No. 11-965

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Respondents acknowledge that the circuits are divided over whether the Due Process Clause permits a court to exercise general personal jurisdiction over a foreign corporation based on the in-state activities of a subsidiary that is not an alter ego of the parent. Br. in Opp. 9–14. Although respondents attempt to narrow that split by misreading several decisions, they do not deny that the circuits have adopted irreconcilable answers to a jurisdictional question of fundamental importance to the international relations of the United States and the ability of both domestic and foreign corporations to structure their conduct with some assurance as to where they can be sued.

Instead, respondents invent supposed vehicle problems that either lack support in the record below or simply do not make legal or logical sense. For example, they claim that general jurisdiction over Daimler AG might be proper in Michigan, Br. in Opp. 17–18, but the district court squarely held that this argument was forfeited. Respondents also contend that this petition should be denied because this Court's forthcoming decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, might eliminate respondents' only remaining federal claim. Br. in Opp. 14–17. But even were that to occur, the district court would be under no obligation to dismiss respondents' foreign- and state-law claims—which respondents make clear they intend to pursue vigorously on remand—making it imperative that this Court reverse the Ninth Circuit's clearly erroneous personal-jurisdiction holding before Daimler AG is compelled to litigate further in a State in which it does not manufacture or sell products, own property, or em-

ploy workers. Moreover, the Ninth Circuit's decision has implications that extend well beyond this case, and should not remain on the books simply because Daimler AG might ultimately prevail in this litigation on non-jurisdictional grounds. In any event, respondents' request that this Court *immediately* deny the petition is incoherent on its own terms: If *Kiobel* does *not* eliminate respondents' Alien Tort Statute ("ATS") claim, there would be no conceivable reason to refrain from granting review. Even if the ATS claim were respondents' only cause of action, the proper course would be to hold this petition for *Kiobel* and then grant plenary review if *Kiobel* preserves that claim.

The expansive jurisdictional rule that has been adopted by the Second and Ninth Circuits, each home to numerous subsidiaries of foreign corporations, vitiates bedrock principles of corporate separateness and "extends the reach of general personal jurisdiction far beyond its breaking point." Pet. App. 135a (O'Scannlain, J., dissenting from denial of rehearing en banc). This Court should grant review and set forth a uniform rule that comports with due process.

ARGUMENT

I. RESPONDENTS CONCEDE THAT THERE IS A CONFLICT OF AUTHORITY AMONG THE CIRCUITS.

A. Respondents concede that the courts of appeals are divided over whether a parent corporation can be subject to general personal jurisdiction based on the in-state activities of a subsidiary that is not an alter ego of the parent. Br. in Opp. 9–14. They take issue only with the scope of the split, claiming that the Eighth Circuit alone has "directly consid-

ered and rejected" the position that a mere "agency" relationship between a foreign parent and an in-state subsidiary is sufficient to establish general jurisdiction over the parent. *Id.* at 13.

Even if the division of authority were only 3-1, as respondents contend, Br. in Opp. 11, 13, it would be intolerable to leave that split unresolved and to continue subjecting foreign companies to lawsuits in U.S. courts for conduct anywhere in the world based solely on the fact that they have a subsidiary headquartered in Los Angeles or New York rather than St. Louis. Indeed, the decision below creates entirely artificial incentives for U.S. subsidiaries to relocate to States where their foreign parents will not be subjected to such far-reaching jurisdiction.

In any event, respondents vastly understate the extent of the circuit split; as eight federal appellate judges have concluded, the decision below "is inconsistent with the law of at least six [other] circuits." Pet. App. 136a (O'Scannlain, J., dissenting from denial of rehearing en banc). With no discussion of the cases' holdings or reasoning, respondents assert that the decisions of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits cited by Daimler AG did not hold that an alter-ego relationship was *necessary* to subject a parent to general jurisdiction based on its subsidiary's activities, leaving that question open in those circuits. Br. in Opp. 11–12. That is not correct.

