No. 11-965

In the Supreme Court of the United States

DAIMLERCHRYSLER AG, PETITIONER

v.

BARBARA BAUMAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether and under what circumstances the Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a parent corporation based on its subsidiary's contacts with the forum State, in a case not arising out of, or related to, either corporation's contacts with the State.

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INTEREST OF THE UNITED STATES

This case concerns a federal court's exercise of personal jurisdiction over a foreign parent corporation based on its subsidiary's contacts with the State in which the federal court sits, in a case not arising out of, or related to, either entity's contacts with the State. This Court has referred to such a claim of adjudicatory authority as "general" personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011). In some instances, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. But expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States' diplomatic relations and its foreign trade and economic interests. See U.S. Br. at 1-2, 28-34, *Good-*

year, *supra* (No. 10-76) (U.S. *Goodyear* Br.). Those concerns would only be magnified under the court of appeals' framework, which fails even to give foreign defendants fair warning of what conduct would subject them to suit in domestic courts, and thus leaves them unable "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).

From an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity. Likewise, an enterprise may be reluctant to invest or do business in a forum, if the price of admission is consenting to answer in that forum for all of its conduct worldwide. The uncertain threat of litigation in United States courts, especially for conduct with no significant connection to the United States, could therefore discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States. Such activities are likely to be undertaken through domestic subsidiaries and thus are likely to implicate the decision below.

From a diplomatic perspective, foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. See Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161-162. The conclusion of such international compacts is an important foreign policy objective because such agreements serve the United States' interest in providing its residents a

fair, sufficiently predictable, and stable system for the resolution of disputes that cross national boundaries.

The United States has a further interest in preserving the federal government's legislative and regulatory flexibility to foster those trade, investment, and diplomatic interests, while assuring a domestic forum to adjudicate appropriate cases. This case does not directly implicate that interest. It does not, for example, involve an Act of Congress addressing the relationship between a parent corporation and its subsidiary, or reflecting Congress's judgment concerning relevant contacts with a forum for jurisdictional purposes. And it presents a question under the Due Process Clause of the Fourteenth Amendment, while exercises of the federal judicial power are, as a constitutional matter, constrained instead by the Due Process Clause of the Fifth Amendment.[1] Nonetheless, because the political Branches are well positioned to determine when the exercise of personal jurisdiction will, on balance, further the United States' interests, the United States has an interest in ensuring proper regard for their judgments in this field.

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[1] "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion). For example, the United States' special competence in matters of interstate commerce and foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States (see *ibid.*), would permit the exercise of federal judicial power in ways that have no analogue at the state level. This Court has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction precedents would apply in a case governed by the Fifth Amendment, and it should do so here. See, *e.g.*, *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

STATEMENT

1. a. Principles of due process establish the outer limits of a federal court's authority to assert personal jurisdiction over a defendant and thus to "make binding a judgment in personam against an individual or corporate defendant." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-319 (1945). When a federal court exercises federal question jurisdiction, the Due Process Clause of the Fifth Amendment marks the outermost limit of that authority. See *Omni Capital*, 484 U.S. at 102-105.

Acting within those limits, Congress has provided by Rule that in many federal cases, a federal district court is limited to the personal jurisdiction available to the courts of the State within which the federal court sits. In particular, "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant * * * who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Thus, the question in such federal cases is whether the courts of the forum State would have personal jurisdiction over the foreign defendant consistent with the State's "long arm" statute and the constraints of the Due Process Clause of the Fourteenth Amendment.

The court of appeals apparently decided this case under Rule 4(k)(1)(A) (cf. Pet. App. 17a n.9), and respondents have not asked this Court to affirm the judgment below on some other basis. California's long arm statute permits the exercise of personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10 (West 2004). Accordingly, the question in this Court is whether a California court could exercise personal ju-

risdiction over petitioner consistent with the Due Process Clause of the Fourteenth Amendment.

b. "The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 131 S. Ct. at 2853. A State may authorize its courts to exercise personal jurisdiction over an out-of-state juridical person that has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). This limitation on a court's authority "protects [a defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985) (quoting *International Shoe*, 326 U.S. at 319). In turn, that constraint provides "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

This Court has "differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear*, 131 S. Ct. at 2851 (citing *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 nn.8-9 (1984)). "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Ibid.* (internal quotation marks omitted). Specific jurisdiction, by contrast, is the

exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8.[2]

The nature and quantity of minimum contacts with a State needed for the exercise of personal jurisdiction to comport with "traditional notions of fair play and substantial justice" depends on whether the court claims a limited authority to adjudicate a particular suit (specific jurisdiction), or instead an authority to adjudicate all matters involving the defendant, wherever they occur (general jurisdiction). In particular, a court may assert specific jurisdiction over a defendant "if the defendant has 'purposefully directed' [its] activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472-473 (quoting *Keeton* v. *Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984); *Helicopteros*, 466 U.S. at 414)).

