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 FOR PETITIONER

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QUESTION PRESENTED

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to *general* personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—because it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities.

The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gregory Grieco, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro de Belmonte, Hector Ratto, Eduardo Olasiregui, Richardo Martin Hoffman, Eduardo Estiville, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, and Alejandro Daer were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Daimler AG, formerly known as DaimlerChrysler AG, is an *Aktiengesellschaft* or German public stock company. It has no parent company, and no publicly held company owns 10% or more of its stock.

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JURISDICTION

The court of appeals filed its opinion on May 18, 2011, and denied a timely petition for rehearing and rehearing en banc on November 9, 2011. The petition for a writ of certiorari was filed on February 6, 2012, and granted on April 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

A corporation is subject to general personal jurisdiction only when its contacts with the forum State are "so continuous and systematic as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks omitted). Plaintiffs in this case contend, and the Ninth Circuit agreed, that Daimler AG—a German company that owns no property, sells no vehicles, and employs no workers in California—is nevertheless "at home" in California because it has an indirect subsidiary that distributes Daimler AG-manufactured vehicles in the State. Thus, according to Plaintiffs and the Ninth Circuit, Daimler AG can be sued in California for any claim, including claims by foreign plaintiffs for alleged human-rights violations committed in a foreign country by a *different* foreign subsidiary.

The court of appeals' holding defies this Court's personal-jurisdiction jurisprudence and violates Daimler AG's due-process rights. It exposes corporations to personal jurisdiction in any State where they have a subsidiary, distributor, or independent contractor that regularly conducts business—not just for the activities of that third party, but for *any* alleged activities of the corporation or *any* of its subsidiaries *anywhere* in the world. This Court should reject the Ninth Circuit's sweeping conception of general jurisdiction and reaffirm that a corporation is subject to general personal jurisdiction only where it is truly "at home." *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

1. Plaintiffs are 22 Argentine residents. They allege that, while employed in Argentina by Mer-

cedes-Benz Argentina (a subsidiary of Daimler AG's predecessor-in-interest), they, or their relatives, were subject to human-rights abuses at the hands of the military junta that ruled Argentina in the 1970s. In 2004, Plaintiffs filed suit against Daimler AG in the Northern District of California under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. They also brought claims "under the laws of California . . . and Argentina." J.A. 57a; *see also* J.A. 50a.[1]

Daimler AG is a German *Aktiengesellschaft*, or public stock company, that manufactures Mercedes-Benz vehicles in Germany. Pet. App. 95a. It does not manufacture products, sell products, or employ workers in the United States. *Id*. Nonetheless, Plaintiffs argued that Daimler AG was subject to general personal jurisdiction in California because Mercedes-Benz USA, LLC ("MBUSA")—an indirect subsidiary of Daimler AG that is incorporated in Delaware and has its principal place of business in New Jersey—distributes Daimler AG-manufactured vehicles to dealers in California.[2]

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[1] Although Plaintiffs' ATS and TVPA claims have been extinguished by, respectively, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), their claims under California and Argentina law remain at issue and within the district court's supplemental jurisdiction under 28 U.S.C. § 1367.

[2] Although the named defendant in this case is DaimlerChrysler AG, DaimlerChrysler AG divested most of its ownership interest in Chrysler LLC in 2007 and changed its name to Daimler AG. Daimler AG divested the remainder of its interest in Chrysler LLC in 2009. At the time this lawsuit was filed, MBUSA was wholly owned by DaimlerChrysler North

The relationship between Daimler AG and MBUSA is governed by a General Distributor Agreement. Pursuant to this Agreement, MBUSA acts as an "independent contractor[ ]" that operates an "independent business for [its] own account." J.A. 179a. The Agreement expressly provides that it does *not* make MBUSA "a general or special agent, partner, joint venture or employee of" Daimler AG. Nor does it "create any fiduciary relationship or any other relationship of trust or confidence" between Daimler AG and MBUSA. *Id.* The Agreement is terminable by either party for good cause or with notice, at which point all amounts owed by either party would be immediately due, and Daimler AG would be required to repurchase all vehicles and parts from MBUSA. J.A. 187a–195a.

The Agreement also sets out terms under which MBUSA purchases Mercedes-Benz vehicles from Daimler AG in Germany (where title passes to MBUSA), imports them into the United States, and distributes them to independent dealerships nationwide, including in California. Pet. App. 116a; *see also* J.A. 149a–215a. Under the Agreement, MBUSA retains broad control over its own operations. For example, once title to the vehicles passes to MBUSA, Daimler AG has "no control over the ultimate destination of the products in the United States." Pet. App. 116a. Similarly, MBUSA has discretion not to purchase classes of vehicles from Daimler AG. Until 2001, for example, MBUSA independently decided against buying G-Class vehicles from Daimler AG for

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[Footnote continued from previous page]

America Holding Company, which, in turn, was a subsidiary of DaimlerChrysler AG. Pet. App. 7a.

distribution in the United States. Pet. App. 49a–50a; *see also* J.A. 147a.

Based on these facts, Daimler AG moved to dismiss Plaintiffs' complaint for lack of personal jurisdiction. In response, Plaintiffs argued that *MBUSA* was subject to general personal jurisdiction in California, and that its jurisdictional contacts with the State should be attributed to Daimler AG, giving the district court general personal jurisdiction over Daimler AG for causes of action having no relationship to MBUSA or to California. Pet. App. 82a. In so arguing, Plaintiffs did not dispute that Daimler AG and MBUSA adhere to the requirements of their separate corporate identities. *See* Pet. App. 114a ("Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]."). They asserted instead that attribution of MBUSA's jurisdictional contacts was appropriate because MBUSA is Daimler AG's "agent."

2. On November 22, 2005, the district court tentatively granted Daimler AG's motion to dismiss. First, recognizing that Daimler AG is "a German stock company with headquarters located in Stuttgart, Germany" that "is not qualified or authorized to do business in California and does not import, manufacture, sell, service, or warranty cars in California" (Pet. App. 95a), the district court found that Daimler AG did not, by itself, have sufficient contacts with the State of California to confer general jurisdiction. Pet. App. 111a–112a. Plaintiffs did not appeal this finding. *See* Pet. App. 51a n.2.

Second, the district court tentatively concluded that MBUSA's contacts with California should not be attributed to Daimler AG. The court's analysis was based on Ninth Circuit precedent permitting the at-

tribution of a corporate subsidiary's jurisdictional contacts to a parent company if the subsidiary was acting as the parent's "agent"—*i.e.*, if "'the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.'" Pet. App. 24a n.13 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001) (per curiam)) (emphasis omitted). The court found that, in the absence of MBUSA, Daimler AG could have distributed Mercedes-Benz vehicles in the United States through "a wholly independent company," as Daimler AG did for many years before engaging with MBUSA, and as other auto manufacturers have done in the past and continue to do today both in the United States and around the world. Pet. App. 116a–117a; *see also* J.A. 147a ¶ 11. In addition, the court found that Plaintiffs had provided "no evidence whatsoever" that Daimler AG "exercises operational control over MBUSA." Pet. App. 116a. The court therefore concluded that attributing MBUSA's jurisdictional contacts to Daimler AG would likely be improper. Pet. App. 117a.

