No. 11-965

In the

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Miscellaneous

INTEREST OF AMICUS CURIAE

NELF seeks to present its views, and the views of its supporters, on whether certiorari should be granted to decide 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 an out-of-state corporation solely because it has a corporate 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

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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 amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that all parties were provided with ten-day written notice of NELF's intent to file this brief, which NELF's counsel emailed to counsel for all parties on Monday, February 27, 2012. Moreover, the parties have provided written consent to the filing of amicus briefs, copies of which NELF has included with the filing of this brief.

businesses located primarily in the New England region.

NELF has long been committed to a reasonable interpretation of federal constitutional law that affects the rights of corporations. Moreover, the Ninth Circuit's "agency" test at issue in this case is of direct importance to NELF's corporate constituents, many of whom have corporate subsidiaries or affiliates within the Ninth Circuit, and therefore could face the same fate as the Petitioner in this case and be haled unexpectedly into the courts of a distant or inconvenient forum, to defend claims that are entirely unrelated to that forum.

In this case, NELF is concerned with the Ninth Circuit's virtually limitless "agency" test, which could impose vicarious general jurisdiction on *any* foreign parent based solely on the fact that it has an in-state subsidiary that is engaged in business operations on the parent's behalf. In NELF's view, this unduly overbroad "test" offends due process because it completely ignores the bedrock principle of corporate separateness, which has long been upheld by this Court and has long informed corporations' reasonable jurisdictional expectations based on their diligent observance of corporate formalities.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New

England and the national business communities.[2] This is such a case, and NELF believes that its brief would provide an additional perspective to aid this Court in deciding whether to grant certiorari to resolve the issue presented herein.

SUMMARY OF ARGUMENT

Certiorari should be granted to decide whether the Due Process Clause permits the Ninth Circuit's virtually limitless "agency" test of vicarious general personal jurisdiction, which imposes general jurisdiction on a foreign parent based solely on the fact that it has an in-state subsidiary operating on its behalf. The Ninth Circuit's unduly expansive "agency" test, both on its face and as applied in this case, offends due process. This is so because the test completely disregards the core principle of corporate separateness, long recognized by this Court and legitimately relied upon by corporate

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[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London,* 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

actors in the structuring of their business relationships to limit their amenability to suit in remote or inconvenient jurisdictions. According to that bedrock principle of corporate law, a corporation is a separate legal entity from its owners, be they individuals or another corporation. Consequently, the conduct of one corporation is generally not attributable to another, except perhaps under limited and extreme circumstances, altogether absent in this case, showing a parent's complete disregard of the corporate form.

Thus, the in-state subsidiary's jurisdictional contacts should not generally be attributable to the foreign parent corporation. As this case illustrates, however, the Ninth Circuit's test abandons the principle of corporate separateness because it could broadly apply to virtually any parent-subsidiary relationship, even where, as here, corporate formalities have been diligently observed. The test thereby imputes general jurisdictional contacts where frequently *none* should be imputed at all. Consequently, the test falls far short of this Court's demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign defendant, recently announced in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011) (requiring sufficiently "continuous and systematic" contacts with the forum state "as to render [the foreign corporation] essentially at home in the forum State").

Contrary to the Ninth Circuit's approach, this Court, in an earlier decision, applied the principle of corporate separateness to the issue of vicarious general jurisdiction and refused to impute any of the subsidiary's forum activities to the foreign parent. *See Cannon Mfg. v. Cudahy Packing Co.,* 267 U.S. 333 (1925). *Cannon* establishes that a court should respect the legal separateness between parent and subsidiary so long as the corporate defendant has done so. In addition to the *Cannon* decision, this Court has more recently approved the very features of a typical parent-subsidiary relationship that the Ninth Circuit has "demonized" under its overbroad "agency" test.

The Ninth Circuit's "agency" test clearly contravenes these precedents, and due process, because it almost categorically conflates the subsidiary with the parent for jurisdictional purposes, even where, as here, the parent has treated the subsidiary as a separate legal entity and should not be imputed with any of the subsidiary's jurisdictional contacts, let alone sufficiently "continuous and systematic" contacts to justify a finding of general personal jurisdiction.

The Ninth Circuit's indiscriminate test further offends due process by subverting the predictability of the judicial system, along with the corporate defendant's ability to control and predict where it will and will not be sued. The constitutional guarantee of due process gives

legal effect to the corporate defendant's reasonable expectations that, if it diligently preserves corporate formalities and structures its transactions with its subsidiary as a separate legal entity, it will not be amenable to suit in the subsidiary's forum.

Certiorari should also be granted so that the Court may resolve the apparent confusion among the lower courts on this jurisdictional issue, and to provide guidance to corporate actors, by announcing a uniform rule of imputed general jurisdiction between two otherwise legally separate entities. Consistent with this Court's precedent, such a rule should be sufficiently narrow and rigorous to preserve the principle of corporate separateness, and to satisfy this Court's recent requirement, in *Goodyear Dunlop Tires*, that the foreign corporation must have made itself "at home" in the forum state.

