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

REPLY BRIEF FOR PETITIONER

JUSTS N. KARLSONS
MATTHEW J. KEMNER
DAVID M. RICE
TROY M. YOSHINO
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

THEODORE B. OLSON
Counsel of Record
DANIEL W. NELSON
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in Petitioner's Brief on the Merits remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Plaintiffs' brief is most remarkable for what it does *not* request: *affirmance*. Plaintiffs agree that the Ninth Circuit's opinion cannot be upheld. They disparage the court's approach to "agency" jurisdiction as "not . . . particularly helpful," Resp. Br. 39 n.18, and concede that the judgment below must at a minimum be vacated, *id*. at 12, 60.

The reason for Plaintiffs' unusual approach is self-evident: the Ninth Circuit's conclusion that Daimler AG is subject to general jurisdiction in California simply cannot be defended. This case involves claims by Argentine residents against a German corporation based on alleged actions by an Argentine company in Argentina during the 1970s. The case has no business in a California court. The Ninth Circuit's reasoning—that the contacts of Mercedes-Benz USA, LLC (MBUSA), an indirect subsidiary of Daimler AG, may be attributed to Daimler AG under an "agency" theory of general jurisdiction—is "seriously flawed." U.S. Br. 11. There is no dispute that Daimler AG and MBUSA maintain all corporate formalities and are not alter egos. Disregarding their corporate separateness—and thereby subjecting Daimler AG to suit in California on *any* cause of action arising *anywhere* in the world—violates due process.

Plaintiffs' brief amounts to an attack on the very concept of corporate separateness. They challenge the established understanding, long enshrined in both statutory and common law, that there is a critical difference between a "subdivision" and a "subsidiary," the latter of course being *a separate company*. The law's respect for corporate separateness—treating related companies as distinct entities absent

a showing that the corporate veil must be pierced—is the very sort of "traditional notion[ ] of fair play" and well-settled expectation that the Due Process Clause safeguards. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). A corporation does not anticipate being haled into court in a forum where it is not present—and forced to defend claims with no connection to that forum—based on the activities of one of its subsidiaries. As the United States explains, "the Ninth Circuit's approach is divorced from the background principles of law that fairly set corporations' expectations." U.S. Br. 12–13.

Plaintiffs urge this Court to brush aside these bedrock principles of corporate law and adopt a complex four-factor "agency" jurisdiction test that no court follows and that Plaintiffs appear to have developed themselves solely for purposes of this case. Like the Ninth Circuit test they decline to defend, Plaintiffs' test is unwieldy, unpredictable, and ungrounded in law or precedent—the very antithesis of the "[s]imple jurisdictional rules" that promote the "greater predictability" the Due Process Clause commands. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). This Court should reject both the Ninth Circuit's approach and Plaintiffs' reformulation, and hold that companies can be merged for purposes of general jurisdiction only when they are alter egos.

Daimler AG owns no property, sells no vehicles, and employs no workers in California. It plainly is not "at home" in the State under this Court's general-jurisdiction test. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

Because Daimler AG is not subject to general jurisdiction in California based on its own contacts, and because there is no basis for disregarding the corporate form and attributing MBUSA's contacts to Daimler AG, the decision below must be reversed.

ARGUMENT

I. THE COURT MAY, BUT NEED NOT, CLARIFY THE "AT HOME" STANDARD TO RESOLVE THIS CASE.

In *Goodyear*, the Court stated that "[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." 131 S. Ct. at 2853–54. Plaintiffs do not argue that either Daimler AG or MBUSA satisfies this "at home" standard. Instead, they contend that this case "presents no question regarding what it means for a corporate defendant to be 'at home'" in a State. Resp. Br. 12 (capitalization altered).