Third, the district court considered whether exercising general personal jurisdiction over Daimler AG would be constitutionally "unreasonable." The court explained that several factors weighed against the reasonableness of exercising jurisdiction: the burden Daimler AG would face as a German corporation litigating in California; the German government's "express[ion of] concern that this suit may violate its sovereignty rights"; and California's mere "abstract interest in adjudicating" the dispute based on the "general goal of world-wide preservation of human rights." Pet. App. 121a–122a.

Determining that it needed additional information to reach a final decision, the district court ordered discovery and further briefing on two issues: (1) whether MBUSA was Daimler AG's "agent," and (2) whether Argentina and Germany were adequate alternative forums for the dispute. Pet. App. 132a–133a. Following this discovery and additional briefing, the district court reaffirmed its initial conclusion that MBUSA and Daimler AG did not have an agency relationship for jurisdictional purposes. Pet. App. 83a–85a. The district court also ruled that the exercise of jurisdiction would be constitutionally unreasonable because both Argentina and Germany provided adequate alternative forums for the dispute. Pet. App. 85a. Finally, the district court rejected as waived Plaintiffs' "newly-raised arguments" that the court had personal jurisdiction based on Federal Rule of Civil Procedure 4(k)(2) or that the action should be transferred under 28 U.S.C. § 1406. Pet. App. 92a.

The district court entered a final order dismissing the case for lack of personal jurisdiction.

3. The Ninth Circuit initially affirmed in a 2-1 decision, over Judge Reinhardt's dissent. Pet. App. 61a. Relying on then-settled Ninth Circuit precedent, the court of appeals held that MBUSA was not Daimler AG's "agent" for jurisdictional purposes because Plaintiffs had "failed to make a prima facie showing that [Daimler AG] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler AG did not exercise "pervasive and continual control" over MBUSA. Pet. App. 58a. The court of appeals also affirmed the district court's ruling that Plaintiffs' untimely argument regarding Rule 4(k)(2) and their request for a transfer were waived. Pet. App. 60a–61a.

Nine months later, however, the Ninth Circuit panel granted Plaintiffs' petition for rehearing and vacated its initial opinion. Pet. App. 146a. The court of appeals set the case for reargument, but thereafter canceled the argument and issued a new opinion. Pet. App. 1a. The new opinion, authored by Judge Reinhardt, reached the opposite conclusion and held that Daimler AG was subject to general personal jurisdiction in California because MBUSA was its "agent." Pet. App. 3a.

The Ninth Circuit held that satisfying either of "two *separate* tests" would allow it to "find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." Pet. App. 21a. "The first test," the court stated, "is the 'alter ego' test," which is "predicated upon a showing of parental *control* over the subsidiary." *Id.* "The second test . . . is the 'agency' test," which is "predicated upon a showing of the *special importance* of the services performed by the subsidiary." *Id.* The court explained that its agency test relied upon a unique definition of "agency" that applies only in "the context of personal jurisdiction." Pet. App. 28a.

Because Plaintiffs had not alleged that MBUSA and Daimler AG were alter egos, the Ninth Circuit held that the alter-ego test was "not directly at issue" in this case. Pet. App. 21a. Instead, the Ninth Circuit turned to its "'agency' test" and applied a two-part standard for determining whether an "agency" relationship existed between the two corporations for purposes of general personal jurisdiction. Pet. App. 21a–22a.

The court first asked whether "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative." Pet. App. 22a. The court concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist." Pet. App. 25a.

The Ninth Circuit next inquired whether Daimler AG had the "right to control" MBUSA's operations. Pet. App. 26a. The court of appeals explained that "actual control was not necessary," Pet. App. 22a n.12, 27a, and therefore discounted the district court's finding that there was "no evidence whatsoever that [Daimler AG] exercises operational control over MBUSA," Pet. App. 116a. Relying primarily on the General Distributor Agreement between Daimler AG and MBUSA, the court concluded that Daimler AG "had the right to substantially control MBUSA's activities." Pet. App. 30a.

The Ninth Circuit then concluded that exercising jurisdiction over Daimler AG in this case would be reasonable. Pet. App. 43a. The court acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but announced that it "d[id] not agree." Pet. App. 34a. The Ninth Circuit further held that Argentina was not an adequate forum, and that, while it was "not clear" whether Germany was an adequate forum, Germany's availability as a forum ultimately did not matter because "American federal courts, be they in California or any other state, have a strong

interest in adjudicating and redressing international human rights abuses." Pet. App. 36a, 38a, 40a. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary of that defendant's corporate predecessor more than 30 years ago. Pet. App. 41a.

4. The Ninth Circuit denied Daimler AG's petition for rehearing or rehearing en banc. Judge O'Scannlain, joined by seven other judges, dissented from the denial of rehearing. Pet. App. 135a. Judge O'Scannlain criticized the panel for, among other things, "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal systems.'" Pet. App. 141a (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," as well as on "our nation's economy." Pet. App. 144a, 145a. The court's "holding," Judge O'Scannlain declared, "is an affront to due process." Pet. App. 135a.

SUMMARY OF ARGUMENT

I. A corporation is subject to general personal jurisdiction only where its in-state contacts are "so continuous and systematic as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks omitted). Here, it is undisputed that Daimler AG is not subject to general personal jurisdiction in California based on its own contacts with the State. Daimler AG does not operate in California; it owns no property, sells no vehicles, and employs no workers in the State.

II. The California contacts of MBUSA may not be attributed to Daimler AG. The *only* basis for merging companies for jurisdictional purposes is when the companies are deemed alter egos. Here, Daimler AG and MBUSA observe all corporate formalities, and Plaintiffs do not contend that they are alter egos. The Ninth Circuit erred by nevertheless attributing MBUSA's jurisdictional contacts to Daimler AG under an expansive theory of "agency" that would subject virtually any corporation to general jurisdiction in any State where a subsidiary, distributor, or independent contractor regularly conducts business.

A. The principle of corporate separateness is deeply rooted in American law and business. As this Court has repeatedly recognized, treating a corporation and its stockholders as separate entities promotes investment and economic growth. *See*, *e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

This Court has long respected corporate separateness in the jurisdictional context. *See*, *e.g.*, *Goodyear*, 131 S. Ct. at 2857 ("merging parent and subsidiary for jurisdictional purposes requires an in-

quiry comparable to the corporate law question of piercing the corporate veil") (internal quotation marks omitted). Attributing a subsidiary's jurisdictional contacts to its parent *only* when the two companies are truly alter egos affords defendants the certainty and predictability that due process requires and ensures that defendants are subject to suit only in those jurisdictions in which they themselves possess the requisite minimum contacts. Here, because it is undisputed that Daimler AG and MBUSA are not alter egos, the jurisdictional contacts of MBUSA may not be attributed to Daimler AG.

