject To General Jurisdiction Only In Their States Of Incorporation And Principal Place Of Business.

Under this Court's precedents, general jurisdiction over corporations lies only in forums where they are incorporated or maintain their principal place of business. This rule comports with the history of the due process limits on adjudicatory jurisdiction and promotes the functions served by those limits. Finally, several practical considerations support this rule.

### A. This Court's prior decisions narrowly define the forums that may exercise general jurisdiction over corporate defendants.

*International Shoe* highlighted the constitutional significance of the relationship between a plaintiff's claims and a defendant's activities in the forum state. Though not employing the phrase "general jurisdiction," *International Shoe* did speak in terms of "instances in which the continuous corporate operations within a state were thought so substantial

and of such a nature as to justify suit against it on cause of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. Subsequent academic research[4] described these "instances" as "general jurisdiction," a term this Court later formally incorporated into the doctrine. *See Helicopteros*, 466 U.S. at 416.

Since *International Shoe*, this Court has surveyed the constitutional boundaries of general jurisdiction over corporations three times. Most recently, in *Goodyear*, this Court unanimously held that general jurisdiction could not lie based upon the nonresident defendants' sales of goods to the forum state (North Carolina). Central to this conclusion was the Court's belief that such sales did not render these corporations "essentially at home in the forum State." 131 S. Ct. at 2851. In the Court's view, corporations were "at home" in places equivalent to the domicile of an individual. *Id.* at 2853; *see also Milliken v. Meyer*, 311 U.S. 457, 462 (1940). These consisted of the corporation's place of incorporation and principal place of business. *Goodyear*, 131 S. Ct. at 2853 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988)); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (describing the states of "incorporation or principal place of business" as analogous to individual citizenship or domicile and "indicat[ing] general submission to a State's powers"). Under this standard, the corporate defendants in *Goodyear* were not "at home" in North Carolina because they

[4] *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

were incorporated and had their principal places of business elsewhere—namely, Turkey, France, and Luxembourg. *Id.* at 2850. *See also Nicastro*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (A foreign corporation is "not subject to general (all purpose) jurisdiction in [forum courts], for that foreign-country corporation is hardly 'at home' in [the forum]."). While their sales of goods to North Carolina might have supported specific jurisdiction in an action related to those sales, *see Goodyear*, 131 S. Ct. at 2855, they were insufficient to support general jurisdiction.

The "at home" standard announced in *Goodyear* fits comfortably with the Court's two earlier post-*Shoe* decisions addressing general jurisdiction over nonresident corporations. A quarter-century before *Goodyear*, this Court held that general jurisdiction would not lie over nonresident corporations based on their purchases from the forum state. *See Helicopteros*, 466 U.S. at 415-19. Like the non-resident defendants in *Goodyear*, the corporate defendant in *Helicopteros* was incorporated and had its principal place of business in a foreign country—Colombia. *Id.* at 409. And while its purchases from the forum state would perhaps be relevant to a specific jurisdiction claim, *see id.* at 425-26 (Brennan, J., dissenting), they were insufficient to render it "at home" in the forum (Texas) and thus could not support general jurisdiction.

In contrast to *Goodyear* and *Helicopteros*, this Court upheld an assertion of general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*, 343 U.S. 437 (1952). *Perkins* involved a shareholder's claims for nonpayment of dividends and failure to issue shares against a "sociedad anonima" organized under the laws of the Philippines and conducting mining

operations in that country. *Id.* at 439. Despite the company's foreign seat, the shareholder filed suit in Ohio where its president (who was also its general manager and principal stockholder) had relocated during the wartime hostilities in the Philippines. *Id.* at 447-48. Although the shareholder's claims were unrelated to the company's contacts with Ohio, *id.* at 447, the Court held that the Ohio court's assertion of adjudicatory jurisdiction comported with the Due Process Clause, *id.* at 448-49. The Court rested this conclusion on several facts—the company's president maintained an office there, carried on correspondence there relating to the company, maintained company bank accounts there, used an Ohio-based bank as a transfer agent, hosted board meetings, and directed corporate operations from there. *Id.* at 447-48. As this Court later explained, "[i]n those circumstances, Ohio was the corporation's *principal, if temporary, place of business.*" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984) (emphasis added); *cf. Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (describing principal place of business for purposes of federal diversity statute as "referring to the place where a corporation's officers direct, control and coordinate the corporation's activities").