General jurisdiction, by contrast, concerns a court's authority over matters "arising from dealings entirely distinct from" the defendant's contacts with the forum. *Goodyear*, 131 S. Ct. at 2853 (citation omitted). A plaintiff need not demonstrate any connection between the forum and the events that gave rise to the suit, but must instead make a more demanding showing: Whereas "single or occasional acts in a State may be sufficient to render a corporation answerable in that State with respect to those acts" on a theory of specific jurisdiction, general jurisdiction requires "the kind of continuous and

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[2] This Court has also recognized other bases for a State's assertion of personal jurisdiction not implicated in this case, such as express consent and personal service on a natural person while he is within the State's territorial jurisdiction. See *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion).

systematic general business contacts" that "render [the defendant] essentially at home in the forum State." *Id.* at 2851, 2853, 2856 (internal quotation marks and citations omitted). "[T]he paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, [or] principal place of business." *Id.* at 2853-2854 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988) (*General Jurisdiction*)); cf. *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion) (citing *Goodyear*); *id.* at 2797 (Ginsburg, J., dissenting) (citing *Goodyear*).

2. Petitioner DaimlerChrysler AG was formed in 1998 when Daimler-Benz AG merged with the United States-based Chrysler Corporation. Petitioner is a German *Aktiengesellschaft* (a juridical form closely resembling a publicly traded stock corporation) with its principal place of business in Stuttgart, Germany. As part of its broader business, petitioner manufactures Mercedes-Benz vehicles at plants in Germany. Mercedes-Benz United States, LLC (MBUSA), is a Delaware limited liability company with its principal place of business in New Jersey. MBUSA purchases Mercedes-Benz vehicles from petitioner in Germany, imports them into the United States, and distributes them throughout the Nation. MBUSA is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation (DCNAHC), which is a Delaware corporation with its principal place of business in Michigan. DCNAHC is in turn a wholly owned subsidiary of petitioner. MBUSA's relationship with petitioner is governed by a General

Distributor Agreement between the companies. J.A. 60a-62a, 149a-215a.[3]

Respondents are twenty-two Argentinian residents who allege that another of petitioner's subsidiaries, Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill respondents or their relatives in Argentina during Argentina's "Dirty War" in 1975-1977. Pet. App. 2a-3a; J.A. 27a-49a. Respondents sued petitioner in the Northern District of California, asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350, the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, various international treaties and declarations, federal common law, and (unidentified) provisions of California law. J.A. 49a-57a.[4]

3. The district court granted petitioner's motion to dismiss for lack of personal jurisdiction. Pet. App. 80a-93a; see *id.* at 94a-133a (tentatively granting motion to dismiss but permitting limited jurisdictional discovery).

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[3] Petitioner restructured in 2007, selling its majority interest in Chrysler Car Group. The court of appeals found this development irrelevant both because personal jurisdiction is determined as of the time the suit was filed and because the restructuring did not materially change the corporate relationship between petitioner and MBUSA. Pet. App. 7a n.7. For simplicity, this brief refers in the present tense to petitioner's corporate family as it existed at the time this suit was filed.

[4] Because respondents are foreign residents and petitioner is a foreign entity, the district court correctly concluded that the case was not within its diversity or alienage jurisdiction. Pet. App. 81a n.3. The court instead noted federal question jurisdiction under the ATS and 28 U.S.C. 1331, though respondents' ATS and TVPA claims do not survive this Court's intervening decisions in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702 (2012).

The court noted that "[t]he parties agree that [respondents'] claim does not arise out of or relate to [petitioner's] purported activity in California," and thus respondents "do not seek to establish specific jurisdiction," but instead "contend that the court has general jurisdiction over [petitioner]." *Id.* at 98a-99a.