B. California may not exercise general jurisdiction over Daimler AG on the basis that an "agency" relationship exists between Daimler AG and MBUSA. While an agency relationship may be sufficient in some circumstances to create *specific* jurisdiction over the principal as to claims relating to the agency, it cannot provide a basis for *general* jurisdiction. Indeed, many courts of appeals have declined to recognize an "agency" theory in the general-jurisdiction setting and require a showing of alter ego before a subsidiary's contacts may be attributed to the parent; and even those that do recognize "agency" jurisdiction generally impose a standard akin to an alter-ego requirement.

Even if this Court were to recognize an "agency" theory of general jurisdiction, there is no basis for finding that Daimler AG and MBUSA have an agency relationship. Both companies have expressly disclaimed the existence of an agency relationship between them, there is no fiduciary relationship, and Daimler AG does not exercise operational control over MBUSA's day-to-day activities. Moreover, MBUSA has no right to bind Daimler AG contractually to third parties. The distribution agreement

that governs the relationship between Daimler AG and MBUSA merely gives Daimler AG the right to exercise some control over its brand and intellectual property, establishing a relationship that is typical between foreign manufacturers and their domestic subsidiaries.

This Court should reject the Ninth Circuit's expansive "agency" test because it is not grounded in traditional agency principles and undercuts the doctrine of corporate separateness. Indeed, the Ninth Circuit's standard would be satisfied in virtually every case involving a parent and subsidiary. This flawed approach would subject foreign manufacturers to general jurisdiction based solely on their relationship with a domestic subsidiary or independent distributor. In so doing, it would chill foreign investment in the United States and expose U.S. companies with foreign subsidiaries to retaliatory laws enacted by other nations.

III. Even if Daimler AG had sufficient minimum contacts with California, exercising personal jurisdiction in this case would not be reasonable. This case involves foreign plaintiffs suing a foreign defendant for alleged conduct that occurred in a foreign country more than 30 years ago. Exercising jurisdiction in such a case is *per se* unreasonable. It would also impose a significant burden on Daimler AG and infringe upon the sovereignty of Germany and Argentina, both of which are adequate and far more appropriate forums to resolve this dispute. The Ninth Circuit's view that federal courts possess a "strong interest in adjudicating and redressing international human rights abuses" cannot justify California's exercise of jurisdiction in a lawsuit that has no connection to the United States.

ARGUMENT

I. DAIMLER AG IS NOT SUBJECT TO GENERAL JURISDICTION IN CALIFORNIA BASED ON ITS OWN CONTACTS.

The Due Process Clause prohibits the exercise of personal jurisdiction over a defendant unless the defendant has sufficient contacts with the sovereign. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011). Under the doctrine of "specific jurisdiction," a corporate defendant's "'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts." *Id.* at 2853 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). But a State may not assert "general" or "all-purpose" personal jurisdiction over a corporate defendant unless the corporation's contacts with the forum State are "so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* at 2851 (internal quotation marks omitted).

"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 . . . in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business." *Goodyear*, 131 S. Ct. at 2853–54. As this Court explained in another jurisdictional context, "'[p]rincipal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities . . . [a]nd in practice it should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

This Court's decision in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), "remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation." *Goodyear*, 131 S. Ct. at 2856 (internal quotation marks and alteration omitted). There, general personal jurisdiction was appropriate because the foreign corporation *itself* had set up its "principal, if temporary, place of business" in Ohio, the forum jurisdiction. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984) (describing *Perkins*); *see also Goodyear*, 131 S. Ct. at 2857 (the *Perkins* defendant's "*sole* wartime business activity was conducted in [the forum State]"). Thus, the foreign company unquestionably was "at home" in the forum State: "To the extent that the company was conducting *any* business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio." *Id.* at 2856 (emphasis added).

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), in contrast, the Court held that Texas could not exercise general personal jurisdiction over a Columbian corporation when that corporation lacked "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Id.* at 416. The Court emphasized that the foreign corporation did not have a place of business in Texas and never had been licensed to do business in the State; the fact that it purchased equipment from Texas and periodically sent its employees to Texas was not sufficient to support general jurisdiction. *Id*.

Most recently, in *Goodyear*, the Court clarified the limited reach of general personal jurisdiction in a products-liability case involving foreign product manufacturers sued in North Carolina regarding an accident that occurred in France. 131 S. Ct. 2846.

Although the plaintiffs and their decedents were from North Carolina, and the defendants' products had been sold in North Carolina, the Court held that the foreign defendants were "in no sense at home in North Carolina." *Id.* at 2857. *Goodyear* rejected a "sprawling view of general jurisdiction" under which "any substantial manufacturer . . . would be amenable to suit, on any claim for relief, wherever its products are distributed," and explained that "even regularly occurring sales of a product in a State do not justify" the exercise of general jurisdiction there. *Id.* at 2856, 2857 n.6.

There is good reason for limiting the number of jurisdictions in which a corporate defendant is subject to general personal jurisdiction. Unlike specific jurisdiction, general jurisdiction allows the forum to assert authority over a defendant for its conduct anywhere in the world. The forum's authority stems not from a close connection to the *conduct* at issue (as with specific jurisdiction), but from its especially close connection to the particular *defendant*—a connection so systematic, continuous, and substantial that it justifies the adjudication of any dispute involving the defendant. Limiting this type of exposure to those States in which the defendant is "at home"—*e.g.*, the States in which the defendant is incorporated and has its corporate headquarters—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); *see also Hertz*, 130 S. Ct. at 1193 ("Simple jurisdictional rules . . . promote greater predictability.").

Here, it is uncontested that Daimler AG is not subject to general personal jurisdiction in California

based on its own contacts with the State. *See* Pet. App. 137a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("No one disputes that Daimler itself lacks sufficient contacts with California to render it subject to general personal jurisdiction there."). Daimler AG is a German corporation with its headquarters in Stuttgart, Germany, and it is undisputed that Daimler AG does not operate in California—it owns no property, sells no vehicles, and employs no workers in the State. Accordingly, Daimler AG, by itself, lacks the requisite contacts with California to be subject to general personal jurisdiction in the State.