The Court need not further elucidate the meaning of *Goodyear*'s "at home" standard to reverse the Ninth Circuit's decision. The parties agree that the Court can resolve this case by holding that MBUSA's contacts may not be attributed to Daimler AG or that the exercise of jurisdiction over Daimler AG would be unreasonable. *See* Resp. Br. 16–17; Pet. Br. 23 n.4. Indeed, Plaintiffs concede that "[t]he first question in this case is . . . when are the contacts of a wholly owned subsidiary properly taken into account in the minimum contacts analysis." Resp. Br. 18. The constitutionally compelled answer to that question—that such contacts can only be taken into account when the parent company and subsidiary are alter

egos—resolves this case, as there is no dispute that Daimler AG and MBUSA are *not* alter egos.

In the event the Court is inclined to define the circumstances in which a corporation is "at home" in a State, *Goodyear* points to the conclusion that a corporation can only be "at home" in the States where it is incorporated and maintains its principal place of business. *See* 131 S. Ct. at 2853–54; *see also* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1141–44 (1966). Here, Daimler AG is incorporated, and maintains its principal place of business, in Germany, and MBUSA is incorporated in Delaware and maintains its principal place of business in New Jersey. Even if MBUSA could somehow be deemed "at home" in California—and even if its contacts were attributable to Daimler AG—there would be no basis for concluding that the combined enterprise is "at home" in California. It is a German company, headquartered in Germany, and only 2.4 percent of its vehicles are sold in California. Pet. App. 7a.

Plaintiffs err in claiming that Daimler AG waived this argument below and did not include it in the question presented. Resp. Br. 12–17. The only putative concession identified by the courts below involved *MBUSA's* amenability to general jurisdiction in California. *See* Pet. App. 8a ("[Daimler AG] does not dispute that MBUSA is subject to general jurisdiction in California."); *id.* at 113a (same); *see also* U.S. Br. 16 n.5. But even if MBUSA were subject to general jurisdiction in California, the question the parties have been briefing throughout this litigation is whether that would be enough to subject *Daimler AG* to general jurisdiction in California. That is the question the lower courts decided (*see* Pet. App. 3a,

82a, 101a, 113a); it is the question presented in Daimler AG's certiorari petition (Pet. i); and it is the question addressed in *amicus* briefs filed in this Court (*see* U.S. Br. i; Brilmayer Br. 4). Thus, if it chooses, this Court can decide whether MBUSA's California contacts—even if *relevant*—would be *sufficient* to render Daimler AG "at home" in California. Resp. Br. 12–13; *see also* Chamber Br. 6–23.

Plaintiffs' passing suggestion that the Court dismiss the petition as improvidently granted, Resp. Br. 17, is meritless. This Court has all the facts—namely, the undisputed fact that Daimler AG and MBUSA adhere to all the requirements of their separate corporate identities and are not alter egos—that it needs to resolve the question whether Daimler AG is subject to general personal jurisdiction in California. It also possesses the facts—including the undisputed facts regarding place of incorporation and principal place of business—needed to decide whether MBUSA's contacts would be sufficient to render a combined MBUSA-Daimler enterprise "at home" in California, if the Court elects to decide that question.

Moreover, dismissing the petition would leave in place the Ninth Circuit's decision—a ruling that *all* the parties in this case *and* the Government agree must be vacated. Indeed, the Ninth Circuit's decision is already causing substantial harm in the district courts, where it is compelling the exercise of expansive jurisdiction over foreign companies. *See*, *e.g.*, *Waterfall Homeowners Ass'n v. Viega, Inc.*, 2012 U.S. Dist. LEXIS 167875, at *9–10 (D. Nev. Nov. 26, 2012); *Perfect 10, Inc. v. Yandex N.V.*, 2012 U.S. Dist. LEXIS 125325, at *4 (N.D. Cal. Sept. 4, 2012). And it is pressuring foreign companies to divest or avoid investments in this country. *See* Viega Br. 17. As the United States emphasizes, it would be profound-

ly disruptive to the Nation's foreign trade and international relations to leave on the books an attribution standard that is "malleable, ill-defined, and subjective," and that "has no foundation in any state or federal law." U.S. Br. 32.