The district court explained that under circuit precedent, a California court could exercise general jurisdiction over petitioner if it had "continuous and systematic contacts with California through MBUSA's contacts." Pet. App. 113a. It noted that petitioner "does not dispute that MBUSA is subject to general jurisdiction in California but argues that MBUSA's contacts cannot be imputed to [petitioner]." *Ibid.* The court stated that "[a] subsidiary's contacts may be imputed to the parent * * * where the subsidiary acts as the general agent of the parent," which under circuit precedent turned on whether the subsidiary was "performing services sufficiently important to the parent corporation that if it did not have a representative to perform them, the parent corporation would undertake to perform similar services." *Id.* at 113a-115a (internal quotation marks, alterations, and citations omitted).

The district court concluded that respondents failed to establish that, but for the existence of MBUSA, petitioner would undertake MBUSA's tasks itself. See Pet. App. 83a-85a, 115a-117a. The court placed particular emphasis on the facts that petitioner had previously used non-subsidiary entities to distribute its vehicles in the United States, and that another foreign automobile manufacturer (Toyota) currently uses such distribution channels. *Id.* at 84a-85a. Because the court refused to attribute MBUSA's contacts to petitioner, and petitioner lacked direct contacts with California, the court con-

cluded it could not exercise personal jurisdiction over petitioner.

4. The court of appeals initially affirmed, largely on the district court's reasoning. Pet. App. 46a-61a. On rehearing, however, it reversed. *Id.* at 1a-45a. As relevant here, it held that the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," and (2) there exists "an element of control" of the subsidiary by the parent. *Id.* at 21a-22a (citation and emphasis omitted). The court stated that it "need not define the precise degree of control required to meet that test or establish any particular method for determining its existence." *Id.* at 23a n.12.

Applying that test, the Ninth Circuit concluded that "[t]he services that MBUSA currently performs are sufficiently important to [petitioner] that they would almost certainly be performed by other means if MBUSA did not exist, whether by [petitioner] performing those services itself or by [petitioner] entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." Pet. App. 25a. The court noted that the market served by MBUSA accounts for 19% (and the California market, 2.4%) of worldwide sales of Mercedes-Benz vehicles. *Ibid.* The court also found the control prong of its test satisfied, focusing on the General Distributor Agreement, which the court described as giving petitioner the rights to "control nearly every aspect" of

MBUSA's operations and to require MBUSA to execute supplemental agreements that "are not an 'unreasonable burden' on MBUSA." *Id.* at 29a-32a. On that basis, the court of appeals held that petitioner was subject to the district court's general jurisdiction.

5. The court of appeals denied rehearing en banc over the dissent of eight judges. Pet. App. 134a-145a. Writing for the dissenting judges, Judge O'Scannlain criticized the panel's approach as "far too expansive and threaten[ing] to make innumerable foreign corporations unconstitutionally subject to general personal jurisdiction in our courts." *Id.* at 140a. He observed that "[a]nything 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." *Ibid.* The dissent urged that such a limitless test fails to respect deeply ingrained notions of corporate separateness and is at odds with this Court's decisions. See *id.* at 140a-141a, 142a n.4.

SUMMARY OF ARGUMENT

The court of appeals held that a large German corporation with few if any direct contacts with California could nonetheless be held to answer in that State for any claim against it, arising anytime, anywhere in the world. The court justified that result by applying a malleable "agency" test to attribute to petitioner the California sales and marketing contacts of petitioner's indirect subsidiary MBUSA. The Ninth Circuit's attribution analysis is seriously flawed, and its result is difficult to square with *Goodyear*.

Goodyear confined general jurisdiction to cases in which the corporate defendant's "affiliations with the State are so 'continuous and systematic' as to render [it]

essentially at home in the forum State," 131 S. Ct. at 2851. The Ninth Circuit's approach effectively endorses general jurisdiction whenever an out-of-state corporation does any substantial business in the State, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's business to its foreign parent. Substantial reason exists to doubt that merely doing business in a forum makes a corporation "at home" there. Here, for example, MBUSA's contacts with California—the distribution, marketing, and sale in California of 2.4% of petitioner's production—are modest relative to petitioner's contacts with Germany, a forum in which petitioner is paradigmatically "at home." Although general jurisdiction is not measured by mechanical quantitative tests, that fact alone should give this Court pause at the result below.

The certiorari petition focuses more specifically on whether MBUSA's California contacts should be attributed to petitioner at all. On that issue, the Court should reject the Ninth Circuit's approach. The Due Process Clause does not, as the Ninth Circuit seemed to assume, supply fixed rules that permit or forbid the attribution of contacts from one entity to another. Rather, such rules are the province of positive law that molds the legal expectations of juridical persons and those with whom they interact. Of central relevance here, the principle of separate corporate personality pervades our legal system, but so too do traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent's actions. Those understandings, in turn, are appropriate bases on which to attribute contacts of a subsidiary to its parent for jurisdictional purposes. By contrast, the Ninth Cir-

cuit's approach is divorced from the background principles of law that fairly set corporations' expectations about their responsibilities for their corporate affiliates, and it is inconsistent with the Due Process Clause's demand that jurisdictional rules be fair and sufficiently predictable in operation.