II. THERE IS NO BASIS FOR ATTRIBUTING MBUSA'S JURISDICTIONAL CONTACTS TO DAIMLER AG.

Despite the undisputed fact that Daimler AG itself lacks sufficient contacts to be subject to general personal jurisdiction in California, the Ninth Circuit held that personal jurisdiction exists in this case because the jurisdictional contacts of MBUSA can be attributed to Daimler AG. According to the Ninth Circuit, Daimler AG can be sued in California based on *any* cause of action arising *anywhere* in the world because MBUSA is Daimler AG's "agent" for purposes of personal jurisdiction. But it was only by disregarding settled principles of corporate separateness and creating a new and expansive conception of "agency" that the Ninth Circuit was able to hold Daimler AG subject to general jurisdiction in California. Under the Ninth Circuit's test, a court could assert general personal jurisdiction over *any* foreign corporation with a domestic subsidiary, distributor, or independent contractor that regularly transacts business in the forum State. Such a sweeping assertion of jurisdiction violates due process and would

impose intolerable burdens on foreign policy, foreign investment, and the federal courts.

A. Attribution Of MBUSA's Jurisdictional Contacts To Daimler AG Is Improper Because The Two Companies Are Not "Alter Egos."

Due process requires affording defendants predictability about the forums in which they are subject to suit and restricting personal jurisdiction to those States in which a defendant possesses sufficient minimum contacts to comport with "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 320 (internal quotation marks omitted). Only a showing of an alter-ego relationship is adequate to meet these constitutional requirements where an assertion of general jurisdiction over a defendant is premised on the attribution of another entity's contacts with the forum.

1. This Court has made clear that a "corporation and its stockholders are generally to be treated as separate entities," regardless of "the control which stock ownership gives to the stockholders." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted). On this bedrock principle of our legal and economic systems, "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). By reducing the cost of capital, improving the allocation of risk, and enhancing liquidity, the doctrine of corporate separateness "makes possible huge economy in production and in trading," and represents "the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities." Stephen B. Presser, *Piercing the Corporate Veil* § 1:1

(2012) (internal quotation marks omitted); *see also* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 503 (1976) ("Far from externalizing the risks of business ventures, the principle of limited liability in corporation law facilitates a form of transaction advantageous to both investors and creditors; in its absence the supply of investment and the demand for credit might be much smaller than they are.").

Corporate separateness is so vital to a functioning economy that "[t]he doctrine of piercing the corporate veil"—in which the corporate form is set aside and stockholders are held accountable for the actions of the corporation—"is the rare exception, applied [only] in the case of fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see also Bestfoods*, 524 U.S. at 62; *Anderson*, 321 U.S. at 362; *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934). Absent "fraud or injustice" "the doctrine of corporate entity [is] recognized generally and for most purposes." *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 322 (1939).

2. This Court has long respected corporate separateness in the context of personal jurisdiction. In *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), for example, this Court concluded that the in-state contacts of a subsidiary corporation doing business in North Carolina were insufficient to establish personal jurisdiction over a parent corporation that itself had no North Carolina contacts. *Id*. at 338. Even though the parent company "dominate[d]" its subsidiary "immediately and completely" "[t]hrough ownership of the entire capital stock and otherwise," "[t]he existence of the [subsidiary] company as a distinct corporate entity [was] . . . in all respects observed." *Id.* at 335. "[T]he corpo-

rate separation carefully maintained" could not "be ignored in determining the existence of jurisdiction" over the parent company, the Court explained, because the "separation, though perhaps merely formal, was real." *Id.* at 336–37; *see also id.* at 338 ("[W]e cannot say that for purposes of jurisdiction, the business of the [subsidiary] corporation in North Carolina became the business of the defendant").

In *Keeton v. Hustler Magazine*, 465 U.S. 770, this Court again applied the doctrine of corporate separateness to a question of personal jurisdiction. The Court held that "[e]ach defendant's contacts with the forum State must be assessed individually," and that, accordingly, "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary." *Id*. at 781 n.13; *see also Rush v. Savchuk*, 444 U.S. 320, 332 (1980). The "fact that jurisdiction may be asserted over Hustler Magazine, Inc." thus did not mean "that jurisdiction may also be asserted over" Hustler's holding company. *Keeton*, 465 U.S. at 781 n.13.

Most recently, in *Goodyear*, this Court indicated that "merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil.'" 131 S. Ct. at 2857 (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14 (1986)).

3. These decisions reflect that due process requires courts to view each defendant *independently* when assessing personal jurisdiction and to give effect to the separate identities of each defendant (and non-parties affiliated with those defendants). *See Rush*, 444 U.S. at 332 ("The requirements of *Interna-*

tional Shoe . . . must be met as to each defendant over whom a state court exercises jurisdiction."). Accordingly, two affiliated corporations may be merged for jurisdictional purposes only where the corporations have failed to adhere to the requirements of their separate corporate identities—in other words, where one is the "alter ego" of the other.

Permitting attribution of jurisdictional contacts only in cases where the corporate veil may be pierced provides the predictability necessary for due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring). This Court has repeatedly emphasized that "[t]he 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." *World-Wide Volkswagen*, 444 U.S. at 297 (citation omitted). Attributing the contacts of a subsidiary to a parent only when the corporations are alter egos provides a predictable jurisdictional rule that is critical for "corporations making business and investment decisions," *Hertz*, 130 S. Ct. at 1193, a concern that is heightened for companies engaged in "international business transaction[s]." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (noting "the need of the international commercial system for predictability").

Corporations have long been familiar with the alter-ego doctrine and know how to conform their conduct to avoid veil-piercing. *See Bestfoods*, 524 U.S. at 62–63 (describing veil-piercing as a "fundamental principle of corporate law" and a "well-settled rule"). "A more free-wheeling approach to veil piercing would hamstring established businesses in their le-

gitimate efforts to expand into new fields; undermine the predictability of corporate risk-taking; and provide a huge disincentive for the investment of venture capital." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992) (Selya, J., joined by Breyer, C.J., and Cyr, J.). Any lesser standard would deprive companies of the "foreseeability that is critical to due process analysis." *World-Wide Volkswagen*, 444 U.S. at 297.[3]

In addition, the alter-ego test ensures that the foreign defendant being haled into court has sufficient contacts with the forum State to be subject to general jurisdiction there. After all, "the constitutional touchstone" of personal jurisdiction is whether "*the defendant*" itself has "established 'minimum contacts' in the forum." *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316) (emphasis added). Relying on the jurisdictional contacts of a separate corporate entity to establish personal jurisdiction would run counter to "'traditional notions of fair play and substantial justice'" that underpin this Court's personal-jurisdiction jurisprudence, *Int'l Shoe*, 326 U.S. at 316 (citation omitted)—unless the two corporations are truly one and the same entity. Only if the subsidiary is in fact the alter ego of the parent company would it be fair to treat the parent company as "at home" in the subsidiary's home jurisdiction. *See NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (explaining

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[3] Determining the appropriate alter-ego test through the forum State's choice-of-law rules will help ensure foreseeability, at least in cases where familiar and well-recognized alter-ego standards are fairly applied.

that an alter ego is the "mere instrumentality . . . of its owner") (internal quotation marks omitted).

