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 AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the Due Process Clause of the Fourteenth Amendment, as interpreted most recently by this Court in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011), should allow a court to exercise general personal jurisdiction over a foreign corporation solely because it has a subsidiary conducting business on its behalf in the forum State.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF also states that, on May 28 and on May 30, 2013, counsel for petitioner and counsel for respondents respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to the preservation of the due process protections afforded businesses when they are sued in unanticipated, remote, and inconvenient fora. In this connection, NELF and AIM recently filed an amicus brief in *Walden v. Fiore*, *cert. granted*, 133 S. Ct. 1493 (Mar. 4, 2013) (No. 12-574), arguing for reasonable due process limits on a court's exercise of specific jurisdiction over an out-of-state defendant sued for intentional torts. Moreover, NELF has filed many other amicus briefs before this Court, advocating successfully for protections afforded businesses under the Constitution and federal law.[2]

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[2] *See, e.g.*, *Vance v. Ball State*, 2013 WL 3155228 (Jun. 24, 2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 2013 WL 3155234 (Jun. 24, 2013) (standard of but-for causation applies to Title VII retaliation claims); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (Federal Arbitration Act requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts State law requiring class arbitration as condition of enforcing consumer arbitration agreements); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)

In this case, NELF and AIM support the petitioner in arguing that the Ninth Circuit has violated due process by exercising general jurisdiction over a foreign corporation based solely on the forum connections of its indirect subsidiary. Under this Court's clear precedent, general jurisdiction should not lie in this case, because petitioner has observed all of the corporate formalities, by using the services of a subsidiary as a *separate* legal entity to conduct business on its behalf in the forum State.

Amici are interested in this case because many of their corporate supporters may also have subsidiaries or affiliates doing business in the Ninth Circuit on their behalf as separate legal entities. Under the Ninth Circuit's approach, amici's supporters could face the same fate as petitioner and be subject to the exercise of general jurisdiction by a remote court of that circuit, based solely on the existence of such subsidiaries or affiliates. This Court has long recognized that, in the ordinary parent-subsidiary relationship, where the corporate formalities are observed, the law generally treats the parent and subsidiary as two separate legal entities, even though the subsidiary may be conducting business on the parent's behalf and may be subject to a certain degree of parental oversight.

Due process, in turn, gives legal effect to the corporate defendant's reasonable expectations. If the defendant structures its business relationship with its subsidiary carefully to preserve this corporate separateness, it should not be haled into

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(First Amendment protects sale and use of prescriber-identifiable data).

court in a distant and unanticipated forum based solely on its subsidiary's activities there, to defend claims that are entirely unrelated to those activities.

The Ninth Circuit's decision and "agency" test of derivative general jurisdiction contravene this Court's clear precedent by negating the principle of corporate separateness. In so doing, the lower court has defeated the corporate defendant's reasonable expectations as to where it may and may not be sued based on its careful compliance with corporate formalities. The Ninth Circuit's decision thus violates Due Process and should be reversed.

For these and other reasons provided below, amici believe that their brief would provide an additional perspective to aid this Court in deciding the issue of personal jurisdiction presented in this case.

SUMMARY OF ARGUMENT

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment permits a court to exercise general personal jurisdiction over a foreign corporation merely because it has a subsidiary doing business on its behalf in the forum State. The Ninth Circuit has so held, based on the theory that the subsidiary conducted its business in the forum State as an "agent" of the parent corporation.

The lower court's decision and "agency" test offend due process. General jurisdiction can only lie if the foreign parent corporation has made itself "essentially at home" in the forum State by engaging in sufficiently "continuous and systematic" contacts

there. The petitioner has not established any such quasi-domiciliary relationship with the forum State in this case. To the contrary, it has carefully avoided creating any such relationship, by observing all of the corporate formalities that separate itself from its subsidiary as two distinct legal entities. This Court long has recognized that, in such a parent-subsidiary relationship, the subsidiary remains a separate entity under the law, even though it is conducting business on the parent's behalf and is, of necessity, subject to a certain degree of parental oversight. So long as the corporate form is observed, the subsidiary's contacts should not be imputed to the parent.

Due process should require a court to honor a foreign corporation's diligent observance of the corporate form, here by declining to exercise general jurisdiction over that corporation based solely on its subsidiary's forum connections. This is so because due process gives legal effect to the corporate defendant's reasonable expectations. If the defendant structures its inter-corporate relationships expressly to maintain this separateness, it should not be haled into a distant and unanticipated forum based solely on its subsidiary's forum connections, to defend claims that are entirely unrelated to those connections.

This Court has recognized only one limited exception to the principle of corporate separateness, which is inapplicable here. That exception is when the parent has so completely disregarded the corporate form that a court may do the same, by piercing the corporate veil. As the Ninth Circuit has acknowledged here, this case does *not* present any such exceptional circumstances warranting a court

to pierce the corporate veil between parent and subsidiary.