ARGUMENT

The court of appeals applied a rule for attributing a subsidiary's forum contacts to its foreign parent that is inconsistent with due process, and indeed is not grounded in any applicable law shaping petitioner's expectations about the jurisdictional consequences of its corporate affiliations. Even apart from its flawed approach to attribution of contacts, the court below embraced the startling conclusion that the relatively small fraction of a German manufacturer's production sold in California by a corporate affiliate permits that State's courts to bind the German corporation to judgment on potentially any claim, arising anytime, anywhere in the world. *Goodyear* puts that result in doubt by holding that a forum court may properly exercise general jurisdiction only over corporations that are "essentially at home in the forum." 131 S. Ct. at 2851.

A. The Ninth Circuit's Decision Did Not Take Account Of *Goodyear*

The court of appeals' approach would hold a foreign parent corporation subject to general jurisdiction in a forum whenever the parent has an element of control over its subsidiary that makes substantial sales in the forum State of products manufactured and sold abroad by the foreign parent. The lower court endorsed that approach without the benefit of this Court's decision in *Goodyear*, which was announced a month after the pan-

el's decision. The result below is difficult to square with *Goodyear*'s reaffirmation of the principle that a State may bind a corporation to judgment on any claim arising anywhere in the world only when the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State," 131 S. Ct. at 2851.

1. Because the foreign corporate defendants in *Goodyear* had only "attenuated connections to the [forum] State" that "f[e]ll far short" of the standard for exercising general jurisdiction, 131 S. Ct. at 2857, this Court did not have occasion there to explain what kinds of contacts would establish that a defendant is "essentially at home" in a particular forum. Scholars continue to debate the adequate theoretical justifications for general jurisdiction since *International Shoe*, *supra*, in an effort to shed light on the appropriate analysis of forum contacts. See, *e.g.*, Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. Rev. 527, 533-548 (2012) (*Essentially at Home*); *General Jurisdiction*, 66 Tex. L. Rev. at 727-772. Whatever precise rule emerges from *Goodyear*, we understand the Court's test to be appropriately demanding, given that an exercise of general jurisdiction subjects a defendant to suit for any claim arising anytime, anywhere in the world.

The Ninth Circuit's approach is very different. As the court of appeals acknowledged, its "agency" test "has its origins in case law from the Second Circuit," Pet. App. 32a. In particular, *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), adopted the test in *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967), cert. denied, 390 U.S. 966 (1968). *Gelfand* in turn drew its standard from

New York cases, most prominently *Frummer* v. *Hilton Hotels International, Inc.*, 227 N.E.2d 851, 852-854 (N.Y.), cert. denied, 389 U.S. 923 (1967). *Frummer* applied a principle of "[t]raditional" New York personal jurisdiction law, *viz.*, that New York courts have general jurisdiction over a foreign corporation "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Id.* at 853 (citation omitted). That principle traces back decades before *International Shoe*, to cases such as *Tauza* v. *Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.), which held that a Pennsylvania coal company's maintenance of a "branch office in New York" for salesmen, "contain[ing] eleven desks, and other suitable equipment," subjected it to general jurisdiction in New York. *Id.* at 916-917. At bottom, therefore, the Ninth Circuit's test articulates what it meant a century ago for an out-of-state corporation to be "doing business" in New York, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's "doing business" to its foreign parent.

Substantial reason exists to doubt the continuing vitality of the Ninth Circuit's concept of general jurisdiction. The analysis below is unmoored from this Court's "continuous and systematic" test for general jurisdiction, obligingly quoting it once (Pet. App. 20a) but never mentioning it again. More broadly speaking, a foreign corporation that merely does business in the forum State would not necessarily be "essentially at home" there. The "doing business" approach to general jurisdiction has been a source of contention in diplomatic contexts, see U.S. *Goodyear* Br. at 33 n.14, and has been subject to extensive scholarly criticism, see, *e.g.*, *Essen-*

tially at Home, 63 S.C. L. Rev. at 545-548; *General Jurisdiction*, 66 Tex. L. Rev. at 758-759, 781.