4. It is undisputed that Daimler AG is not MBUSA's alter ego. "Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]," Pet. App. 114a, and do not contest that Daimler AG and MBUSA have maintained all the formalities of their separate corporate identities: the two companies have separate boards of directors, officers, and employees; separate books and records; and each corporation is responsible for its own day-to-day decision-making. *See* J.A. 129a–130a; *see also*, *e.g.*, *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600–01 (2d Cir. 1989) (describing veil-piercing factors); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691–92 (5th Cir. 1985) (same). Because Daimler AG and MBUSA have adhered to the formalities of corporate separation and are not alter egos of each other, MBUSA's jurisdictional contacts with California cannot be attributed to Daimler AG.[4]

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[4] Moreover, although the Court need not decide the issue to reverse the decision below, this Court's precedent indicates that MBUSA itself—which is incorporated in Delaware and has its principal place of business in New Jersey—is not "at home" in California for purposes of general personal jurisdiction. *See Goodyear*, 131 S. Ct. at 2853–54 (for a corporation, "the paradigm forum for the exercise of general jurisdiction" is where "the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business").

B. Attribution Of MBUSA's Jurisdictional Contacts To Daimler AG May Not Rest On An "Agency" Theory.

The Ninth Circuit did not purport to find that Daimler AG and MBUSA were alter egos. It nonetheless held that MBUSA's jurisdictional contacts with California could be attributed to Daimler AG—and that Daimler AG was therefore subject to general personal jurisdiction in the State—on the theory that MBUSA was Daimler AG's "agent." In reaching this conclusion, the Ninth Circuit relied on a malleable and expansive conception of "agency" that is unknown elsewhere in the law and that the court acknowledged did not apply "[o]utside the context of personal jurisdiction." Pet. App. 28a.

The Ninth Circuit's approach is deeply flawed. It would violate due process to premise general jurisdiction on an agency relationship between the defendant and another entity. In any event, MBUSA is not Daimler AG's "agent" for jurisdictional purposes because neither company consented to agency, there is no fiduciary relationship between them, and Daimler AG does not exercise day-to-day operational control over MBUSA.

1. While an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction, it cannot support a finding of *general* jurisdiction—*i.e.*, jurisdiction over claims that have no connection to the agency itself. A corporation is not "at home" wherever its agents are located. *Goodyear*, 131 S. Ct. at 2851.

In *Burger King*, this Court recognized that an agency relationship might give rise to *specific* personal jurisdiction over a foreign defendant for activi-

ties "carried on in behalf" of that defendant. 471 U.S. at 479 n.22 (internal quotation marks omitted). The Court cited *Calder v. Jones*, 465 U.S. 783 (1984)—a specific jurisdiction case—for the proposition that jurisdiction may exist where the defendant is a "'primary participan[t]' in the enterprise and has acted purposefully in directing" the agent's activities giving rise to the suit. *Burger King*, 471 U.S. at 479 n.22 (alteration in original) (quoting *Calder*, 465 U.S. at 790). But this Court has never suggested that an agency relationship is sufficient to extend *general* personal jurisdiction over a foreign defendant.

Consistent with *Burger King*—and with the principles of corporate separateness discussed above—many courts have declined to treat "agency" as a permissible basis for general jurisdiction, holding that the contacts of a subsidiary may be attributed to the parent *only* when the companies are alter egos. The Eighth Circuit, for example, has held that "personal jurisdiction can be based on the activities of [a] nonresident corporation's in-state subsidiary . . . *only* if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011) (alterations in original; internal quotation marks omitted; emphasis added); *see also Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003). The Seventh Circuit has similarly held that "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates . . . due process." *Cent. States, Se. & Sw. Ar-*

eas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 944 (7th Cir. 2000).

The Fourth, Fifth, and Sixth Circuits are in accord. *See Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir.), *cert. denied*, 132 S. Ct. 575 (2011); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008). Indeed, in examining facts indistinguishable from those in this case, the Sixth Circuit held that Toyota Motor Corporation Worldwide, a Japanese corporation, was *not* subject to general personal jurisdiction in Ohio based on the forum-state contacts of its U.S. subsidiary, Toyota Motor Sales, U.S.A., Inc., because the two companies complied with corporate formalities and were "not alter egos." *Toyota Motor Corp.*, 545 F.3d at 363.

With the exception of the Second and Ninth Circuits, even those courts that *have* permitted the attribution of jurisdictional contacts based on an "agency" relationship between parent and subsidiary have required a showing akin to alter ego—that is, that the two corporations are "so intertwined as to demonstrate that the two corporations are, in reality, a single entity." *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985). If, on the other hand, "the day to day operational decisions of each company are made by separate groups of corporate officers," then permitting "jurisdiction over [the principal] would offend all notions of fair play and due process." *Id.*; *see also Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1294 (11th Cir. 2000) (plaintiff failed to show that the subsidiary was "merely [an] agent" because the subsidiary had "its own officers and boards of directors . . . [and] its own bank accounts[,] offices, and employees").

These courts are correct in rejecting the exercise of general personal jurisdiction upon a showing of anything less than an alter-ego relationship between the defendant and its in-state affiliate. As explained above, only an alter-ego test can provide defendants with the predictability mandated by due process and ensure that they are subject to general jurisdiction only in those States in which their own jurisdictional contacts are so significant as to render them "at home." *Goodyear*, 131 S. Ct. at 2851.

2. Even if this Court were to recognize an "agency" theory of general jurisdiction—and it should not—Daimler AG would not be subject to general personal jurisdiction in California because it does not have an agency relationship with MBUSA.

Any agency test applied in the general-jurisdiction setting would have to provide defendants with the notice and predictability that due process requires. *See World-Wide Volkswagen*, 444 U.S. at 297. Any such test would also need to ensure that defendants are subject to general jurisdiction only where they—and not just their agents—have sufficient contacts to render them "at home" in the forum State. *Goodyear*, 131 S. Ct. at 2851; *Int'l Shoe*, 326 U.S. at 316. Thus, at a minimum, general jurisdiction based on an agency theory would have to be limited to cases where the putative principal and agent have established a bona fide agency relationship sufficient to pierce the corporate veil under applicable agency principles.

Individuals and corporations alike have long been able to rely on established principles of agency law to manage risk and liability. *See Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929) ("[F]ew doctrines of the law are more firmly estab-

lished" than the "rule which fastens on the principal liability for the acts of his agent"). It is widely accepted that a principal-agent relationship will not be recognized unless several fundamental elements are satisfied, including "assent" by both parties to the agency relationship, the existence of fiduciary duties between the parties, and the principal's "control" over the agent's actions. *See* Restatement (Third) of Agency § 1.01 (2006); *see also Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982) ("'Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'") (quoting Restatement (Second) of Agency § 1(1) (1958)). Any agency-based jurisdictional test must therefore include those basic requirements.