Read together, *Goodyear*, *Helicopteros*, and *Perkins* establish a clear and predictable rule: Corporations are subject to general jurisdiction only in their state of incorporation and principal place of business. *See also Nicastro*, 131 S. Ct. at 2787 (plurality opinion) ("[T]hose who live or operate primarily outside a State have a due process right not to be subject to judgment in its courts as a general matter."). This rule comports with the history underpinning the due process limits on adjudicatory jurisdiction, as ex-

plained in Section I.B. It advances the purposes underpinning those limits, as explained in Section I.C. Finally, it is supported by several additional practical considerations, discussed in Section I.D.

### B. Limiting general jurisdiction to the forums where corporate defendants are "at home" comports with the history underlying the due process limitations on adjudicatory jurisdiction.

Before *International Shoe*, "[t]he foundation of jurisdiction [wa]s physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Courts authenticated their physical power over defendants by effecting proper service of process. Corporations, as initially conceived, were "artificial persons" that existed only within the territorial borders of the sovereign that created them; thus, they could not reside beyond the territorial borders of their place of incorporation. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839). Because corporations act through their agents, service was originally possible only on their principal corporate officers in their state of incorporation. Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 Harv. L. Rev. 871, 878 (1919). This was because the functions and authority of corporate officers were thought to cease at the territorial border of the state of incorporation. *E.g., McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819). Consequently, corporations were subject to general jurisdiction only in their state of domicile—their state of incorporation. Justice Field summarized this point in *St. Clair v. Cox*:

> Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which

> it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice TANEY [in *Bank of Augusta v. Earle*], migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

106 U.S. 350, 354 (1882).

This restrictive view of adjudicatory authority began to wither during the late nineteenth century as interstate commerce began to bloom. Corporations, through their agents, increasingly transacted business beyond the borders of their state of incorporation. 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1066 (3d ed. 2002). The Court, moreover, recognized that such transactions were possible only with the express or implied consent of the other state. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855). In exchange for that consent, states could impose conditions on nonresident corporations so long as they were not "repugnant to the [C]onstitution or the laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." *Id., quoted with approval in St. Clair*, 106 U.S. at 359.

As a result, both before and after the Fourteenth Amendment's ratification, states sometimes required nonresident corporations "doing business" within their borders to appoint an agent for service or deemed service proper when it was made on a designated public official or an in-state agent of the corporation. *See e.g.*, *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 605 & n.1 (1899) (discussing 1877 Tennessee statute permitting in-state service on any agent of a nonresident corporation "doing business in the state" for suits arising from its in-state business transactions); *French*, 59 U.S. at 406 (discussing 1851 Ohio statute permitting in-state service on most in-state agents of nonresident insurance corporations); *see also* Restatement (First) of Judgments § 29 & cmt. a (1942); Restatement (First) of Conflict of Laws § 91 & cmt. b (1934). These statutes aided states in asserting jurisdiction over nonresident corporations. So while they could not "reside" outside of their state of incorporation, they could be sued in another state in limited circumstances. *French*, 59 U.S. at 407.

Even during this period of expanding adjudicatory jurisdiction, a state's authority over nonresident corporations did not extend to every possible claim against them. This point was made plain in Justice Harlan's unanimous opinion in *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907). There, the Court reiterated that states could condition a nonresident corporation's ability to transact business within their borders upon filing a statement with a state public official (in that case, an insurance commissioner) attesting that service on the public official could be treated as personal service on the nonresident corporation. *Id.* at 21. Importantly, however, should the nonresident corporation fail to do so and yet transact business within the state, its lack of

compliance would not constitute a defense but rather an implicit acceptance of the state's service statute. *Id.* at 21-22.

Yet the Court was equally clear that, under these circumstances, states did not have unlimited adjudicatory jurisdiction over nonresident corporations. Instead, their jurisdiction extended only to claims related to the corporation's business transactions within the state. *See id.* at 21 ("But even if it be assumed that the [nonresident corporation] was engaged in some business in [the forum state] at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the [public official] of that [state] would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of [the forum state]."). In the Court's view, public policy considerations warranted the inference that the nonresident corporation implicitly assented to the forum state's jurisdiction "as to business there transacted by it." *Id.* at 23. But "it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although the citizens of the former state may be interested in such business." *Id.* In other words, absent explicit consent, nonresident corporations could not be subject to general jurisdiction outside of their state of incorporation, no matter how much business they transacted there. *See Louisville & Nashville R.R. Co. v. Chatters*, 279 U.S. 320, 325 (1929) ("Even when present and amenable to suit [a nonresident corporation] may not, *unless it has consented*, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction."