2. The particular result below, moreover, is in tension with this Court's decisions. A court may not assert general jurisdiction over a foreign parent based simply on (1) a conclusion (or concession) that its subsidiary is subject to the court's general jurisdiction, and (2) a determination to attribute some or all of the subsidiary's contacts to its parent. See *Keeton*, 465 U.S. at 781 n.13 ("Each defendant's contacts with the forum State must be assessed individually.").[5] Rather, the court must directly apply *Goodyear*'s test to the foreign parent's direct contacts (if any) and any contacts fairly attributed to it. Moreover, this Court's decisions suggest that if contacts are attributed from a subsidiary to its parent, their significance may well shrink by their placement in context with the foreign parent's independent contacts with other jurisdictions throughout the world. Cf. *Goodyear*, 131 S. Ct. at 2853-2854 (identifying as "paradigm" certain forums with which a defendant is likely to have relatively substantial contacts, implying that relatively insubstantial contacts are less likely to support the exercise of general jurisdiction); *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 447-448 (1952) (finding modest corporate contacts with Ohio sufficient to establish general jurisdiction, given that the company had ceased its Philippine mining oper-

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[5] Although petitioner conceded below that MBUSA is subject to general jurisdiction in California (Pet. App. 113a; but see Pet. Br. 23 n.4), that assumption is debatable after *Goodyear*. For example, the Ninth Circuit did not conclude that California is MBUSA's "domicile, place of incorporation, [or] principal place of business"—the "paradigm" places MBUSA would be "at home." *Goodyear*, 131 S. Ct. at 2852-2854.

ations, but implying that if such operations were ongoing, the result might have been different).

Here, MBUSA's contacts with California, even if properly attributed to petitioner, would be modest relative to petitioner's contacts with the forum in which petitioner is most obviously "at home" and subject to general jurisdiction—Germany. Cf. European Community Council Reg. 1215/2012 Art. 4.1 ("[P]ersons domiciled in a [European Union] Member State shall, whatever their nationality, be sued in the courts of that Member State."); Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 5, 2005, Bundesgesetzblatt [BGBI] 3202, as amended, § 17, ¶ 1, sentences 1-2 ("The general venue of * * * corporate bodies * * * is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre."). Petitioner's headquarters are in Germany, where it manufactures and sells Mercedes-Benz vehicles, and where it presumably orchestrates its corporate operations. J.A. 60a-62a. By contrast, only 2.4% of petitioner's production is ultimately sold in California by MBUSA, Pet. App. 7a, and none is sold by petitioner, whose direct contacts with California appear minimal or nonexistent, see *id.* at 95a.

This Court has eschewed "simply mechanical or quantitative" jurisdictional tests. *International Shoe*, 326 U.S at 319. But *Goodyear*'s "at home" inquiry weighs against recognizing general jurisdiction where, as here, the defendant's forum contacts are dwarfed (in both qualitative and quantitative senses) by its contacts with a forum in which it is paradigmatically "at home." See Pet. Br. 31 n.5; *J. McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (recognizing that an English

corporate defendant whose product was distributed through a third party and caused an injury in New Jersey "surely [wa]s not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation [was] hardly 'at home' in New Jersey") (quoting *Goodyear*, 131 S. Ct. at 2851). Likewise, the sheer consequences of the court of appeals' expansive notions of general jurisdiction are a further reason to doubt the compatibility of the judgment below with *Goodyear*. The decision below ultimately rests on the sales and marketing contacts associated with a relatively small portion of production to assert general jurisdiction over petitioner potentially concerning claims arising anytime, anywhere in the world—the vast majority of which would (like respondents' claims here) have no relation to California. There seems little to recommend that result, in either theory or practice.

B. The Ninth Circuit's Framework For Attributing Contacts Of A Corporate Subsidiary To Its Parent Offends Due Process

For the reasons above, the Ninth Circuit's result is in considerable tension with *Goodyear*, even assuming that MBUSA's contacts with California were properly attributed to petitioner. But the record was developed and the case was decided below without the benefit of *Goodyear*, and petitioner sought this Court's review on the specific question (see Pet. i) of the Ninth Circuit's approach to attribution of a subsidiary's forum contacts to its foreign parent. Answering that question, the Court should reject the Ninth Circuit's approach to attribution.