In addition, in order to ensure that the principal (and not just the agent) has the requisite contacts with the forum State to justify the exercise of general jurisdiction, any agency test must require that the foreign defendant exercise pervasive and total control over the in-state agent's day-to-day operations. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 628 (1983) ("[W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other."). Only in such circumstances is the agency relationship sufficient to pierce the corporate veil between the principal and agent. *See*, *e.g.*, *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839–45 (D. Del. 1978) (an agency relationship should give rise to veil piercing only where the principal exercises "actual, participatory, and total [control]" and "complete dom-

ination" over the agent). In the words of then-Chief Judge Cardozo, there are certain relationships in which "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent." *Berkey v. Third Avenue Ry.*, 155 N.E. 58, 61 (N.Y. 1926). Only that type of "obtrusive" relationship—in which the principal's domination of the agent is complete—could even arguably give rise to general jurisdiction over a parent corporation in its subsidiary's home forum.

The relationship between Daimler AG and MBUSA does not constitute an agency—let alone, the type of agency relationship sufficient to pierce the corporate veil between Daimler AG and MBUSA. "At the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control.'" *Gen. Bldg. Contractors*, 458 U.S. at 393 (quoting Restatement (Second) of Agency § 1(1) (1958)). Here, "the critical legal document that defines [Daimler AG's] relationship with MBUSA" is the General Distributor Agreement. Pet. App. 9a. That Agreement *expressly disclaims* a fiduciary relationship and leaves no doubt that the companies did *not* consent to agency. Specifically, the Agreement states that MBUSA is an "independent contractor[ ]" operating an "independent business for [its] own account," *not* a "general or special agent, partner, joint venture or employee of" Daimler AG. J.A. 179a. The Agreement also declares that it "does not create any fiduciary relationship or any other relationship of trust or confidence" between Daimler AG and MBUSA. *Id*.

Nor does Daimler AG exercise the requisite day-to-day control over MBUSA. The district court found

"no evidence whatsoever" that Daimler AG "exercises operational control over MBUSA." Pet. App. 116a. That finding was correct and warrants deference. Far from giving Daimler AG operational control over MBUSA, the Agreement merely establishes the contractual terms by which Daimler AG permits MBUSA to distribute its vehicles and use its trademarks. For example:

- The Agreement contemplates that MBUSA and Daimler AG will "agree upon quantitative and/or qualitative objectives to be reached" by MBUSA during each Sales Period, including sales targets. J.A. 153a.
- Even when the parties do not agree on specific terms, Daimler AG may not unilaterally impose targets on MBUSA—such targets are based on sales from the previous sales period. J.A. 155a–156a.
- MBUSA "ha[s] the power to independently decide against buying" certain types of Daimler AG's vehicles. Pet. App. 58a. In fact, until 2001, MBUSA decided against buying G-Class vehicles from Daimler AG. J.A. 147a.
- Either party may terminate the Agreement for good cause or with notice. J.A. 187a–188a.

Moreover, although the Agreement provides Daimler AG with the right to be notified of (and, in some cases, approve) authorized resellers and personnel decisions, and grants Daimler AG the authority to set certain standards with respect to advertising Daimler AG's vehicles and using Daimler AG's trademarks, *see*, *e.g.*, J.A. 171a–174a, these provi-

sions merely provide Daimler AG with a measure of control over its brand and intellectual property—not over the day-to-day operations of MBUSA. In fact, the very existence of the Agreement underscores the fact that Daimler AG does not control MBUSA's operations. If Daimler AG dominated the affairs of MBUSA, there would have been no need for Daimler AG to enter into a contract with MBUSA that grants Daimler AG certain defined rights with respect to the manner in which its vehicles are distributed in the United States; Daimler AG could simply have relied upon that domination over MBUSA to control the manner of distribution.

At bottom, the distribution agreement in this case is typical of relationships between foreign parent companies and domestic subsidiaries. *See*, *e.g.*, *Toyota Motor Corp.*, 545 F.3d at 363; *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *Honda Motor Co.*, 779 F.2d at 772; *Rasmussen v. Gen. Motors Corp.*, 803 N.W.2d 623, 624–28 (Wis. 2011). Asserting general jurisdiction over Daimler AG in California based solely on its distribution agreement with MBUSA would create an unworkable jurisdictional rule that violates the Due Process Clause, *see World-Wide Volkswagen*, 444 U.S. at 297, and leave countless foreign companies vulnerable to general jurisdiction in every State where their subsidiaries do business, or where they have distributors, independent contractors, or other ordinary business relationships.[5]

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[5] Even if MBUSA were the "agent" of Daimler AG—and agency could be a basis for attributing contacts for purposes of general jurisdiction—that would mean at most that the two corporations should be treated as a "single enterprise" for jurisdictional purposes. *Goodyear*, 131 S. Ct. at 2857. The question

3. If this Court does hold that some agency relationships may be sufficient to give rise to general personal jurisdiction, it should nevertheless reject the Ninth Circuit's expansive "agency" test. Under the Ninth Circuit's standard, a corporation is subject to general jurisdiction whenever (1) an entity performs in-state services that are of "special importance" to the foreign corporation, and (2) the foreign corporation has the "right to control" the entity performing those in-state services. Pet. App. 21a–22a. This novel definition of "agency"—which the Ninth Circuit acknowledged it would not apply "[o]utside the context of personal jurisdiction," Pet. App. 28a—fails to provide the jurisdictional predictability and fairness mandated by the Due Process Clause.

Under the Ninth Circuit's "agency" test, the court first asks whether the services being performed by the in-state entity are "important" enough that, in the absence of the in-state entity, the foreign defendant would find "other means" to undertake the activity—"whether by . . . performing those services itself or by . . . entering into an agreement with a new subsidiary or a non-subsidiary . . . for the performance of those services." Pet. App. 25a. But this standard

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[Footnote continued from previous page]

would remain whether that combined enterprise is "at home" in California. *Id.* at 2851; *see also Perkins*, 342 U.S. at 447–48 (deciding that the foreign company *as a whole* was "at home" in Ohio because the Ohio headquarters were its "sole[ ]" wartime operations). Even if MBUSA were a division of Daimler AG rather than a separate corporation, Daimler AG would still be a German corporation headquartered in Germany, and would still not be "at home" in California. *See Hertz*, 130 S. Ct. at 1192.

would be satisfied in virtually every case where a foreign defendant has a relationship with a third party that performs services on its behalf in the forum State. "*Anything* a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." Pet. App. 140a (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis added).

Next, the Ninth Circuit's test asks whether the foreign corporation has the "right to control" the domestic entity; "actual control," however, "[i]s not necessary." Pet. App. 27a. Like the first element of the Ninth Circuit's test, this standard would be satisfied in virtually every case involving a parent and subsidiary. A corporate parent always has the *right* to control a subsidiary, even if the parent company does not actually exercise day-to-day control. *See United States v. Scophony Corp. of Am.*, 333 U.S. 795, 814 (1948) (even if a foreign parent company is "nothing more than a shareholder for investment purposes," it would have "voting rights and control" over the subsidiary). In fact, "a parent corporation [is] so-called *because of control* through ownership of another corporation's stock." *Bestfoods*, 524 U.S. at 61 (emphasis added); *id*. at 61–62 (it is "hornbook law" that "stock ownership gives to the stockholders" "the exercise of the control," which includes "the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders") (internal quotation marks omitted; alteration in original).