(emphasis added) (citations omitted)).[5] *See generally* Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 681-84 (2012).

In sum, then, the history of adjudicatory jurisdiction before *International Shoe* establishes that the Due Process Clause limited general jurisdiction over nonresident corporations, absent their prior consent, to only those forums where they were deemed to be legally "at home."

### C. Limiting general jurisdiction to the forums where corporate defendants are "at home" advances the purposes underlying the due process limitations on adjudicatory jurisdiction.

The due process limits on adjudicatory jurisdiction traditionally have served "two related, but distinguishable functions." *Woodson*, 444 U.S. at 292. First, they reduce clashes among sovereign states (whether domestic or foreign). *See id.*; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Assertions of jurisdiction over nonresident defendants necessarily implicate the interests of two sovereigns—the sovereign asserting adjudicatory jurisdiction and the sovereign where the defendant is "at home." Second,

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[5] Under the Restatement, general jurisdiction might lie where nonresident corporations explicitly consented—by filing the applicable paperwork either appointing an agent for service or assenting to service upon a public official and then expressly empowering the designated agent or public official to accept service on its behalf for any cause of action. *See* Restatement (First) of Conflict of Laws § 91 & cmt. c (1934). In no case could the state's adjudicatory jurisdiction exceed the scope of authority that the agent or official possessed to accept service. *Id.* cmt. b.

the constitutional limits avoid unfairness to the defendants. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 465 U.S. 694, 702-03 n.10 (1982). Permitting jurisdiction over corporations with a few forum contacts unrelated to the claims "lays too great and unreasonable a burden on the[m] to comport with due process." *Int'l Shoe*, 326 U.S. at 317. These twin functions influence the different doctrinal approaches governing specific and general jurisdiction.

Specific jurisdiction inquiries require a complex analysis of the competing sovereign interests and the burdens on the defendant. Consequently, specific jurisdiction entails a fact-intensive, two-step inquiry: (1) whether the defendant has undertaken "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253, and (2) whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316. *Woodson*, a specific jurisdiction case, explained that the second step of this inquiry turns on an array of factors, such as the burden on the defendant and the forum state's interest, to guide the determination whether an exercise of jurisdiction accords with "traditional notions of fair play and substantial justice." 444 U.S. at 292; *see also Asahi*, 480 U.S. at 113-16 (majority opinion) (holding, in a specific jurisdiction case, that *Woodson*'s factors do not support exercise of adjudicatory jurisdiction).

General jurisdiction inquiries look different. The balance of sovereign interests is more one-sided, and the unfairness to the defendant is more easily

assessed. Consequently, general jurisdiction rules tend to be categorical. *Goodyear*, *Helicopteros*, and *Perkins* all resolved their respective questions of adjudicatory authority without considering whether the exercise of general jurisdiction comported with "traditional notions of fair play and substantial justice." Strictly limiting general jurisdiction over corporations to the forums where they are incorporated or maintain their principal place of business avoids needless "uncertainty and litigation over the preliminary issue of the forum's competence," *Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 626 (1990) (plurality opinion), and reflects the categorical approach previously employed in this Court's general jurisdiction decisions. Any assertion of general jurisdiction outside of those forums would be, as Petitioner puts it, *per se* unreasonable. *See* Brief for Petitioner at 37-38.

### D. Carefully drawn limits on the forums that can assert general jurisdiction provide predictability, promote foreign commerce, and minimize interference with the foreign relations of the United States.

*Goodyear*'s "at home" rule is not only compatible with doctrine, history, and purposes, it also is supported by several additional practical considerations.

*First*, the rule offers predictability for businesses and easy application for courts. "Predictability," as this Court recently explained, "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94**.** In the context of adjudicatory jurisdiction, clear and predictable jurisdictional rules enable companies "to structure their primary conduct with some minimum assurance as to where that

conduct will and will not render them liable to suit." *Woodson*, 444 U.S. at 297. By contrast, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94.