The Due Process Clause itself does not intrinsically forbid or permit the attribution of a subsidiary's contacts to its parent. Rather, due process analysis should

look to the general framework of state law (and when appropriate, federal law) to define the circumstances in which forum contacts may be attributed to a foreign defendant, within outer constitutional limits that ensure fairness and sufficient predictability. In our legal system, the pervasive principle of separate corporate personality is grounded in positive law; it forms the backdrop for the operation of other legal norms; and it molds the expectations of the corporations themselves and those with whom they interact. Within that legal framework, the paradigmatic (if not inevitably exclusive) state law bases on which one entity is held responsible for the acts of another are the traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent's actions. The Ninth Circuit's approach, however, ignores that framework and is inconsistent with the Due Process Clause's demand that jurisdictional rules be fair and sufficiently predictable in operation.

1. The Due Process Clause does not itself prescribe rules for attribution of contacts to a juridical person

a. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (internal quotation marks and alteration omitted)). Rather, "[t]he substantive relations that enter into due process calculations are primarily a matter of the law that creates the cause of action, usually state law." Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 25 (1986). For example, it is well established that the "property" rights protected by the Due

Process Clauses "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The same is true of certain "liberty" interests. See, *e.g.*, *District Atty's Office* v. *Osborne*, 557 U.S. 52, 68 (2009).

Moreover, this Court has often declined to infuse the Due Process Clause with absolute or prescriptive content, but rather has taken into account tradition and practical considerations, with due regard for legislative judgment. See, *e.g.*, *Turner* v. *Rogers*, 131 S. Ct. 2507, 2517-2520 (2011) (recognizing that in some child-support civil contempt proceedings, either provision of counsel or a "set of substitute procedural safeguards" shown by "considerable experience" to be adequate would satisfy due process) (internal quotation marks and citation omitted); *Osborne*, 557 U.S. at 69 ("[W]hen a State chooses to offer help to those seeking relief from convictions, due process does not dictat[e] the exact form such assistance must assume.") (brackets in original, internal quotation marks and citation omitted); *Jones* v. *Flowers*, 547 U.S. 220, 234 (2006) ("[I]t is not [the Court's] responsibility to prescribe the form of service that the [government] should adopt [to provide adequate notice of the pendency of proceedings].") (citation omitted, third set of brackets in original); *Mathews*, 424 U.S. at 349 ("In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").

b. For similar reasons, this Court should not constitutionalize fixed rules governing the attribution of contacts from one juridical person to another for jurisdictional purposes, without regard to the substantive legal regime within which those entities operate. The inappropriateness that approach is illustrated by both historical and contemporary considerations.

As a historical matter, with the possible exception of some special corporate charters, "[u]ntil the New Jersey legislature in 1888 granted permission for any corporation chartered in the state to own stock in another corporation, neither parent-subsidiary holding companies nor other intercorporate arrangements could exist anywhere in the nation." Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1051 (2004) (*Vicarious Jurisdiction*) (citing *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 556 n.32 (1933) (Brandeis, J., dissenting in part)). Moreover, even in the early decades of the Twentieth Century "the doctrinal boundaries of limited liability for corporate shareholders were hardly settled, and the doctrinal exceptions to the rule were still being shaped." *Id.* at 1052. Indeed, the now-ubiquitous metaphor of "piercing the corporate veil" was not coined until 1912. I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496 (1912). Thus, when the Fourteenth Amendment was ratified in 1868, the fact pattern of a parent-subsidiary relationship was rarely if ever observed, and the limited liability that now characterizes corporate personality was not established in substantive law.

Further counseling against any one fixed rule is the modern diversity of state-authorized juridical forms, which has burgeoned from traditional partnerships,

trusts and stock corporations to include—by legislative judgment—limited partnerships, limited liability partnerships, limited liability companies (LLCs), and the like. See generally Robert W. Hamilton & Jonathan R. Macey, *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies* 8-24 (10th ed. 2007) (discussing these and other forms). Courts grappling with the personal jurisdictional ramifications of such entities have found different attribution principles appropriate for different juridical forms. See, *e.g.*, *Donatelli* v. *National Hockey League*, 893 F.2d 459 (1st Cir. 1990) (unincorporated association); *Jackson Nat'l Life Ins. Co.* v. *Greycliff Partners, Ltd.*, 2 F. Supp. 2d 1164, 1167 (E.D. Wis. 1998) (partnership); *Marriott PLP Corp.* v. *Tuschman*, 904 F. Supp. 461, 465-467 (D. Md. 1995) (limited partnership); *Graymore, LLC* v. *Gray*, No. 06-cv-638, 2007 WL 1059004, at *7-*8 (D. Colo. Apr. 6, 2007) (limited liability company).[6] Whatever the correctness of any particular decision in that field, those cases illustrate that different considerations may apply to different juridical forms. That in turn suggests that any attempt to constitutionalize fixed rules about the separation or unity of a juridical entity and its owners or managers would deprive legislatures of the latitude to shape the characteristics of the juridical forms they authorize.