The Ninth Circuit's "agency" test ignores the well-settled requirements for establishing an agency relationship sufficient to pierce the corporate veil be-

tween two distinct entities. For example, the test fails to consider whether the subsidiary owes a fiduciary duty to the parent, *see* Restatement (Third) of Agency § 1.01 cmt. e (2006), whether the subsidiary has the power to act on behalf of the parent and affect the parent's legal rights and duties, *see id.* at cmt. c, and whether the parent exercises pervasive control over the day-to-day activities of the subsidiary. *See First Nat'l City Bank*, 462 U.S. at 628–29. Because the Ninth Circuit's boundless "agency" test is unpredictable and malleable—potentially ensnaring any foreign corporation with a subsidiary, distributor, or independent contractor in the forum State—and allows a State to exercise personal jurisdiction over a defendant without regard for the defendant's *actual* contacts in that State, it violates the Due Process Clause. *See World-Wide Volkswagen*, 444 U.S. at 297; *see also Burger King*, 471 U.S. at 474 ("[T]he constitutional touchstone" of personal jurisdiction is "minimum contacts.").

The Ninth Circuit's expansive "agency" test also poses substantial policy concerns for the United States. It would allow a proliferation of suits against foreign defendants in American courts challenging conduct that occurred outside the United States—anything and everything from a false advertising claim arising out of a product sold in Japan, to a dispute involving a contract made and performed in Brazil, to a workplace dispute concerning a factory in Germany, simply because the foreign defendant has a commercial relationship with a U.S. entity. The Ninth Circuit's rule would turn the federal judiciary into an international tribunal for disputes arising anywhere in the world.

Such an expansive conception of general jurisdiction provides a strong incentive for foreign compa-

nies to limit or end their commercial ties to the United States, and to direct their investments to alternate markets with more predictable legal risks. It deters them from establishing subsidiaries in the United States, hiring U.S.-based independent contractors, or engaging in transactions with domestic distributors and other business partners. That, in turn, risks diminishing the flow of foreign-manufactured goods and other foreign investments into the United States, to the detriment of U.S. consumers and the U.S. economy. As President Obama has stated, foreign direct investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities." Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy.

Allowing the Ninth Circuit's jurisdictional rule to stand would also encourage foreign nations to enact retaliatory jurisdictional laws that threaten U.S. companies with subsidiaries abroad. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987) (citing retaliatory laws in Belgium, Italy, and elsewhere); *cf.* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 679–83 (5th ed. 2011) (describing retaliatory claw-back statutes in the United Kingdom). As Judge O'Scannlain explained, "several countries have enacted retaliatory jurisdiction laws" that "empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." Pet. App. 144a (O'Scannlain, J., dissenting

from denial of rehearing en banc) (internal quotation marks omitted). Such retaliation could result in a reduction in U.S. exports at a time when exports are increasingly important to the health of the U.S. economy. *See*, *e.g.*, Exec. Order No. 13,534, § 1, 75 Fed. Reg. 12,433, 12,433 (Mar. 11, 2010) ("A critical component of stimulating economic growth in the United States is ensuring that U.S. businesses can actively participate in international markets by increasing their exports of goods, services, and agricultural products."). In fact, such expansive and extraterritorial application of personal jurisdiction has already harmed U.S. foreign-policy interests. "[F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 33, *Goodyear*, 131 S. Ct. 2846 (No. 10-76); *see also* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161.

Finally, permitting expansive assertion of personal jurisdiction against foreign defendants for foreign conduct—based solely on the foreign defendant's ties to an uninvolved domestic entity—also places United States courts out of step with international jurisdictional standards. Article 2 of the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, for example, permits general jurisdiction over member-state defendants only in their state of domicile. Allen R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. Rev. 527, 532 (2012). It would never be reasonable anywhere in the European Union to exercise general personal jurisdiction in a case like

this one, and it should not be considered reasonable here.

III. IT WOULD BE UNREASONABLE FOR CALIFORNIA COURTS TO ASSERT GENERAL PERSONAL JURISDICTION OVER DAIMLER AG.

Even if Daimler AG had the necessary minimum contacts with California through its relationship with MBUSA to be considered "at home" in that State, due process would still require that the exercise of jurisdiction be "reasonable[ ]." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). As this Court has made clear, the "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if" the defendant otherwise has sufficient contacts with the forum. *Burger King*, 471 U.S. at 477–78 (citation omitted). Subjecting Daimler AG to general personal jurisdiction in California in this case—where all of the parties are foreign and the alleged conduct and injury occurred entirely overseas—would not be reasonable.

A. It Is *Per Se* Unreasonable To Exercise General Jurisdiction Over A Foreign Company For Purely Foreign Conduct Based Solely On Its Relationship With An Uninvolved Domestic Entity.

This Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted). And it has "admonished [lower] courts . . . to consider the procedural and substantive policies of other nations whose interests are affected

by the assertion." *Id.* (emphasis omitted). Conduct occurring in a foreign nation is already governed by that country's laws. Accordingly, the assertion of jurisdiction by a U.S. court seeking to apply U.S. law, or a U.S. interpretation of foreign law, to alleged foreign conduct raises the "obvious" "probability of incompatibility" with "the applicable laws of other countries." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010). This Court recently warned that such cases present a unique "danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

The Ninth Circuit went out of its way to assert jurisdiction in this case even though the plaintiffs are foreign, the defendant is foreign, and the alleged conduct occurred in a foreign land and implicates actions by a foreign government. That is *per se* unreasonable where, as here, the subsidiary corporation that provides the jurisdictional "hook" has no relationship to the alleged conduct at issue. Plaintiffs did not even ask the courts in California to exercise jurisdiction over MBUSA because all of the allegations involved Mercedes-Benz Argentina—a different Daimler AG subsidiary that Plaintiff chose not to name as a defendant—not MBUSA. J.A. 25a–27a.

B. Every Relevant Factor Weighs Against Exercising General Jurisdiction Over Daimler AG In This Case.

Even in the absence of a *per se* rule, the exercise of jurisdiction in this case would still be unreasonable. The constitutional "reasonableness" inquiry focuses on the "general fairness" of subjecting the defendant to the jurisdiction of a foreign tribunal. *Per-*

kins, 342 U.S. at 444; *see also Goodyear*, 131 S. Ct. at 2857 n.5; *World-Wide Volkswagen*, 444 U.S. at 294. In analyzing reasonableness, a "court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," and "must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies.'" *Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

The district court carefully considered these factors and concluded that the "exercise of general jurisdiction over [Daimler AG] in this action would be unreasonable." Pet. App. 91a. In reversing that judgment, the court of appeals simply ignored the district court's careful weighing of the evidence. But the district court had it right—every relevant factor weighs against the exercise of jurisdiction over Daimler AG.