The benefits of a clear and predictable rule governing general jurisdiction over nonresident corporations resonate equally with foreign and domestic companies. Domestic companies, like foreign ones, routinely use subsidiaries or other juridical entities to conduct business across state lines, *see* Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 Yale L.J. 1413, 1427 & n.76 (1998), and lower courts sometimes rely on the activities of those entities to exercise general jurisdiction over the nonresident domestic company.[6] Unfortunately, the standards employed in those cases are hardly clear. Confirming that corporations are subject to general jurisdiction only in the forums where they are incorporated and maintain their principal place of business avoids that uncertainty and unpredictability. The forum of incorporation is easily identified by reference to the company's founding documents. And although the forum where the company maintains its principal place of business might be debatable in borderline cases, this Court can develop clear standards to guide that inquiry, perhaps by reference to comparable tests in other jurisdictional contexts. *See Hertz*, 559 U.S. at 94 (explaining how the "nerve center" test for principal place of business in subject-

[6] *See, e.g., Alderson v. S. Co.*, 747 N.E.2d 926, 944-45 (Ill. App. Ct. 2001); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967) (applying New York law).

matter jurisdiction is easily applied in mine-run cases).

*Second*, holding that corporations are amenable to general jurisdiction only in forums where they are "at home" has salutary effects on foreign commerce. Foreign direct investment plays a vital role in the health of the United States Economy. *See* 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* 2 (2008). Such investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity and support[s] American communities." Statement by President Barack Obama on the United States Commitment to Open Investment Policy (June 20, 2011).

Extraordinary assertions of jurisdiction can frustrate this commerce-promotion objective. "Overseas firms . . . could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008); *cf. Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979). While such concerns often are articulated in the context of prescriptive jurisdiction, the commerce-frustrating effects of the capacious approach to general adjudicatory jurisdiction exemplified by Judge Reinhardt's panel opinion are potentially far worse. Whereas prescriptive jurisdiction rules subject foreign companies to account for specific claims, general jurisdiction rules make them answerable in the forum's courts for *all* claims regardless of where they occurred. This makes the foreign company a tempting target for plaintiffs, who may simply join the foreign company in litigation as a part of an effort to obtain settlement leverage. Even if a lower court

eventually dismisses the foreign company from the case, such relief may come only after costly and burdensome jurisdictional discovery, as this case well illustrates, *see* Pet. App. 80a. Thus, as the United States Government has acknowledged, extraordinary assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10-76 ("*Goodyear Brief*") at 12.

The threat to foreign-commerce promotion affects domestic companies too. As the judges dissenting from rehearing en banc correctly recognized, sweeping assertions of jurisdiction over foreign companies threaten U.S. companies with retaliatory assertions by foreign courts. Pet. App. 144a. Concern about retaliation against American companies has prompted this Court to proceed cautiously when permitting the exercise of prescriptive jurisdiction over foreign companies. *See, e.g., Japan Line*, 441 U.S. at 450; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). Those same concerns should animate the rules governing adjudicatory jurisdiction. European officials recently revised the rules governing the adjudicatory jurisdiction of member-state courts and considered changes to the rules governing jurisdiction over companies, like those in the United States, not organized in member states. *See* Council Regulation 2012/1215, art. 6, 2012 O.J. (L351) 1, 7 (EU); Commission of the European Communities, *Green Paper on the Review of Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* at 3-4 (Apr. 21,

2009). Foreign jurisdictional rules are far less likely to reflect a hostile approach toward U.S. companies if our own rules regarding adjudicatory jurisdiction over foreign companies are similarly measured.

*Third*, a carefully cabined approach to general jurisdiction reduces any unintended impact on the foreign relations of the United States. Assertions of authority over foreign corporations can easily raise tensions between the United States and other nations. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Just like assertions of prescriptive jurisdiction, assertions of adjudicatory jurisdiction carry these risks, so any analysis of the constitutional limits of that authority likewise must take into account the "[f]ederal interest in [the] Government's foreign relations policies." *Asahi*, 480 U.S. at 115 (majority opinion).

The United States' brief in *Goodyear* explained how extraordinary assertions of general jurisdiction interfered with that "federal interest." It noted that such assertions had prompted "foreign governments' objections." *Goodyear Brief* at 33. This case well illustrates that point. The German Government identified this case as exemplifying an unwarranted intrusion by a U.S. court into the activities of a German company that, in Germany's view, should be "tried in German courts." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, at 10 & n. 3. And German courts, as Judge Reinhardt's panel opinion acknowledges, "have expressed some concern that this suit may impinge on German sovereignty." Pet.