c. Petitioner implies that *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), already constitutionalizes separate corporate personality in the jurisdictional context by forbidding the attribution of contacts from a subsidiary to a parent. Pet. 20 (describing *Cannon* as holding "that the in-state contacts of a

[6] We accept the parties' evident assumption that MBUSA (an LLC) can be treated for present purposes as a corporate subsidiary would.

subsidiary corporation that did business in North Carolina were an insufficient basis for that State to exercise personal jurisdiction over an out-of-state parent corporation that itself had no North Carolina contacts."); see Pet. Br. 19-20.

That overreads *Cannon*, in which "[n]o question of the constitutional powers of the State, or of the federal Government, [wa]s directly presented." 267 U.S. at 336. Rather, *Cannon* concerned the distinct question whether service of process on a subsidiary corporation's employee within the forum was sufficient to establish jurisdiction over the subsidiary's foreign parent corporation, given that both North Carolina and federal law were silent on that issue. See *ibid.* ("The claim that jurisdiction exists is not rested upon the provisions of any state statute or upon any local practice dealing with the subject. * * * Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein."). Accordingly, "in the absence of an applicable statute," this Court respected the corporations' observance of formal separateness. *Id.* at 337; see *Vicarious Jurisdiction,* 152 U. Pa. L. Rev. at 1046-1074 (using original source material to rebut interpretations of *Cannon* as a constitutional decision).

Moreover, the relevant legal landscape has changed since *Cannon*. First, if *Cannon* is understood to proceed from general assumptions about the inherent separateness of parent and subsidiary corporations, then it may have been linked to the regime of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). But "federal general common law" notions of corporate separateness did not survive

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64, 78 (1938). Second, *Cannon* should be read in the context of *Pennoyer* v. *Neff*, 95 U.S. 714, 720 (1877), which held that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State." Not until two decades after *Cannon* did this Court's transformation of the constitutional law of personal jurisdiction culminate with *International Shoe*'s recognition that "presence" within a State is not the exclusive touchstone of the personal jurisdiction inquiry. Indeed, since *International Shoe*, the Court has cited *Cannon* only for propositions relating to a parent's amenability to service of process through its subsidiary. See *Volkswagenwerk AG* v. *Schlunk*, 486 U.S. 694, 705 n.* (1988); *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 439 n.21 (1949); *United States* v. *Scophony Corp. of Am.*, 333 U.S. 795, 813 n.23 (1948).[7]

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[7] Some federal courts grappling with questions of the attribution of contacts for jurisdictional purposes have adopted subconstitutional principles seemingly in the nature of federal common law. See, *e.g.*, *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1159-1160 (5th Cir. 1983). Such an approach would be inappropriate here. In *Omni Capital*, this Court refused to create a federal common law authorization for service of process to fill the interstices of federal and state statutory authorizations. The Court expressed skepticism that it had "adequate authority for common-law rulemaking." 484 U.S. at 108-109. And the Court ultimately concluded that it "would not fashion [such] a rule * * * even if [it] had the power," noting that "[l]egislative rulemaking better ensures proper consideration of a service rule's ramifications within the pre-existing structure." *Id.* at 109-111. Analogous concerns exist here, where the jurisdictional consequences of a parent-subsidiary relationship are better left to legislative definition in the first instance. Moreover, just as *Omni Capital* expressed concern that adopting a federal common law rule for service of process would run contrary to provisions of Rule 4 affirmatively addressing service, *id.* at 109, here a federal common

2. Considerations of fairness, notice, and consent support looking to state law (or when appropriate, federal law) to decide questions of attribution

Corporations are creatures of positive law and, within broad constitutional limits, the benefits and obligations of corporate existence are matters of legislative judgment. Corporate "personality is a fiction, although a fiction intended to be acted upon as though it were a fact." *International Shoe*, 326 U.S. at 316 (citation omitted). Because state law (or when appropriate, federal law) defines the legal characteristics of juridical persons in general, that law ordinarily should form the foundation for determining when one juridical person's contacts will be attributed to another. When one corporation (the parent) creates or acquires a controlling ownership interest in another corporation (its subsidiary), the parent is on notice of, and can properly be treated as subjecting itself to, the law governing the existence of the subsidiary and the parent-subsidiary relationship.