For example, in *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir. 1990), the Fifth Circuit expressly considered and rejected the position that the significant control exercised by the parent over its wholly-owned subsidiaries—including having them "funnel their revenues into centralized bank ac-

counts" and conduct the parent's business in Louisiana—was sufficient for general jurisdiction. *Id.* at 1363. Because the parent "observe[d] corporate formalities" and permitted its subsidiaries to run day-to-day activities and keep their own books, the alter-ego test was not satisfied, leaving "no basis" to exercise personal jurisdiction over the parent. *Id.*

Similarly, in the other cited cases, the courts made clear that the alter-ego test sets forth the due process boundary for whether a parent can be subject to general jurisdiction based on the activities of its subsidiary. *See*, *e.g.*, *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (answering the question of "the extent to which a parent corporation is subject to general jurisdiction based on activities of a subsidiary" by applying the alter-ego standard); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) (holding that "constitutional due process *requires* that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary" (emphasis added)). Instead of confronting these decisions directly, respondents point to admitted dicta in other decisions of the First and Seventh Circuits supposedly "indicat[ing] that they are open to theories beyond the alter ego test." Br. in Opp. 12. But that dicta casts no doubt on the division of authority deepened by the actual *holdings* of those circuits.[1]

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[1] Contrary to respondents' contention, the First Circuit's decision in *Miller v. Honda Motor Co.*, 779 F.2d 769 (1st Cir. 1985), is a constitutionally-based holding that addressed "the

B. Respondents attempt to narrow the Ninth Circuit's sweeping holding by citing toothless "limitations" on the court's standard. Br. in Opp. 19–22. They claim, for example, that the Ninth Circuit's test would not encompass a subsidiary that is "truly independent." *Id.* at 20. The decision below, however, made clear that the parent need not "actually exercise control over the operations of its subsidiary" to meet the "agency" standard, but rather need only retain the "right to control" the subsidiary. Pet. App. 26a–27a. The malleable "right to control" standard would likely subject *any* parent of a majority-owned subsidiary to general jurisdiction. Indeed, the Ninth Circuit explained that there need not even be an "explicit" agreement between the parent and subsidiary but rather only "some manifestation of assent to the right to control." *Id.* at 27a n.15 (internal quotation marks omitted).

Respondents also point to the requirement that the exercise of jurisdiction be "reasonable," but the factors that the Ninth Circuit found to render the assertion of jurisdiction here reasonable—for example, that Daimler AG designs cars to meet California legal requirements—would be true of countless foreign corporations whose products are sold by subsidiaries in the United States. Other factors cited by the Ninth Circuit, such as the claim that Daimler AG "purposefully and extensively interjected itself into the California market through MBUSA," *id.* at 31a, merely beg the question whether MBUSA's separateness should be disregarded. And although one

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[Footnote continued from previous page]

outer limits of what is permitted by the due process clause." *Id.* at 770.

factor vividly illustrated the unreasonableness of exercising general jurisdiction here—that German courts have objected to it—the Ninth Circuit brusquely stated that "we do not agree" with the courts in Daimler AG's home country. *Id.* at 34a.[2]

Finally, respondents suggest that this Court should turn a blind eye to the Ninth Circuit's boundless standard for general jurisdiction because other doctrines, such as *forum non conveniens*, international comity, and what respondents call "the customary international law doctrine of the exhaustion of local remedies," will require dismissal in some cases in which general jurisdiction is asserted against a foreign company. Br. in Opp. 22–24. That argument is ironic in the extreme, given respondents' strenuous contention below that neither German nor Argentine courts are adequate alternative forums for this suit. In any event, this Court has never suggested that the existence of non-constitutional limitations on the exercise of jurisdiction—which could be overridden by legislatures or common-law courts—are relevant to the requirements imposed by due process. And as a practical matter, companies could hardly "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted), by relying on discretionary doctrines like *forum non conveniens*.