II. THERE IS NO BASIS FOR EXERCISING GENERAL JURISDICTION OVER DAIMLER AG IN THIS CASE.

Plaintiffs do not defend the Ninth Circuit's ruling and concede the decision below must be vacated. Yet the approach they propose is just as bad and possibly worse. Plaintiffs' objections to applying the alter-ego standard in the context of general jurisdiction are based on a disregard for the corporate-separateness doctrine; their proposed multi-factor "agency" test is invented from whole cloth and is deeply flawed; and their reasonableness analysis, like the Ninth Circuit's analysis, improperly ignores the district court's factual findings.

A. Separate Corporations Cannot Be Merged For Jurisdictional Purposes Unless They Are Alter Egos.

Plaintiffs concede that Daimler AG and MBUSA are not alter egos. Their argument that MBUSA's contacts with California may nonetheless be attributed to Daimler AG fails in all respects.

1. The theme of Plaintiffs' brief is that the difference between a "sales division" of a corporation and a "subsidiary" of that corporation is technical, arbitrary, obsolete, and meaningless. Resp. Br. 1, 2–3, 10, 18, 30, 37, 41. Yet that difference—the difference between an entity that is *part of* the corporation and an entity that is a *different* corporation—is the heart of the doctrine of corporate separateness, a doctrine that is firmly embedded in American law

and critical to capital formation and investment. As the Government explains: "Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities." U.S. Br. 29; *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *United States v. Bestfoods*, 524 U.S. 51, 62–63 (1998) (describing corporate separateness as a "well-settled rule" and a "fundamental principle of corporate law").

Plaintiffs offer no persuasive reason to depart from this "fundamental principle" by adopting a rule that merges distinct companies when assessing general jurisdiction. Although they denigrate the purposes of the corporate-separateness doctrine as mere "policy concerns" that need not be respected for purposes of a jurisdictional inquiry, Resp. Br. 3–4, 34–36, the Due Process Clause safeguards "traditional notions of fair play" by protecting a defendant's reasonable and well-settled expectations as to where it may be haled into court. *Int'l Shoe*, 326 U.S. at 320; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("The Due Process Clause . . . 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.").

There can be no serious dispute that participants in the commercial world understand the rule of corporate separateness and the fact that American courts have long respected the legally distinct identities of separately incorporated entities. Indeed, the rule is so "pervasive" in a variety of business and le-

gal contexts that "it molds the expectations of the corporations themselves and those with whom they interact." U.S. Br. 19. It would upend these traditional and long-settled notions to subject a parent corporation to general jurisdiction in a forum based on the business activities of a subsidiary in that forum. That is particularly so in a case like this one, involving the alleged conduct of a *different* subsidiary in a *different* forum.

Plaintiffs urge the Court to disregard these settled expectations because corporate law was less developed in "1868, when the Fourteenth Amendment was adopted." Resp. Br. 33. As this Court has explained, however, "the rules of jurisdiction [that] applied in the 19th century" are not the proper frame of reference for "corporations, which have never fitted comfortably in [such] a jurisdictional regime." *Burnham v. Superior Court*, 495 U.S. 604, 610 & n.1 (1990) (plurality) (internal quotation marks omitted). Indeed, if jurisdiction were limited to the rules that applied in 1868, it is unlikely that States could exercise jurisdiction over foreign corporations under *any* circumstances. *See id.* at 609–10 & n.1 (discussing *Pennoyer v. Neff*, 95 U.S. 714, 722, 732–33 (1878)).

Just as Plaintiffs attempt to obliterate distinctions between separate companies, they try to obliterate the distinction between general and specific jurisdiction. *See* Resp. Br. 9. But "[o]pinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction," *Goodyear*, 131 S. Ct. at 2851, and this Court has carefully maintained the distinction. In *Goodyear* itself, it reversed the lower court for doing exactly what Plaintiffs advocate here: "elid[ing] the essen-

tial difference between case-specific and all-purpose (general) jurisdiction." *Id*. at 2855.