App. 34a. Yet unless the available forums for general jurisdiction are clearly cabined, the "concern[s]" must be assessed by the Article III courts—which are not only thrust into the position of weighing them but may simply choose to reject them, as Judge Reinhardt's panel opinion did in this case, Pet. App. 34a. *Cf. McCulloch*, 372 U.S. at 19 (observing that an "ad hoc weighing of contacts" in the context of prescriptive jurisdiction "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice").

The United States' brief in *Goodyear* also noted that extraordinary assertions of general jurisdiction "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Goodyear Brief* at 33. The United States presently is not a party to any bilateral or multilateral convention governing adjudicatory jurisdiction or judgment enforcement. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1081-85 (5th ed. 2011). Though diplomats spent the better part of the last decade trying to achieve some degree of consensus, a lack of agreement on common principles of general jurisdiction presented a central stumbling block. *See* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319, 338-39 (2002); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Leg. F. 141, 161-63. The lower court's expansive theory of general jurisdiction based on a foreign parent's "right to control" a subsidiary simply widens the chasm between the law of the United States and the laws of its major trading partners. By contrast, limiting general jurisdiction to the state of the defendant's

domicile is a well-recognized principle of European law. *See* Council Regulation 2012/1215, art. 4. Anchoring the United States law of general jurisdiction in similar reference points facilitates "efforts to help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Invs., Inc.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.); *cf. Nicastro*, 131 S. Ct. at 2803-04 (Ginsburg, J., dissenting) (comparing American and European law on adjudicatory jurisdiction).

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This extensive historical, purposive, and practical support for *Goodyear*'s rule demonstrates the wisdom in this Court's limiting assertions of general jurisdiction over corporate defendants to forums where they are incorporated or have their principal place of business. Any objection to that rule based on alleged hardships it may cause plaintiffs is unwarranted. In all cases, *specific* jurisdiction may be available to ameliorate any hardship so long as the plaintiffs' claims are sufficiently related to the defendants' forum contacts. Only when *specific* jurisdiction is not available—that is, when a plaintiff's claims arise from a defendant's purposeful contacts outside the forum state—will *Goodyear*'s *general* jurisdiction rule be implicated. Hardship objections in such cases ring especially hollow when, as in this case, the plaintiffs are not even forum residents. But even if plaintiffs were forum residents, limiting general jurisdiction to forums where the nonresident defendant is "at home" is entirely appropriate. In cases against domestic companies, the plaintiffs would have at least one, if not two, states where general jurisdiction unquestionably would lie. And while such a forum might not exist with respect to a foreign company, Congress can

attempt to craft mechanisms designed to facilitate an available forum where specific jurisdiction might otherwise be unavailable.[7] Courts should not expand general jurisdiction out of a belief that they need to fill some gap in the jurisdictional architecture designed by Congress. Those gaps do not always reflect mere legislative oversight. Instead, as Judge Friendly observed in a related context a half-century ago, jurisdictional rules "represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing [sic] resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations." *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963) (en banc). In this context, the "balancing of various considerations"—including forum availability and commerce promotion—is one that Congress, not the courts, must undertake.

## II. A Parent Corporation's Right To Control A Subsidiary Does Not Supply A Basis For Equating The Two Entities For Purposes Of Adjudicatory Jurisdiction.

Even if the Court does not rely on a categorical rule cabining the forums where general jurisdiction over corporations will lie, the Ninth Circuit's decision still must be reversed. Its "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction.

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[7] For certain cases arising under federal law, Rule 4(k) already alters the range of contacts relevant to the jurisdictional analysis. *See* Fed. R. Civ. P. 4(k)(1)(c); 4(k)(2). Those rules are not at issue here for the simple reason that Respondent has waived any reliance on them. *See* Brief for Petitioner at 7.

### A. This Court's decision in *Cannon* creates a strong presumption that parents and subsidiaries will be treated separately in any jurisdictional inquiry.

The starting point for analyzing adjudicatory jurisdiction based on the relationship between a parent and subsidiary corporation is this Court's decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). Decided before *International Shoe*, *Cannon* involved a simple breach of contract action brought by a North Carolina company (Cannon) against a Maine company (Cudahy Packing) in a North Carolina court. Following removal, the Maine company sought dismissal for lack of jurisdiction; service had been effected only on the agent of a third company (Cudahy of Alabama) whose entire capital stock was owned by Cudahy Packing. The Alabama-based subsidiary maintained an office in North Carolina for the purpose of marketing Cudahy products there, so the question arose whether Cudahy Packing was "doing business" or "present" in North Carolina by dint of the activities of its wholly owned subsidiary. The Court unanimously held that, under such circumstances, jurisdiction did not lie.[8] Despite