C. Respondents downplay the importance of reviewing, and reversing, the decision below on the

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[2] In *Kiobel*, Germany reiterated its objection to jurisdictional overreaching by U.S. courts and specifically pointed to the decision below. Br. of Fed. Rep. of Germany, No. 10-1491, at 10 n.3.

ground that, in *prior* decisions, "courts within the Ninth Circuit regularly dismiss[ed] suits against foreign defendants for lack of personal jurisdiction." Br. in Opp. 25. Those cases are irrelevant to the practical effects that the Ninth Circuit's "newly reformed test" will have on litigation against foreign companies. Pet. App. 139a n.2 (O'Scannlain, J., dissenting from denial of rehearing en banc).[3]

Respondents also cite three subsequent district-court decisions, but those cases cast no doubt on the breadth of the Ninth Circuit's holding. In one of the cases, for example, the court merely rejected the even more attenuated assertion of jurisdiction over a foreign *subsidiary* of a foreign company based on the contacts of the parent's American subsidiary. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 U.S. Dist. LEXIS 96739, at *12–13 (N.D. Cal. Aug. 29, 2011). And in *Bixby v. KBR, Inc.*, 2011 U.S. Dist. LEXIS 79156 (D. Or. June 16, 2011), the district court expressly acknowledged that the decision below held broadly that a parent is subject to general jurisdiction to the same extent as its subsidiary if the subsidiary "performs services that are sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation's own officials would undertake to perform substantially similar services, and . . . the parent has some cognizable right to control the subsidiary's operations (regardless of whether the right to control is actually exercised)." *Id.* at *17 (empha-

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[3] Although respondents claim that the decision below applied a Ninth Circuit standard developed in 1977, the dissenting judges correctly explained that the panel's test was "not . . . an accurate characterization of [the circuit's] precedent." Pet. App. 139a n.2.

sis omitted; alterations in original; internal quotation marks omitted). The court decided only that the subsidiary was not itself subject to general jurisdiction in Oregon. *See id.* at *16–18. Far from assuaging concern over the implications of the Ninth Circuit's holding, *Bixby* demonstrates just how expansively it has been read by lower courts.

Respondents also assert that in the twelve years since the Second Circuit's decision in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), "only a handful" of cases have found general jurisdiction over a foreign company under the "agency" theory. Br. in Opp. 24. The reported decisions, however, illustrate the threat that the rule adopted by the Second and Ninth Circuits poses to foreign companies, who will find themselves subject to suit in the United States based on the presence of even minor subsidiaries. In *SEB S.A. v. Montgomery Ward & Co.*, 2002 WL 31175244 (S.D.N.Y. Oct. 1, 2002), for example, the district court asserted general personal jurisdiction over a foreign corporation that ran an international business "responsible for products under [numerous] brand names" on the ground that it owned an American subsidiary that performed investor-relations activities on behalf of the parent in New York. *Id.* at *3–4. Moreover, reported decisions do not account for the myriad costs imposed by the Second and Ninth Circuits' flawed agency rule, including the significant jurisdictional discovery that it invites, with attendant legal fees and settlement pressure, or the ways in which companies are forced to change how they structure their primary conduct, *Burger King*, 471 U.S. at 472, to avoid unconstitutional assertions of jurisdiction in New York, California, and elsewhere.

II. THIS CASE SQUARELY PRESENTS AN ISSUE OF SURPASSING LEGAL AND PRACTICAL SIGNIFICANCE.

With no substantial argument that this Court should decline to resolve the division of authority among lower courts, respondents resort to illusory vehicle problems. Respondents suggest, for example, that the interlocutory posture of the decision below disfavors this Court's review, Br. in Opp. 14, but nearly all of this Court's personal-jurisdiction decisions have come to this Court without a final judgment. *See*, *e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In reality, this case squarely implicates an exceptionally important jurisdictional question on which the lower courts are deeply divided.