Despite this Court's clear precedent honoring corporate separateness, the Ninth Circuit has nonetheless imputed all of the subsidiary's forum contacts to the foreign parent, based on its "agency" theory of derivative corporate personal jurisdiction. But this so-called "test" would subject *any* foreign parent to general jurisdiction because it merely *describes* the ordinary, arms-length relationship between a parent and its subsidiary. As this Court has recognized, the ordinary parent-subsidiary relationship will necessarily entail a certain degree of parental oversight. This alone does not negate corporate separateness. So long as the parent observes the corporate formalities, it may use the services of a subsidiary to sell its goods, or conduct some other business on its behalf in the forum State, without risking judicial disregard of the corporate form for jurisdictional purposes.

In effect, the Ninth Circuit has penalized the petitioner for having made the legally permissible and economically sound decision to facilitate its overseas operations through a legally separate subsidiary, rather than through its own officers. The Court has rejected any such judicial disregard of the parent-subsidiary relationship.

In short, the Ninth Circuit's "agency" test, both on its face and as applied to the facts of this case, contravenes this Court's clear precedent honoring the principle of corporate separateness in cases involving the parent-subsidiary relationship. As a result, the lower court's test would impute jurisdictional contacts where frequently *none* should

be imputed at all, as in this case. Both the test and its application in this case should fail altogether under this Court's demanding, quasi-domiciliary standard under the Due Process Clause for the exercise of general jurisdiction over a foreign corporate defendant.

ARGUMENT

I. GENERAL JURISDICTION SHOULD NOT LIE AGAINST A FOREIGN CORPORATION MERELY BECAUSE IT HAS A SUBSIDIARY DOING BUSINESS ON ITS BEHALF IN THE FORUM STATE.

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to exercise general personal jurisdiction over a foreign corporation solely because it has a subsidiary doing business on its behalf in the forum State.[3] The Ninth

[3] The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. While this case concerns the constitutional limits on a federal court's exercise of personal jurisdiction, it is the Due Process Clause of the Fourteenth Amendment, and not the Fifth Amendment, that applies here. This is so because, absent a federal statute to the contrary, a federal district court may only exercise personal jurisdiction to the same extent as a State court of general jurisdiction in the State where the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A), (C). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) ("The question presented is whether this exercise of long-arm jurisdiction [by a federal district court] offended traditional conceptions of fair play and substantial justice embodied in the Due Process Clause of the Fourteenth Amendment.") (citation and internal quotation marks omitted).

Circuit has so held. Petitioner DaimlerChrysler AG ("Daimler AG") is a German corporation that manufactures Mercedes-Benz cars in Germany. Daimler AG has an indirect corporate subsidiary, Mercedes-Benz USA ("MBUSA"), which purchases Daimler AG's cars in Germany for distribution in California.[4] Daimler AG has observed all of the corporate formalities that separate itself from MBUSA. *See Bauman v. DaimlerChrysler Corp.*, 644 F.3d 904, 914, 920 (9th Cir. 2011). Nonetheless, the Ninth Circuit has concluded that MBUSA was an "agent" of Daimler AG for jurisdictional purposes. According to the lower court, all of MBUSA's California contacts must be imputed to Daimler AG, thereby establishing "vicarious" general jurisdiction over Daimler AG in that State. *See Bauman*, 644 F.3d at 920-21.

The Ninth Circuit's decision violates Due Process. General jurisdiction should not lie because Daimler AG has not made itself "essentially at home" in the forum State by engaging in sufficiently "continuous and systematic" contacts there. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations v. Brown*,

[4] Daimler AG does not own MBUSA. Instead, when this lawsuit was filed, MBUSA was a wholly-owned subsidiary of DaimlerChrysler North America Holding Corporation, which, in turn, was a wholly-owned subsidiary of DaimlerChrysler AG (now known as Daimler AG). *Bauman v. DaimlerChrysler Corp.*, 644 F. 3d 904, 913 (9th Cir. 2011).

131 S. Ct. 2846, 2851 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

It is important to bear in mind that general jurisdiction extends to any and all claims against the foreign defendant that do not arise from the defendant's activities in the forum State. *See Goodyear*, 131 S. Ct. at 2851, 2853. Since the forum State has no direct interest in the claim itself, the exercise of general jurisdiction is justified only when the corporate defendant has established a *special relationship* with that State, akin to an individual defendant's domicile. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as *at home*." *Goodyear*, 131 S. Ct. at 2853-54 (emphasis added). Accordingly, to satisfy this quasi-domiciliary requirement for the exercise of general jurisdiction over a corporate defendant, due process requires the defendant's forum contacts "[to be] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S. Ct. at 2853 (quoting *Int'l Shoe*, 326 U.S. at 318).