To overcome the principle of corporate separateness, and to satisfy the quasi-domiciliary relationship necessary under *Goodyear* for the exercise of general jurisdiction, an appropriate test should, at minimum, require a showing that the parent corporation has so completely disregarded the corporate form, such as by failing to observe corporate formalities, and by dominating and controlling the subsidiary's day-to-day activities, that the two entities have in fact merged into one for jurisdictional purposes. No

such facts are present in this case, and therefore the Ninth's Circuit's exercise of general jurisdiction over Petitioner offends due process.

I. THE NINTH CIRCUIT'S VIRTUALLY LIMITLESS "AGENCY" TEST FOR VICARIOUS GENERAL JURISDICTION VITIATES THE CORE PRINCIPLE OF CORPORATE SEPARATENESS, CONTRARY TO THIS COURT'S PRECEDENT AND THE CORPORATE DEFENDANT'S REASONABLE EXPECTATIONS.

This Court should grant Petitioner DaimlerChrysler AG's petition for certiorari and decide whether the Due Process Clause permits the Ninth Circuit's virtually limitless "agency" test for imposing vicarious general jurisdiction on a foreign parent based solely on the fact that it has an in-state subsidiary operating on its behalf.

The Ninth Circuit's unduly expansive "agency" test, both on its face and as applied in this case, offends due process. This is so because the lower court's test completely disregards the bedrock principle of corporate separateness, which has long been recognized by this Court and has legitimately informed corporations' reasonable jurisdictional expectations based on their diligent observance

of corporate formalities. According to that core principle of corporate law, a corporation is a separate legal entity from its owners, be they individuals or another corporation. "[I]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998).

Based on that fundamental principle of corporate law, the Court has long held that conduct of one corporation is generally not attributable to another, be it for jurisdictional or liability purposes, except perhaps under circumstances, altogether absent in this case, showing a parent's complete disregard of the corporate form. *See Cannon Mfg. v. Cudahy Packing Co.,* 267 U.S. 333 (1925) (no general jurisdiction over foreign parent based on subsidiary's forum activities, so long as corporate formalities are preserved). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-475 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. . . . The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances . . . ."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) ("The unilateral activity of those who claim some

relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."); *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 parent corporation]; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. . . . *Each defendant's contacts with the forum State must be assessed individually*.") (emphasis added); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact.").

Contrary to this clear precedent, however, the Ninth Circuit's test abandons the principle of corporate separateness, because it could broadly apply to virtually any parent-subsidiary relationship, even where, as here, corporate formalities have been diligently observed. In particular, the Ninth Circuit's test disregards the corporate form whenever 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. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). This is hardly a factor identifying disregard of the corporate form and is instead a

flaccid and limitless formulation that merely describes the ordinary economic relationship between parent and subsidiary.

The Ninth Circuit's test further offends due process because it requires only that the parent reserve "the right to control" certain aspects of the subsidiary's operations. *See Bauman*, 644 F. 3d at 920-21, 922-23. This is also a standard feature of the parent-subsidiary relationship, and hardly one that indicates any disregard of the corporate form through *actual* control, let alone a degree of actual control sufficient to pierce the corporation veil for general jurisdictional purposes. S*ee Cannon Mfg. v. Cudahy Packing Co.*, 267 U.S. at 335.

In short, the Ninth Circuit's test imputes general jurisdictional contacts where frequently *none* should be imputed at all. Consequently, the test falls far short of this Court's demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign corporate defendant, recently announced in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011) (requiring sufficiently "continuous and systematic" contacts with the forum state "as to render [the foreign corporation] essentially at home in the forum State"). As this Court further explained in *Goodyear*, "[f]or 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*." *Id.*, 131 S. Ct. at 2853-54 (emphasis added).

This case clearly illustrates that the Ninth Circuit's "agency" test fails the *Goodyear* quasi-domiciliary standard because it applies overbroadly to virtually any parent-subsidiary relationship, where ordinarily none of the subsidiary's jurisdictional contacts should be imputed to the foreign parent, let alone contacts that are sufficiently "continuous and systematic."

This Court's decision in *Cannon* is on all fours with Petitioner's case and warrants closer examination. In *Cannon*, as in this case, this Court identified the issue as one of imputed jurisdiction between the in-state, wholly owned subsidiary and the foreign parent where, as here, the parent had carefully preserved the formal separateness between itself and the subsidiary. "The question is simply whether the *corporate separation carefully maintained* must be ignored in determining the existence of jurisdiction." *Cannon*, 267 U.S. at 336 (emphasis added).