Burden on the Defendant. Because Daimler AG is a German corporation with no officers, employees, or presence in California, requiring Daimler AG to defend a lawsuit in the State would impose a "significant burden"—even more so where, as here, the allegations have no relationship to California or the United States. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). None of the relevant parties, witnesses, or documents is present in the forum. Daimler AG would have to endure a costly, time-consuming, and uncertain process to obtain access to witnesses and secure their participation in a U.S. proceeding. Indeed, the language challenges alone would be tremendous. The language of the documents, and the native tongues of the witnesses, would be Spanish and perhaps German.

German witnesses potentially testifying through a German-English interpreter about Spanish-language documents before a U.S. court would create inefficiency and confusion.

Sovereignty of Foreign Nations. As both the district court and the Ninth Circuit noted, "German courts have expressed . . . concern that this suit may impinge upon German sovereignty." Pet. App. 34a; *see also* Pet. App. 121a.[6] This Court regularly credits the concerns of foreign nations that extraterritorial application of U.S. law would interfere with their sovereign interests. *See*, *e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167–68 (2004). But the Ninth Circuit refused to give credence to Germany's concern, declaring simply that it "d[id] not agree." Pet. App. 34a.

The potential for this case to invade the sovereignty of both Argentina and Germany is "obvious." *Morrison*, 130 S. Ct. at 2885. Plaintiffs seek to have U.S. courts apply Argentine *as well as* U.S. law to conduct that occurred wholly within Argentina. *See* J.A. 57a (asserting claims "under the laws of California . . . and Argentina"); *see also* J.A. 50a. Such extraterritorial application of U.S. law runs a high probability of conflicting with the liability regime in the nation where the alleged conduct occurred. *See Morrison*, 130 S. Ct. at 2885. Similarly, "[t]he Federal Republic of Germany has an inherent interest in

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[6] The Federal Republic of Germany reiterated its concern directly to this Court as *amicus curiae* in *Kiobel*, citing the Ninth Circuit's ruling in *Bauman* as "potentially interfer[ing]" with its sovereignty because the case has "little or no significant nexus with the United States." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10 & n.3, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

applying its laws and using its courts in cases in which German defendants are accused of the violation of international customary laws." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). And this Court has acknowledged Germany's expressed interest "'in seeing that German companies are not subject to the extraterritorial reach of the United States' . . . laws by private foreign plaintiffs.'" *F. Hoffman-La Roche Ltd.*, 542 U.S. at 167–168 (quoting Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* at 2).

Interests of the Forum State. The Ninth Circuit reasoned that California has "a significant interest in adjudicating the suit" because all "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses" occurring anywhere in the world. Pet. App. 36a. To support this remarkable assertion, the court of appeals relied exclusively on the "policy" objectives it believed were enshrined in the Alien Tort Statute and the Torture Victims Protection Act. Pet. App. 36a–37a. But Plaintiffs' claims under those provisions are no longer cognizable. *See Kiobel*, 133 S. Ct. at 1669; *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). Nor is the Ninth Circuit's approach consistent with this Court's prior recognition that the forum State's interest typically turns on whether the parties are state residents or the conduct occurred within state borders. *See*, *e.g.*, *Asahi*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

Availability of Alternative Forums. This Court has looked to the availability of "more conven-

ient" forums in assessing the reasonableness of personal jurisdiction. *See Asahi*, 480 U.S. at 114. In *Asahi*, this Court made clear that it is a *plaintiff's* burden to show that a more convenient forum is *not* available. *See id*. Indeed, the Court held that the assertion of jurisdiction was unreasonable in that case in part because the plaintiff had "not demonstrated that it [was] more convenient for it to litigate its indemnification claim . . . in California rather than in Taiwan or Japan." *Id.*; *cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (plaintiffs have the burden to show that the alternative forum "is so clearly inadequate or unsatisfactory that it [provides] no remedy at all").

The Ninth Circuit took exactly the opposite approach in this case, requiring Daimler AG to prove that courts in Germany or Argentina were more appropriate forums than California. *See* Pet. App. 38a–41a. Indeed, the court of appeals did not even resolve that issue, dismissing the entire inquiry after concluding that the availability of Germany as an alternative forum was "not clear." Pet. App. 40a. A proper analysis would have led the court of appeals to conclude, as the district court did, that "both Argentina and Germany provide [Plaintiffs] with an adequate alternative forum for their claims." Pet. App. 85a.

First, Plaintiffs failed to prove that Germany is not an adequate alternative forum. As Daimler AG's expert Dr. Stefan Rützel explained (and the district court accepted), "German law would allow a human rights action against a corporation" and "Argentine citizens would have access to German courts for a suit like this one." Pet. App. 91a. Plaintiffs' only response was to offer the opinion of a legal expert who "cite[d] no law in support of his claims." Pet. App.

90a. Indeed, the district court noted that Plaintiffs' submission was so deficient that it amounted to a "failure to address the argument" entirely. Pet. App. 91a. The Ninth Circuit did not acknowledge these glaring omissions and deficiencies, noting only that there was "conflicting expert testimony" on German law. Pet. App. 40a.

Second, Plaintiffs failed to prove that Argentina is not an adequate alternative forum. The Ninth Circuit held that Argentina is not suitable because Argentina's statute of limitations would make it "unlikely" that Plaintiffs could bring a suit there. Pet. App. 39a n.18. But that cursory analysis ignored the district court's "conclus[ion] that [Daimler AG] has cited sufficient authorities to refute plaintiffs' contention that they may not bring their claims in Argentina." Pet. App. 125a. In fact, the district court noted "evidence of a somewhat similar lawsuit against Ford Motor Company in Argentina." Pet. App. 86a.

The Ninth Circuit also questioned Plaintiffs' ability to get a fair trial in Argentina. Pet. App. 39a n.18. But the district court was "reluctant to find [the Argentine] courts corrupt or biased," Pet. App. 127a (internal quotation marks omitted), relying instead on the U.S. State Department's report, which noted that Argentine "law provides for the right to a fair trial, and the independent judiciary generally enforce[s] this right," Argentina Country Report on Human Rights Practices at 7 (2012), *available at* http://www.state.gov/documents/organization/204633.pdf. The court of appeals should have given deference to the district court's findings and held that Plaintiffs failed to carry their burden of proof.

CONCLUSION

Daimler AG—a German company that conducts no operations in the United States—cannot plausibly be said to be "at home" in California. And the complaint in this case—filed by foreign plaintiffs against a foreign defendant alleging conduct in a foreign country—has nothing to do with California. Requiring Daimler AG nevertheless to answer those allegations in a California court would be an unwarranted and unconstitutional departure from the "traditional notions of fair play and substantial justice" that animate this Court's personal-jurisdiction jurisprudence. *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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