Thus, the issue here is whether Daimler AG, with no "continuous and systematic" connections of its own in California, can nevertheless be deemed to be "at home" in California based solely on the forum activities of MBUSA, its indirect subsidiary, to defend claims that are entirely unrelated to MBUSA's forum activities.

Due process bars the exercise of general jurisdiction over Daimler AG in California because it

has not made itself "essentially at home" in that State. To the contrary, Daimler AG has taken all available and permissible steps to *avoid* establishing any such quasi-domiciliary relationship with the State of California. Daimler AG has observed all of the corporate formalities by using the services of MBUSA as a *separate* legal entity to engage in forum operations on its behalf. Under those circumstances, this Court has long recognized the foundational principle of corporate separateness, which treats the parent and subsidiary, especially the *indirect* subsidiary, as two separate legal entities:

> A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. . . . A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, *it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary.*

Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003) (emphasis added).

Because the parent and subsidiary are structured and maintained as two separate legal entities, as in this case, the actions of the subsidiary should not be imputed to the parent. Therefore, jurisdiction cannot lie against the foreign parent based solely on its subsidiary's forum activities, such as when, as here, the subsidiary purchases the parent's goods in another jurisdiction for distribution in the forum State. In fact, this Court, when faced with substantially similar jurisdictional facts,

answered in the negative "[t]he question . . . whether the *corporate separation carefully maintained* must be ignored in determining the existence of jurisdiction." *Cannon Mfg. v. Cudahy Packing Co.,* 267 U.S. 333, 336 (1925) (no jurisdiction over foreign parent based on subsidiary's purchase of parent's goods in foreign jurisdiction for distribution in forum State) (emphasis added).[5]

This principle of corporate separateness "is a general principle of corporate law *deeply ingrained in our economic and legal systems*[:] . . . a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States. v. Bestfoods*, 524 U.S. 51, 61 (1998) (emphasis added). Corporations such as Daimler AG have structured their business relationships carefully in reliance on this deeply ingrained principle of corporate separateness. This principle allows the corporation to remove itself from the commercial enterprises it owns, in this case only indirectly, and

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[5] While *Cannon* was apparently not decided under the Due Process Clause, and was decided before *International Shoe*, *Cannon* nevertheless framed the jurisdictional issue consistently with *International Shoe*'s minimum-contacts analysis (albeit using older jurisdictional terminology, such as "doing business" and "presence"), *and* consistently with the very issue raised in this case: "The main question for decision is whether, at the time of the service of process, [the parent corporation] defendant was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there." *Cannon*, 267 U.S. at 334-35. Therefore, despite its pre-*International Shoe* status, *Cannon* is nevertheless highly instructive precedent on the issue presented here--whether a parent corporation can be amenable to general jurisdiction based solely on its subsidiary's forum contacts.

thereby control its exposure to liability *and* personal jurisdiction.

The Due Process Clause, in turn, gives legal effect to the corporation's reasonable expectation that its diligent observance of corporate formalities should protect it from amenability to suit in a distant and unanticipated forum. "The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to *structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit*." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (emphasis added). *See also id*. (due process inquiry determines whether "the defendant's conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there.") (emphasis added).

Accordingly, due process should require a court to honor a corporation's compliance with corporate formalities by declining to exercise general jurisdiction over that corporation based solely on its subsidiary's forum contacts. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("It does not of course follow from the fact that jurisdiction may be asserted over [the wholly owned subsidiary] Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants [including the subsidiary's holding corporation]; . . . *Each defendant's contacts with the forum State must be assessed individually*.") (emphasis added).

This Court has recognized only one limited exception to the principle of corporate separateness,

which is inapplicable here. That limited exception is when the parent has so completely disregarded the corporate form that a court may do the same, by piercing the corporate veil. "The veil separating corporations and their shareholders may be pierced in some circumstances . . . . The doctrine of piercing the corporate veil, however, is the *rare exception*, applied in the case of fraud or certain other *exceptional circumstances*." *Dole Food Co.*, 538 U.S. at 475 (emphasis added). As the Ninth Circuit has acknowledged here, this case does *not* present any such exceptional circumstances warranting a court to pierce the corporate veil between Daimler AG and MBUSA. *See DaimlerChrysler*, 644 F.3d at 920 (noting inapplicability of "alter ego" theory of imputing subsidiary's jurisdictional contacts to parent).

Despite this Court's adherence to the principle of corporate separateness, and despite the clear absence in this case of any basis to disregard the corporate form, the Ninth Circuit has nonetheless imputed all of MBUSA's California contacts to Daimler AG for jurisdictional purposes. The lower court has based its decision on a novel "agency" theory of derivative general jurisdiction, which disregards the corporate form whenever (1) the subsidiary's activities are "sufficiently important" to the parent such that the parent would have to carry on those activities by other means in the subsidiary's absence, and (2) the parent has reserved the "right to control" aspects of the subsidiary's operations. *Bauman v. DaimlerChrysler*, 644 F.3d at 920, 922.