[8] Some critics of *Cannon* have argued that the case did not even involve the constitutional limits of adjudicatory jurisdiction and cite its statement that "no question of the constitutional powers of the state, or of the federal government is directly presented." 267 U.S. at 336. That statement is better understood as referring to lack of a constitutional challenge to the state's regulatory power rather than a constitutional challenge to the state's adjudicatory power. But even if *Cannon*'s critics are correct, they cannot avoid the cases upon which *Cannon* rests its rule of corporate separateness, all of which rest firmly on constitutional principles of adjudicatory

the Maine parent company's exercise of "control both commercially and financially" over its Alabama subsidiary, "[t]he existence of the Alabama company as a distinct corporate entity [wa]s, however, in all respects observed." 267 U.S. at 335. *Cannon*'s emphasis on the observance of corporate formalities sets a high bar to deeming nonresident corporations present in a state based on the activities of their subsidiaries there.

Some have suggested that *International Shoe* superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.194 (collecting authorities). That argument misreads *International Shoe*. While *International Shoe* perhaps sought to replace the lexicon of "consent, presence and doing business" with one stressing "contacts," it did not magically wipe clean the constitutional slate and discard all prior decisions that, since *Pennoyer*, had charted the due process limits on the exercise of adjudicatory jurisdiction.[9] Subsequent

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jurisdiction. *See Cannon*, 267 U.S. at 336 (citing *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 409-11 (1903); *Peterson v. Chi., Rock Island & Pac. Ry. Co.*, 205 U.S. 364 (1907); and *People's Tobacco Co., Ltd., v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918)).

[9] Others have suggested that this Court's decision in *United States v. Scophony Corp. of Am.*, 333 U.S. 795 (1948), superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.199 (collecting authorities). That argument is incorrect. *Scophony* did not concern the constitutional constraints on adjudicatory jurisdiction but instead addressed questions of venue and statutory authorization for service. *See* 333 U.S. at 804 ("We deal here with a problem of statutory construction, not one of constitutional import." (footnote omitted)). Given this Court's admonition that it does not overrule or dramatically limit prior precedents *sub silentio*, *see, e.g., Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), it would be strange to conclude that the Court overruled *Cannon* in an opinion that

decisions of this Court have relied extensively on post-*Pennoyer*/pre-*Shoe* precedents. In the area of general jurisdiction, this Court's decision in *Helicopteros* drew heavily on the pre-*Shoe* precedent in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), to conclude that the assertion of adjudicatory jurisdiction in that case did not comport with the limits imposed by the Due Process Clause. 466 U.S. at 417-418. And this Court's decision in *Keeton* settled any doubt specifically about *Cannon*'s continuing vitality when it cited *Cannon* for the proposition that "jurisdiction over a parent corporation does [not] automatically establish jurisdiction over a wholly owned subsidiary." 465 U.S. at 781 n.13. Thus, *Cannon* remains the seminal decision in this area.

### B. Principles of individualized consideration and corporate separateness should frame the jurisdictional inquiry.

While *International Shoe* may have changed the vocabulary of the constitutional analysis, it did not alter the underlying principles. Two principles, reflected in *Cannon*, are relevant in this case.

The first is the principle of individualized consideration. This principle flows from the very nature of the Due Process Clause itself, which protects each person from "the power of a sovereign to resolve disputes through judicial process." *Nicastro*, 131 S. Ct. at 2786-87 (plurality opinion). Consistent with this principle the "unilateral activity of another party or a third person is not an appropriate consideration

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adverted to it, *see Scophony*, 333 U.S. at 813 n.23, but did not otherwise discuss it.

when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 417; *see also Hanson*, 357 U.S. at 253; *Woodson*, 444 U.S. at 298; *Kulko v. Superior Ct. of Cal., City & Cnty. of S.F.*, 436 U.S. 84, 93-94 (1978). It would be "plainly unconstitutional" to rest an assertion of adjudicatory jurisdiction over a nonresident defendant based on another's contacts. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Instead, consistent with this principle of individualized consideration, "[t]he requirements of *International Shoe* . . . must be met as to each defendant." *Id.* at 332; *see also Keeton*, 465 U.S. at 781 n.13.