A. Respondents argue that this case is not a proper vehicle to resolve the question presented because this Court's forthcoming decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, may eliminate respondents' ATS claim, their only remaining federal cause of action. Br. in Opp. 14–17. As respondents concede, however, there is no guarantee that the district court would refrain from exercising subject matter jurisdiction over their remaining foreign- and state-law claims on remand, 28 U.S.C. § 1367(c), and respondents have made clear that they fully intend to pursue those claims in the district court regardless of the outcome of *Kiobel*. Daimler AG should not be subject to further litigation in U.S. courts when it has already interposed a meritorious jurisdictional objection that is properly before this Court. Indeed, should the district court elect to exercise subject matter jurisdiction over the remaining

claims, Daimler AG may have no opportunity to challenge the Ninth Circuit's erroneous personal-jurisdiction holding until after a full trial on the merits.

Moreover, even if the district court declines to exercise supplemental jurisdiction, the Ninth Circuit's holding has vast jurisprudential, economic, and foreign-policy implications that transcend the parties to this case. If Daimler AG eventually prevails on other grounds, that deeply flawed jurisdictional decision—which threatens to unsettle U.S. foreign relations and deter foreign companies from doing business in the U.S. market—should not be left standing. *See* Br. of *Amici Curiae* Chamber of Commerce et al. 12–18; Br. of *Amici Curiae* Alliance of Automobile Manufacturers, Inc. et al. 17–26.

Accordingly, this Court should grant the petition and reverse the Ninth Circuit's decision without regard to the pending *Kiobel* case. In any event, respondents' request that the petition be *immediately* denied makes no sense. Even if respondents' ATS claim were the only claim in the case, the proper course would be to hold this petition until *Kiobel* is decided and then, depending on the outcome of *Kiobel*, either grant plenary review or grant, vacate, and remand the case to the Ninth Circuit. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Respondents argue that holding the petition for *Kiobel* is unnecessary because "the district court will already be empowered to give effect to *Kiobel* without the need for a remand from this Court." Br. in Opp. 16. But that argument ignores the possibility that this Court will decide *Kiobel* favorably to respondents, preserving their ATS claim. In that circumstance, there would be no reason for this Court not to grant plenary review.

B. Respondents assert that, were this Court to reverse the Ninth Circuit, this case would be transferred to Michigan because Daimler AG allegedly had one of two corporate headquarters there when this suit was filed. Br. in Opp. 17–18. This argument was forfeited below: When respondents attempted belatedly to argue that the case could be transferred to Michigan, the district court "reject[ed] the[] newly-raised argument[]" as waived. Pet. App. 92a.

Moreover, the record is clear that Daimler AG has never maintained its headquarters in Michigan. Respondents confuse Daimler AG, which manufactures Mercedes-Benz vehicles, with the former DaimlerChrysler Corporation ("DCC"), a Delaware corporation that manufactured Chrysler, Dodge, and Jeep vehicles and had its principal place of business in Auburn Hills, Michigan. Decl. of Louann Van Der Wiele, Dist. Ct. Dkt. 37 ¶ 3 (Apr. 18, 2005). From 1998 until the sale of DCC to a third party in 2007, the two companies were affiliated as part of the DaimlerChrysler group, with DCC an indirect subsidiary of Daimler AG. *See id.* ¶¶ 2–3. But Daimler AG was at all times a German company with its principal place of business in Stuttgart, Germany. *Id.* ¶ 2.

The quotation that respondents lift from a proxy statement, Br. in Opp. 2, refers to the DaimlerChrysler group of companies as a whole, which included both DaimlerChrysler AG and DCC, among many others. It does not suggest that Daimler AG itself maintained a headquarters in Michigan. Indeed, the quotation makes clear that DCC's headquarters were in Michigan while Daimler AG's headquarters were (and are) in Germany. Respondents' belated factual assertion thus poses no barrier to this Court's re-

view, and rejection, of the Ninth Circuit's boundless jurisdictional ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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