But this so-called "test" for disregarding the corporate form, based on the subsidiary's "sufficient importance" to the parent and the parent's "right to

control" certain aspects of the subsidiary's operations, merely *describes* the ordinary, arms-length relationship between any parent and its subsidiary. And this Court has recognized that, in the typical parent-subsidiary relationship, the parent and subsidiary remain separate entities under the law, even though the subsidiary is conducting business on the parent's behalf and is subject to a certain degree of parental oversight. *See Bestfoods*, 524 U.S. at 72 (parental oversight of subsidiary, consistent with parent's investor status, does not give rise to CERCLA liability); *Cannon*, 267 U.S. at 35 (no jurisdiction over foreign parent based on subsidiary distributor's forum connections, even though parent exercised substantial control, because parent maintained corporate form).

After all, a subsidiary is established precisely to advance the economic interests of the parent, such as by distributing the parent's products in a remote market, as in this case. It is a truism that the subsidiary's operations are "sufficiently important" to the parent, such that the parent would need to continue the subsidiary's efforts by some other means in the subsidiary's absence. The "right to control" is also a standard feature of the parent-subsidiary relationship. The parent needs to reserve a certain degree of oversight to ensure that the subsidiary is serving the parent's interests consistently with the parent's corporate policies. As this Court has recognized, a parent corporation may oversee the operations of its subsidiary "consistent[ly] with the parent's investor status, such as [by] *monitoring* of the subsidiary's performance, *supervision* of the subsidiary's finance

and capital budget decisions, and *articulation* of general policies and procedures," without incurring liability. *Bestfoods*, 524 U.S. at 72 (citation and internal quotations omitted) (emphasis added).

But it is precisely these ordinary indicia of parental oversight, quoted above, that the Ninth Circuit has invoked to justify the exercise of general jurisdiction over Daimler AG. *See Bauman*, 644 F.3d at 924. The Ninth Circuit's decision and "agency" test simply contravene this Court's precedent recognizing the economic realities that inform the ordinary parent-subsidiary relationship. So long as the parent observes the corporate form, it may use the services of a subsidiary to sell its goods, or conduct some other business on its behalf, without risking judicial disregard of the corporate form for jurisdictional purposes. *See Cannon*, 267 U.S. at 335 (refusing to disregard parent-subsidiary separateness for jurisdictional purposes, even though parent exerted control over wholly owned subsidiary "in substantially the same way . . . as it does over [its own] selling branches or departments[,] [because] . . . [t]he existence of the [subsidiary] as a distinct corporate entity is . . . in all respects observed.").

In fact, *Cannon* expressly rejected the notion that a subsidiary distributing the parent's goods in the forum State, under substantially similar circumstances as here, is an "agent" of the parent for jurisdictional purposes. *See Cannon*, 267 U.S. at 335 (in-state subsidiary was "the instrumentality employed to market [the foreign parent's] products within the state; but it *does not do so as defendant's*

agent. [Instead, the in-state subsidiary] buys from the defendant and sells to dealers.") (emphasis added).

In effect, the Ninth Circuit has penalized Daimler AG for having made the legally permissible and economically sound decision to facilitate its overseas operations through a legally separate subsidiary, rather than through its own officers. "Ordinarily, [however,] a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary *will not be penalized* by a judicial determination of liability for the legal obligations of the subsidiary." *Bestfoods*, 524 U.S. at 61 (citation and internal quotation marks omitted) (emphasis added). Just as the parent is not ordinarily held liable for the subsidiary's actions, so too should due process forbid a court from exerting general jurisdiction over the parent based on its subsidiary's actions. The Ninth Circuit's exercise of general jurisdiction over Daimler AG is based on a disregard of the parent-subsidiary relationship, which this Court has clearly rejected.

In sum, the Ninth Circuit's virtually limitless "agency" test, both on its face and as applied to the facts of this case, contravenes this Court's clear precedent honoring the principle of corporate separateness in the standard parent-subsidiary relationship. As a result, the lower court's test would impute general jurisdictional contacts where frequently *none* should be imputed at all, as in this case. Accordingly, both the test and its application in this case fail altogether under this Court's

demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign corporate defendant. *See Goodyear*, 131 S. Ct. at 2851 (requiring sufficiently "continuous and systematic" contacts with forum State "as to render [foreign corporation] essentially at home in the forum State"). The Ninth Circuit's decision and "agency" test further offend due process by subverting a corporate defendant's reasonable expectation that the diligent observance of corporate formalities should protect it from being haled into a remote and inconvenient forum. See *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Therefore, general jurisdiction should not lie against Daimler AG in this case.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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