The second is the principle of corporate separateness. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003)*; see also Burnet v. Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."). This principle extends to situations where parent companies own some or all of the capital stock of a subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Treating parent and subsidiary corporations as distinct entities serves several salutary purposes by supporting, *inter alia*, the formation of capital, the extension of credit, the optimal allocation of risk, the efficient use of assets, and the compliance with local laws (such as investment and tax laws). *See Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 626 (1983); *see generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039-41 (1991) (describing the purposes

behind the principle of corporate separateness); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 Yale L.J. 1363, 1389-91 (1998) (describing the purposes of subsidiaries). To be sure, the principle of corporate separateness is not absolute and may be overridden "in the case of fraud or some other exceptional circumstances." *Dole Food*, 538 U.S. at 476; *see also Bancec*, 462 U.S. at 629; *Bestfoods*, 524 U.S. at 62. Nonetheless, such disregard of the corporate form remains the very "rare exception," not the norm. *Dole Food*, 538 U.S. at 475; *cf. Bancec*, 462 U.S. at 627; *Anderson*, 321 U.S. at 362.[10]

Taken together, these two principles—individualized consideration and corporate separateness—might

[10] Some courts have held that because questions of adjudicatory jurisdiction are preliminary and do not determine ultimate liability, the showing necessary to disregard corporate separateness for jurisdictional purposes should be less taxing than the showing necessary to pierce the corporate veil for liability purposes. *See* Born & Rutledge, *supra*, at 184-85, 191 (collecting cases). That proposition should be rejected. Litigation is costly and burdensome, so forcing a nonresident corporation to defend itself in a foreign forum imposes costs on that corporation no less tangible or real than a liability determination. Moreover, most cases never reach a verdict, *see* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. Leg. Stud. 459 (2004), so the exercise of personal jurisdiction effectively can drive the parties' settlement leverage. Finally, a finding of jurisdiction, particularly general jurisdiction, can have a lasting impact on the nonresident company. It amounts to a determination that the company is answerable in the forum on any claim arising anywhere in the world regardless of its contacts with the forum. Thus, the standards governing the disregard of corporate separateness should be no less taxing in the context of a jurisdictional inquiry than in the context of a substantive veil-piercing inquiry.

suggest that it is never appropriate to disregard the corporate form for purposes of evaluating adjudicatory jurisdiction. *See* Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023 (2004). But this Court need not announce such a broad holding here to reverse the judgment below. Instead, it suffices if this Court identifies a set of safe-harbor factors, thereby providing courts and corporations clear guidance about the sorts of activities that will not result in treating a subsidiary's contacts as the parent's own.

Decisions of this Court, drawing on the principles of individualized consideration and corporate separateness, help to chart those safe-harbor factors. They include:

- The parent's stock ownership of the subsidiary, *see Cannon*, 267 U.S. at 335; *cf. Shaffer*, 433 U.S. at 214; *see generally* Restatement (Second) of Conflict of Laws § 52 cmt. b (1971);
- The parent's right to elect the subsidiary's directors who, in turn, select the corporate officers, *see Bestfoods*, 524 U.S. at 62; *Peterson v. Chi., Rock Island & Pac. R.R. Co.*, 205 U.S. 364, 391 (1907);
- Duplication of some or all of the directors or officers of the parent and the subsidiary, *see Bestfoods*, 524 U.S. at 62; *see generally* William M. Fletcher, *Cyclopedia of the Law of Corporations* § 8674 (rev. ed. 2012);
- The parent's role in drafting the subsidiary's by-laws, *see id.*;

- Arms-length distribution arrangements between the parent and the subsidiary, *see Cannon*, 267 U.S. at 335;
- The subsidiary's financial dependence on the parent, *see id.*

These sorts of arrangements, standing alone or in combination, do not justify treating the subsidiary's contacts as the parent's own for purposes of establishing personal jurisdiction.[11]

Measured against these safe-harbor factors, this should be an easy case. Daimler AG and its indirectly held subsidiary maintain separate directors, officers, and employees. They have separate books and records. And the companies have separate responsibility for day-to-day decisionmaking. Thus, there is simply no basis for treating the contacts of MBUSA as Daimler AG's own. *See* Brief for Petitioner at 23.