As in this case, the 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, as in this case,] [the in-state subsidiary] buys from the defendant and sells to dealers." *Cannon*, 267 U.S. at 335 (emphasis

added).[3] The Court observed that the parent corporation exerted control over its wholly owned subsidiary "in substantially the same way" as it would have over its own marketing branches. *Id*. Nevertheless, the Court declined to impute the jurisdictional contacts of the subsidiary to the parent because the parent diligently preserved the separate legal identities of the two entities. Observed the Court, "[t]he corporate separation, though perhaps merely formal, was real. It was not pure fiction." *Id*. at 337.

Therefore, *Cannon*, establishes that a court should give full effect to the legal separateness between parent and subsidiary so long as the corporate defendant has done so. The Ninth Circuit's test and decision in this

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[3] While *Cannon* was apparently not decided under the Due Process Clause, and was decided before *International Shoe*, the *Cannon* decision is nevertheless consistent with *International Shoe*'s minimum-contacts analysis and, in any event, focuses on the different issue of vicarious general jurisdiction. Applying the *International Shoe-Goodyear* framework to *Cannon* clearly establishes that, as in this case, the subsidiary's forum contacts in *Cannon* were sufficient to establish general jurisdiction over it but not over its parent, even though the *Cannon* decision referred to those contacts using the older terminology of "presence" or "doing business." *Cannon*, 267 U.S. at 334-35. Therefore, *International Shoe* should not diminish the precedential value of *Cannon*'s holding, i.e., that the foreign corporation's treatment of the subsidiary as a formally separate entity should preclude imputing the subsidiary's jurisdictional contacts to the parent.

case cannot survive *Cannon*.

In addition to the *Cannon* decision, this Court has more recently approved the very features of a typical parent-subsidiary relationship that the Ninth Circuit has "demonized" under its overbroad "agency" test. Contrary to the Ninth Circuit, this Court has recognized that the typical parent-subsidiary relationship will necessarily and permissibly entail a certain degree of parental supervision and oversight, without risking judicial disregard of the corporate form. *See U.S. v. Bestfoods*, 524 U.S. at 71-72 ("Activities that involve the [subsidiary] facility but which are consistent with the parent's investor status, such as *monitoring* of the subsidiary's performance, *supervision* of the subsidiary's finance and capital budget decisions, and *articulation of general policies and procedures*, should not give rise to direct liability.") (emphasis added) (internal quotation marks omitted). *See also id.* ("Ordinarily, 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") (emphasis added).

Thus, this Court has consistently recognized that the parent corporation may exercise a reasonable degree of oversight without losing its status as a legal entity

separate from its subsidiary. The Ninth Circuit's imposition of general jurisdiction in this case contravenes this clear precedent, and due process, because the lower court's decision has in effect penalized a corporation that has carefully chosen to facilitate its operations via a legally separate subsidiary, rather than through its own officers. *See Cannon*, 267 U.S. at 335. The Ninth Circuit's test is fatally overbroad because it almost categorically conflates the subsidiary with the parent for jurisdictional purposes, even where, as here, the parent has treated the subsidiary as a separate legal entity.

The Ninth Circuit's indiscriminate test further offends due process by subverting the predictability of the judicial system, along with the corporate defendant's right to structure its operations to control and predict where it will and will not be sued. As this Court has long recognized, due process gives legal effect to the corporate defendant's reasonable expectations that, if it diligently preserves corporate formalities in its business operations, it will not be amenable to suit in a distant or inconvenient forum. *See World-Wide Volkswagen Corp.*, 444 U.S. 286, 297 (1980) ("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.*") (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).

These due process concerns for a corporate defendant's reasonable expectations, based on its carefully chosen conduct, are harmonious with an essential purpose of corporate law: to allow either corporate or individual shareholders to separate themselves formally from the commercial enterprises they own and thereby control their exposure to liability or personal jurisdiction. *See U.S. v. Bestfoods*, 524 U.S. at 61; *Cannon*, 267 U.S. at 336-37. *See also Cent. States, Southeast and Southwest Areas Pension Fund v. Reimer Express World. Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) ("[T]he primary purpose of the corporate form is to prevent a company's owners, *whether they are persons or other corporations*, from being liable for the activities of the company. *Where corporate formalities have been observed, a company's owners reasonably expect* that they cannot be held liable for the faults of the company. Thus, such owners *do not reasonably anticipate being hailed into a foreign forum* to defend against liability for the errors of the corporation.") (emphasis added); Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 32 (1986)

("Corporations are legal fictions, created for the precise purpose of allowing individuals to separate themselves from liability created by their commercial enterprises.").

In sum, certiorari should be granted to determine the constitutionality of the Ninth Circuit's virtually limitless "agency" test for vicarious general jurisdiction, which almost categorically disregards the principle of corporate separateness in the parent-subsidiary relationship, contrary to this Court's precedent and the defendant's settled expectations. The Ninth Circuit's approach is infinitely and fatally overbroad because it imputes forum contacts in many instances, such as this case, where none should be imputed whatsoever.