As the Court explained in *Goodyear*, the types of contacts necessary to establish general jurisdiction differ from the types of contacts necessary to establish specific jurisdiction. General jurisdiction turns on the defendant's "affiliations with the State," whereas specific jurisdiction "depends on an affiliatio[n] between the forum and the underlying controversy." *Goodyear*, 131 S. Ct. at 2851 (alteration in original) (internal quotation marks omitted); *see also* Todd David Peterson, *The Timing of Minimum Contacts*, 79 Geo. Wash. L. Rev. 101, 103–04 (2010) (describing differences between contacts required for general and specific jurisdiction); Allan R. Stein, *The Meaning of "Essentially at Home" In* Goodyear Dunlop, 63 S.C. L. Rev. 527, 531, 536–38 (2012) (same). For this reason, "ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Goodyear*, 131 S. Ct. at 2855; *see also Helicopteros*, 466 U.S. at 418 (concluding that "purchases" made in the forum State—the type of contact that might establish specific jurisdiction—"are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation").

Because general jurisdiction depends on the defendant's affiliations with the State, it cannot be based on the contacts that a *different* company has with the State. As this Court has held, "[e]ach defendant's contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("the constitutional touchstone" of personal jurisdic-

tion is whether "the defendant" itself has sufficient connections to the forum). A parent company that otherwise has no forum State contacts cannot acquire them through a separately incorporated subsidiary—which, in the eyes of the law, is a separate person—unless the two companies are truly alter egos of each other (*i.e.*, they are really the same entity). Particularly given the serious consequences that flow from a finding of general jurisdiction—forcing the defendant to defend lawsuits in the forum on any claim arising anywhere in the world—it does not comport with traditional notions of fair play to base general jurisdiction on the activities of a legally distinct corporation. Indeed, this Court has never suggested that general jurisdiction may rest on an "agency" theory.

Plaintiffs rely on cases suggesting that a defendant may be sued in a forum where it has enjoyed the benefits of that forum. Resp. Br. 22–25 (discussing *Int'l Shoe*, *Asahi*, *Nicastro*, *World-Wide Volkswagen*). But in each of those cases, the Court was determining whether the defendant was subject to *specific* jurisdiction—*i.e.*, whether it could be required to defend claims arising from its activities in, or purposefully directed toward, that jurisdiction. In *International Shoe*, for example, the Court held that Washington had specific jurisdiction over a Delaware company for a tax action arising out of the company's relationship with independent in-state sales representatives. 326 U.S. at 320. Nothing in *International Shoe* or any of the cases Plaintiffs cite suggests that a corporation may be subject to *general* jurisdiction—*i.e.*, that it may be required to answer *any* claim arising from its activities around the world—in any State where it has done business or deployed sales representatives. Indeed, such a rule would be

directly contrary to *Goodyear*, which made clear that a corporation is subject to general jurisdiction in a far more limited number of States. Contrary to Plaintiffs' view, general jurisdiction is the exception rather than the rule.

Finally, Plaintiffs contend that unless a subsidiary's jurisdictional contacts are attributed to its parent, corporations will be able to insulate themselves from jurisdiction by creating subsidiaries in each State where they do business. Resp. Br. 25. But Plaintiffs do not explain why suing the in-state subsidiary would not afford full relief. Moreover, whether the parent might also be subject to jurisdiction is a matter of *specific* jurisdiction, not general jurisdiction, and would be resolved according to the circumstances of the individual case. *See* AAJ Br. 1 ("[P]ersonal jurisdiction is based on specific, rather than general jurisdiction" in most of the tort cases handled by AAJ members.).

2. Because Daimler AG and MBUSA are separate corporations, MBUSA's contacts with California cannot establish general jurisdiction over Daimler AG unless the two companies are alter egos, allowing the veil between the two corporations to be pierced.