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[11] Heeding this Court's instruction on these points, numerous lower courts have declined to disregard the corporate form when presented with arrangements of this sort. *See, e.g., Rasmussen v. Gen. Motors Corp.*, 803 N.W.2d 623 (Wis. 2011) (distribution arrangement); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008) (distribution arrangement); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 650 (8th Cir. 2003) (share ownership); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) (collecting cases for the proposition that stock ownership in or affiliation with a corporation, without more, does not justify the assertion of adjudicatory jurisdiction); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998) (overlapping directors and officers); *Miller v. Honda Motor Corp. Ltd.*, 779 F.2d 769 (1st Cir. 1985) (distribution arrangement with overlapping directors and officers).

Judge Reinhardt's panel opinion complicates this easy case with a sweeping "agency" test.[12] Under that test, the contacts of a subsidiary (or any other entity) can be attributed to a parent (or any other entity) wherever two conditions are met—(1) the services provided by the subsidiary are "sufficiently important" to the parent and (2) the parent has the "right to control" the subsidiary's operations. Pet. App. 23a-30a.

This test erodes any meaningful limits set by the principles of individualized consideration and corporate separateness. The emphasis on "sufficient importance" is tautological. If an activity were not sufficiently important, then no party would engage in it. The very fact that a subsidiary company (or any entity) engages in activity supplies some sign of its importance to the company. As the Ninth Circuit judges dissenting from plenary review explained, "[a]nything a corporation does through an independent contractor, subsidiary, or distribution is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." Pet. App. 140a.

The emphasis on "right to control" is similarly flawed. It turns the jurisdictional inquiry on hypothetical acts rather than a party's actual contacts contrary to this Court's clear commands. "[A]n individual's contract with an out-of-state party alone" cannot establish minimum contacts. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 478 (1985); *cf. id.* at 479 n.22 (suggesting in dicta that an agency relation-

[12] Judge Reinhardt's panel opinion purports to draw support for that test from various authorities under New York law. *See Frummer v. Hilton Hotels Int'l*, 281 N.Y.S.2d 41 (1967); *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

ship might exist for purposes of specific jurisdiction where the defendant was the "primary participan[t] in the enterprise and has *acted* purposefully in directing" the agent's activities) (emphasis added) (citation and internal quotations omitted). A "right to control," which in this case allegedly resides with the General Distribution Agreement between Daimler AG and MBUSA, J.A. 149a-215a, amounts to nothing more than the very sort of bare contract that *Burger King* held did not suffice to establish specific jurisdiction, much less general jurisdiction.

This diluted standard upsets the reasonable expectations of foreign parent companies with United States subsidiaries. Foreign companies like a German AG are organized under another country's law. *See generally* Peter Muchlinski, *The Development of German Corporate Law*, 14 German L.J. 339 (2013). Those foreign laws set forth the legal rights and responsibilities on matters of corporation governance; in some cases, those laws may affirmatively obligate the foreign parent to exercise a degree of control or oversight of its subsidiaries. *See* Born & Rutledge, *supra*, at 187; José Engrácia Antunes, *The Liability of Polycorporate Enterprises*, 13 Conn. J. Int'l L. 197, 222 (1999). The test articulated in Judge Reinhardt's panel opinion puts the discharge of those foreign legal duties on a collision course with domestic law: A company discharging its duties under foreign law may find that conduct subjects it to general jurisdiction in the United States; alternatively, the foreign company may seek to avoid general jurisdiction but only by violating the very duties imposed on it by the law of its seat. Such collision courses should be avoided in order to ensure "the potentially conflicting laws of different nations

work together in harmony." *F. Hoffman La Roche Ltd. v. Empagran S.A.*. 542 U.S. 155, 164 (2004).

Domestic companies, especially small businesses, also suffer under the "right to control" standard. The Court's jurisdictional rules must take into account not only the interests of the company in the case before it but also the needs of small domestic concerns that must operate under the same general jurisdictional standards. *Nicastro*, 131 S. Ct. at 2790 (plurality opinion); *id.* at 2794 (Breyer, J., concurring in the judgment and joined by Alito, J.). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., Office of Advocacy, *The Small Business Economy: A Report to the President* 1 (2009). Those small businesses often will be completely owned by a single family or individual, who not only has the "right to control" the corporation but "controls" it completely. *See* Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185, 1192 (2013). One could easily imagine a court applying the lax standard articulated in Judge Reinhardt's panel opinion to those individual owners of small businesses based on their right to control their company. *Cf.* Thompson, *supra*, at 1054-57 (noting that courts are more likely to pierce substantively the veil of closely held corporations with few individual shareholders). Such an approach could "force" small business owners "to choose between" abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). "Jurisdictional rules

should avoid these costs whenever possible." *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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