II. CERTIORARI SHOULD BE GRANTED TO ANNOUNCE A UNIFORM TEST FOR IMPUTED GENERAL JURISDICTION THAT IS SUFFICIENTLY RIGOROUS TO OVERCOME CORPORATE SEPARATENESS AND ESTABLISH THAT THE FOREIGN CORPORATION HAS MADE ITSELF "AT HOME" IN THE FORUM STATE.

Certiorari should also be granted to resolve the apparent confusion among the lower courts on this jurisdictional issue, and to provide guidance to corporate actors, by announcing a uniform and sufficiently rigorous test for imputing general jurisdiction between two otherwise separate corporate entities. At minimum, a proper test should require that the foreign corporate parent has disregarded the very corporate separateness that presumptively protects it from the jurisdictional contacts of its in-state subsidiary. Whether such a test should be simply coextensive with the familiar "alter ego" test for establishing inter-corporate liability under state common law is unclear. *See, e.g., Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433-34 (4th Cir. 2011) (deciding issue of imputed general jurisdiction under state "alter ego" theory of corporate liability); *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362-63 (6th

Cir. 2008) (same); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) (same); *Miller v. Honda Motor Co., Ltd.* 779 F.2d 769, 772 (1st Cir. 1985) (same). While the alter ego test indeed addresses relevant issues of corporate domination and control, an appropriate standard should also take into account the *unique* concerns associated with general personal jurisdiction.

It should be emphasized exactly *why* the stakes are so high when a court exercises general personal jurisdiction over a foreign corporate defendant. General jurisdiction extends to claims, such as those in this case, that have no connection whatsoever with the forum and, consequently, may be justified solely by a foreign defendant's extensive, but unrelated, contacts with the forum. The exercise of such unlimited jurisdiction therefore requires that "the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S. Ct. at 2853 (quoting *Int'l Shoe*, 326 U.S. at 318).

That is, the exercise of general jurisdiction can only be justified by the *special relationship* between the defendant and the forum, since the forum has no apparent relationship with the claim (in marked contrast with specific jurisdiction, where the forum state

typically has an inherent regulatory interest in the claim that arises from the defendant's in-state contacts. *See Goodyear*, 131 S. Ct. at 2851). Hence the Court's recent requirement that the foreign defendant must have made itself "essentially at home" in the forum state, i.e., must have established a quasi-domiciliary relationship with the forum, to justify the imposition of general jurisdiction. *Id*.

It is a given that an individual is subject to general jurisdiction in the state of his or her domicile, *Goodyear*, 131 S. Ct. at 2853. This is so because the individual has so completely availed him or herself of the state's protections, and has thereby generally submitted to its sovereign powers, that it is reasonable to expect the individual to defend claims in the forum state that may arise anywhere else in the world. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (discussing same). *See also* Brilmayer *et al*., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 731-32 (1988).

Under *Goodyear*, the foreign corporation must have established the same kind of domiciliary relationship with the forum state to justify the exercise of general jurisdiction. *Goodyear*, 131 S. Ct. at 2853-54. And yet the foreign corporation in this case, and most likely in many other parent-subsidiary relationships, lacks the sufficient "continuous and systematic" contacts of its own with the forum state, and

thus has not established the kind of relationship with the forum state that could justify the exercise of general jurisdiction.

To overcome this principle of corporate separateness, and to satisfy the quasi-domiciliary relationship necessary for the exercise of general jurisdiction, an appropriate test should require, at minimum, a showing that the parent corporation has so completely disregarded the corporate form, such as by failing to observe corporate formalities and by dominating and controlling the subsidiary's day-to-day activities, that the two entities have in fact merged into one for jurisdictional purposes. *See* Brilmayer & Paisley, *Personal Jurisdiction*, 74 Cal. L. Rev. at 29. No such facts are present in this case, and therefore the Ninth's Circuit's exercise of general jurisdiction over Petitioner offends due process.

In sum, this case provides this Court with the opportunity to announce a uniform rule for the exercise of general personal jurisdiction over a foreign parent corporation based on the jurisdictional contacts of its in-state subsidiary. Only a showing of an inextricably intertwined relationship between parent and subsidiary should be able to overcome the strong presumption of corporate separateness and establish the necessary quasi-domiciliary relationship between the foreign corporation and the forum to justify the exercise of general jurisdiction. Such a test

would also protect a foreign corporation's reasonable expectations, by establishing a clear standard by which to guide its conduct and allow it to determine whether its involvement with an in-state subsidiary could make it amenable to suit in the subsidiary's forum state for claims arising anywhere else in the world.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant Petitioner DaimlerChrysler AG's petition for a writ of certiorari.

Respectfully submitted,

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