Plaintiffs contend that the alter-ego test should be restricted to determining when "it is appropriate to disregard ordinary principles of corporate limited liability." Resp. Br. 31. But "piercing-the-veil or alter-ego jurisprudence is the primary rule in American jurisprudence for disregard of the corporate entity," 1 *Blumberg on Corporate Groups* § 10.03[B] (2d ed. 2012), and as this Court suggested in *Goodyear*, it provides the appropriate standard for jurisdictional determinations as well. *See* 131 S. Ct. at 2857; Brilmayer Br. 4 ("[U]nless the two entities [a]re suf-

ficiently united to share responsibility, they could not be sufficiently united to share forum contacts.").[1]

Applying the same standard in the liability and jurisdictional settings makes sense. The burden of being forced to defend a case in a distant forum based on a subsidiary's activities is similar to being forced to pay a judgment based on the subsidiary's activities. The Court in *Nicastro* drew this parallel when it explained that "[t]he Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–87 (2011) (plurality) (citations omitted). Haling a defendant into court imposes significant pressure to accept liability, even for "questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). That is because "discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). Thus, "when a United States court exercises jurisdiction over a foreign corporate defendant

---

[1] That approach is consistent with *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). Contrary to Plaintiffs' claim, *see* Resp. Br. 28–29, Daimler AG did not suggest that *Cannon* was a constitutional ruling that controlled the outcome of this case. Rather, *Cannon* further demonstrates the traditional and widely-shared understanding that separate corporations are separate for jurisdictional purposes.

it inflicts damage on that defendant (at a minimum in the form of legal costs, but possibly in the form of a judgment) in the United States." *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 816 (D.C. Cir. 2012) (emphasis omitted); *see also* Chamber Br. 28 n.10 ("[F]orcing a nonresident corporation to defend itself in a foreign forum imposes costs on that corporation no less tangible or real than a liability determination."). Because the alter-ego test is the proper standard for determining when a parent company may be held liable for a subsidiary's activities, it is also the proper standard for determining when it may be subject to general jurisdiction based on the subsidiary's activities.

Plaintiffs argue that there are other "legal instrument[s] for disregarding formal corporate distinctions" beyond the alter-ego test. Resp. Br. 31. Plaintiffs mistakenly describe *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), as holding that "the Due Process clause permits states to disregard formal distinctions between parents and subsidiaries for tax purposes." Resp. Br. 29. In fact, the Court addressed a far narrower question that was "confined to . . . whether there is something about the character of income *earned from investments* in affiliates and subsidiaries . . . that precludes, as a constitutional matter, state taxation of that income by the apportionment method." 445 U.S. at 434–35 (emphasis added). Far from disregarding distinctions between parent and subsidiary corporations, *Mobil Oil* was concerned solely with taxation at the parent level of investment profits earned by the parent company itself.

Likewise, in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010), the Court simply noted that a parent and subsidiary are inca-

pable of "conspiring" with each other for antitrust purposes because they are not "competitors." *Id.* at 2212. The fact that Daimler AG and MBUSA are not competitors says nothing about whether their corporate separateness should be ignored. Further, there was no due-process question in *American Needle*; the Court was merely construing the Sherman Act. *Id.* at 2208–09.

Plaintiffs object that using the alter-ego test as part of a due-process analysis is improper because it would require "look[ing] to state law to provide . . . substantive constitutional limits." Resp. Br. 21. But as the Government points out, "[b]ecause state law . . . defines the legal characteristics of juridical persons in general, that law ordinarily should form the foundation for determining when one juridical person's contacts will be attributed to another." U.S. Br. 25. And even were this Court to adopt a uniform federal rule that tracks the veil-piercing rules with which corporations are already familiar, the outcome in this case would not change, as there is no way under any formulation of the traditional veil-piercing standard that Daimler AG and MBUSA—separately incorporated entities that indisputably adhere to all the requirements of their separate corporate identities—could be deemed alter egos.

B. Plaintiffs' Manufactured "Agency" Test Illustrates Why General Jurisdiction Should Not Rest On An Agency Theory.

Plaintiffs do not defend the Ninth Circuit's approach to agency, and in fact denigrate key elements of the court's test as not "particularly helpful." Resp. Br. 39 n.18. They nevertheless urge this Court to reject the widely understood alter-ego standard in fa-

vor of an ad hoc, four-factor "agency" test of their own devise that is "gerrymandered to the facts of this case." *Id*. at 11.

Plaintiffs' misguided approach to general jurisdiction shares many of the same flaws as the Ninth Circuit's approach. For one thing, it rests on the erroneous premise that a corporation is subject to general jurisdiction wherever it "has taken advantage of the forum's laws and economy." Resp. Br. 36–37. But that is the standard for *specific* jurisdiction, not *general* jurisdiction. *See Goodyear*, 131 S. Ct. at 2854 ("As a rule in [specific jurisdiction] cases, this Court has inquired whether there was 'some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

Under Plaintiffs' manufactured test, virtually all corporations with a wholly-owned subsidiary doing business in a State would be subject to general jurisdiction in that State. Because a wholly-owned subsidiary, by its very nature, exclusively serves the parent and is subject to the parent's right of control, the first, third, and fourth factors would be satisfied in every case. And with respect to the second factor—whether "the subsidiary undertakes an important part of the defendant's business in the forum" (Resp. Br. 39)—it is hard to imagine why a parent would maintain a wholly-owned subsidiary to perform unimportant business. Plaintiffs advance the same "sprawling view of general jurisdiction" this Court rejected in *Goodyear*, in which "any substantial manufacturer . . . would be amenable to suit, on

any claim for relief, wherever its products are distributed." 131 S. Ct. at 2856–57.[2]

Plaintiffs' proposed "agency" test—which bears little relation to the common law of agency, *see* Restatement (Third) of Agency § 1.01 (2006)—is flawed in many other respects. Among other things, Plaintiffs do not view their four factors as exclusive. *See* Resp. Br. 38 (proposing that courts may consider these factors "at the very least"). This indeterminacy, coupled with the opportunity for arguing over whether a subsidiary performs an "important" part of the parent's "business," ensures that parties and district courts will spend months fighting over threshold jurisdictional issues, "eating up time and money as the parties litigate." *Hertz*, 130 S. Ct. at 1193. "Complex tests," like the Ninth Circuit's agency test and the multi-factor test Plaintiffs propose as a purportedly reasonable alternative, "produce appeals and reversals, encourage gamesmanship, and . . . diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Id.* Indeed, district courts within the Ninth Circuit are already struggling to implement the court of appeals' new "agency" test and have been forced to supervise extensive discovery and briefing on questions of "agency" jurisdiction. *See*, *e.g.*, *Brady v. Grendene USA, Inc.*, 2012 U.S. Dist. LEXIS 99820, at *12 (S.D. Cal. July 17, 2012) (ordering "jurisdictional discovery

---

[2] Plaintiffs do not seriously dispute that the type of distribution agreement between Daimler AG and MBUSA is a common way for foreign manufacturers to ensure the distribution of their goods in the United States. *See* PLAC Br. 4–8. Nor do they contest that the Daimler AG-MBUSA agreement bears the hallmarks of a traditional distributorship agreement rather than an agency relationship. *See* AAM Br. 16–18.

. . . on the issues of control and importance"); *Perfect 10*, 2012 U.S. Dist. LEXIS 125325, at *1–2 (ordering "supplemental briefing and discovery . . . [on the] agency relationship").

Plaintiffs do not dispute that an "agency" approach in which the contacts of the subsidiary are attributed to the parent would chill foreign investment and expose U.S. corporations with foreign subsidiaries to retaliatory rulings. *See* Pet. Br. 34–37; U.S. Br. 2 ("[A]n enterprise may be reluctant to invest or do business in a forum, if the price of admission is consenting to answer in that forum for all of its conduct worldwide."); Economiesuisse Br. 4–12. Instead, Plaintiffs brush aside these considerations as "policy and diplomatic objections" that can be addressed by the "politically accountable branches." Resp. Br. 35. But this Court has accorded weight to these considerations in its prior jurisdictional cases. *See*, *e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

The alter-ego standard is the only standard that satisfies the primary aims of the Due Process Clause in the personal-jurisdiction context: fairness (*Int'l Shoe*, 326 U.S. at 320); predictability (*World-Wide Volkswagen*, 444 U.S. at 297); simplicity (*Hertz*, 130 S. Ct. at 1193); and sound policy (*Asahi*, 480 U.S. at 115). In sum, "nothing short of the 'merger' or 'alter ego' standard can satisfy the Due Process Clause's requirement that jurisdiction over each defendant be shown individually." Brilmayer Br. 9.

C. Exercising General Jurisdiction Over Daimler AG In This Case Would Be Unreasonable.

If this Court rules in Daimler AG's favor on the antecedent question—that is, if it holds that MBUSA's jurisdictional contacts with California cannot be attributed to Daimler AG—it need not reach the question of reasonableness. If the Court *does* reach reasonableness, it should reverse and order that judgment be entered for Daimler AG, rather than merely vacate and remand as Plaintiffs suggest.

1. Plaintiffs' primary argument against finding general jurisdiction *per se* unreasonable in this case is that the Court has historically avoided bright-line rules in this context. Resp. Br. 48–49. But this Court has never confronted an attempted exercise of general jurisdiction over a foreign defendant sued by foreign plaintiffs over foreign conduct that is not alleged to have any connection to American citizens or to the United States. Under those circumstances, there is no possibility that the foreign defendant should reasonably expect to be haled into a court of the United States to defend such a claim. Thus, a *per se* rule is appropriate and warranted. *Cf. Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (a *per se* rule is appropriate where "courts can predict with confidence that [a practice] would be invalidated in all or almost all instances" under case-by-case reasonableness analysis).

2. Plaintiffs concede that the Ninth Circuit's reasonableness determination cannot stand. Resp. Br. 51 (requesting vacatur). Yet they ask this Court to remand rather than reverse for a variety of meritless reasons. For example, they contend that the

"reasonableness analysis . . . falls outside the scope of the Question Presented." *Id*. at 51. But the question presented asks whether it "violates due process for a court to exercise general personal jurisdiction," which necessarily includes an analysis of reasonableness. *See* Sup. Ct. R. 14.1(a); *see also Asahi*, 480 U.S. at 113; *Burger King*, 471 U.S. at 477–78.

Plaintiffs claim remand is warranted to give the district court an opportunity to decide whether to exercise supplemental subject-matter jurisdiction over their non-federal claims, now that their ATS and TVPA claims are no longer viable. Resp. Br. 52. But the district court properly exercised its discretion to resolve personal jurisdiction *before* subject-matter jurisdiction, and there is no reason to force the court to go back and decide the issues in reverse order. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

Plaintiffs offer an additional proposal for remand: to enable the Ninth Circuit to perform yet another "reasonableness analysis" in light of *Kiobel*. Resp. Br. 51–52. But the Ninth Circuit left no doubt that its analysis would not change. In discussing the only reasonableness factor even conceivably affected by *Kiobel*—"the forum State's interest in adjudicating the suit" (Pet. App. 35a (capitalization altered))—the Ninth Circuit explained its view that the inquiry turns on *California's* interest "in furthering fundamental substantive social policies," an interest that *Kiobel* does not address. *Id.* at 36a (internal quotation marks omitted).

Finally, this Court should reject the various other remand requests that pop up throughout Plaintiffs' brief, often in footnotes. There is no reason to

remand so the lower courts can determine whether to transfer this case to the Eastern District of Michigan. Resp. Br. 49 n.20, 60 n.23. The district court already ruled that Plaintiffs' request for a transfer was untimely and waived. *See* Pet. Br. 7 (citing Pet. App. 60a–61a, 92a). Nor is remand warranted so the lower courts can determine whether Daimler AG is subject to personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2). Resp. Br. 60 n.23. That request, too, was found to be untimely and waived in the district court. *See* Pet. Br. 7 (citing Pet. App. 60a–61a, 92a). And there is no reason to remand so that Plaintiffs can "make any needed amendments to their complaint." Resp. Br. 49 n.20. Plaintiffs filed the operative complaint more than nine years ago and the alleged events underlying this case took place nearly four decades ago. Pet. App. 48a, 95a. The time for amendment has long since passed and, in any event, it would be futile as there is nothing Plaintiffs could possibly add to their complaint that would establish personal jurisdiction over Daimler AG.

3. Even without a *per se* rule, there is no question that exercising general jurisdiction over Daimler AG in this case would be unreasonable. As the district court found—after holding hearings, reviewing evidence and expert testimony, and making all the necessary factual determinations (*see* Pet. App. 85a–91a, 118a–133a)—*every relevant factor* weighs against the exercise of general jurisdiction. The Ninth Circuit should have deferred to those findings, and so should this Court. *See* Fed. R. Civ. P. 52(a)(6); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

First, requiring Daimler AG to litigate in California would impose a significant burden because,

even if MBUSA's jurisdictional contacts could be attributed to Daimler AG, it is undisputed that Daimler AG itself has no presence in California. Pet. App. 119a–120a. Plaintiffs' breezy response—that there is no burden because Daimler AG is a "large sophisticated multi-national corporation" that should be "expected to litigate" in California (Resp. Br. 56)—utterly ignores the fact that none of the relevant parties, witnesses, or documents is present in the forum.

Second, exercising jurisdiction in this case would encroach upon the sovereign interests of Germany and Argentina. Pet. App. 120a–121a. Plaintiffs seem to believe that the legitimate concerns of foreign sovereigns can be assuaged simply by allowing United States courts to apply foreign law to foreign disputes. *See* Resp. Br. 57 (arguing that sovereignty concerns should "be resolved through choice of law principles, not the Due Process Clause"). But that simplistic approach ignores the substance of the sovereignty concerns at issue. *See* Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) ("The Federal Republic of Germany has an inherent interest in applying its laws *and using its courts*" in cases involving German defendants.) (emphasis added). And it again ignores significant real-world implications. *See*, *e.g.*, U.S. Br. 2.

Third, exercising jurisdiction in this case would not serve the interests of California. Pet. App. 122a. Plaintiffs concede that California's interests are diminished where, as here, the case does not involve "local law or parties." Resp. Br. 53. Indeed, the only supposedly "local" interest that Plaintiffs identify—the interest in "vindicat[ing] fundamental human rights recognized by all civilized nations" (*id.* at

55)—is not "local," but rather is an interest presumably shared by every State. *See Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 852 (9th Cir. 1993) (State's interest in maritime trade "is no greater or more specific than that of any port city around the world").

Finally, the district court weighed the competing experts' testimony and found that "both Argentina and Germany provide [Plaintiffs] with an adequate alternative forum for their claims." Pet. App. 85a. Plaintiffs criticize Daimler AG for not "engag[ing] . . . the experts' disagreement" in its opening brief. Resp. Br. 58. But the place for such engagement was the district court—not the Ninth Circuit and not this Court.

CONCLUSION

Plaintiffs do not ask this Court to affirm the judgment below and do not argue that Daimler AG is "at home" in California. *Goodyear*, 131 S. Ct. at 2851. Their theories for asserting general jurisdiction over Daimler AG in California ignore the corporate separateness doctrine that underpins the American economy and the principles of fairness and predictability that underpin the Due Process Clause. Like the Ninth Circuit decision they disavow, Plaintiffs' arguments cannot stand.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JUSTS N. KARLSONS
MATTHEW J. KEMNER
DAVID M. RICE
TROY M. YOSHINO
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

THEODORE B. OLSON
Counsel of Record
DANIEL W. NELSON
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner

September 18, 2013