In particular, by creating or acquiring a subsidiary, the parent accedes to the rights of ownership in the subsidiary. See generally Model Business Corporation Act §§ 7.01-.48. But it also becomes liable for the subsidiary's debts if the articles of incorporation provide for shareholder liability (see, *e.g.*, *id.* § 2.02(b)(2)(v)) or if state veil-piercing law is applied to disregard the subsidiary (see generally 1 Philip I. Blumberg et al., *Blumberg on Corporate Groups* chs. 11-12 (2d ed. 2005) (*Blumberg*)). The parent-subsidiary relationship has substantial consequences under federal law too. Although this Court has interpreted federal law by default to respect

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law rule unique to cases in federal court would undermine the evident plan of Rule 4(k)(1) to avoid disparities in the jurisdictional reaches of state and federal courts (absent congressional authorization).

state corporation law, Congress may provide otherwise, see *United States* v. *Bestfoods*, 524 U.S. 51, 61-64 (1998), and it has in numerous federal laws attached substantive or regulatory consequences to intercorporate relationships.[8]

Moreover, reference to state and federal law in this context is consistent with this Court's practice of looking to and respecting legislative judgments about the corporate characteristics and intercorporate relationships that bear on the proper forum for a suit. See, *e.g.*, *Hertz Corp.* v. *Friend*, 559 U.S. 77 (2010) (interpreting Congress's rule for determining corporate citizenship for purposes of diversity jurisdiction); *Scophony*, *supra* (applying venue and service provisions of federal antitrust laws to British corporation holding a controlling interest in an American firm); *Cannon*, 267 U.S. at 337 (concluding that service there was ineffective "in the absence of an applicable statute").

3. The Due Process Clause limits the rules of attribution a State may adopt

The Due Process Clause of the Fourteenth Amendment nonetheless limits the rules a State may adopt for

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[8] See, *e.g.*, 26 U.S.C. 482 (Internal Revenue Code); 29 U.S.C. 1301(b)(1) (Employee Retirement Income Security Act of 1974); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (Sherman Act); *Radio & Television Broad. Technicians Local Union 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256-257 (1965) (per curiam) (National Labor Relations Act); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 606-608 (1945) (Natural Gas Act); *Anderson* v. *Abbott*, 321 U.S. 349, 357-367 (1944) (National Bank Act). See generally Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996) (surveying federal and state laws expressly applying to affiliated business entities).

attribution of contacts. The attribution inquiry, like any other aspect of the exercise of personal jurisdiction, must "not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). Those limits come in two forms.

First, a State may attribute the in-state contacts of one entity to a foreign defendant for jurisdictional purposes only on terms of which the defendant has fair notice, and which are reasonably susceptible of predictable ex ante application. See *Burger King*, 471 U.S. at 472 (explaining that due process requires defendants to be given "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign") (citation omitted, brackets in original); *World-Wide Volkswagen*, 444 U.S. at 297 (insisting on rules that afford "a degree of predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); cf. *Hertz*, 559 U.S. at 94 ("Simple jurisdictional rules * * * promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

Second, however clearly announced, some rules of attribution are arbitrary or fundamentally unfair, and for that reason impermissible. "A defendant [may] not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Thus, for example, this Court has rejected the forum contacts of an insurer as a basis for exercising personal jurisdiction over the insured defendant. *Rush* v. *Savchuk*, 444 U.S. 320, 328-329 (1980).

A court's determination about the permissibility of attribution under the Due Process Clause should, however, be informed by legislative judgments about the basis for attribution of contacts. See *Shaffer* v. *Heitner*, 433 U.S. 186, 213-214 (1977) (emphasizing "the failure of the [state] Legislature to assert [a] state interest" in exercising jurisdiction over a state-chartered corporation's out-of-state fiduciaries in a derivative suit against the fiduciaries).

Within those broad limits, a State has latitude to provide for the exercise of personal jurisdiction over a foreign defendant on the basis of someone else's direct or physical contacts with the State. This Court has repeatedly endorsed the exercise of specific jurisdiction based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). Such a forum contact may be made through use of agents, salesmen, distributors, or subsidiaries in the forum (at least when that activity is deliberate on the defendant's part). See, *e.g.*, *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) (suggesting that a foreign defendant's creation, control, or use of a distribution system that predictably delivers products into the forum State may establish minimum contacts); *Burger King*, 471 U.S. at 471-476 ("[W]e have consistently rejected the notion that an absence of physical contacts can [alone] defeat personal jurisdiction.").

4. Traditional alter ego and agency principles from substantive law generally should govern the attribution of contacts from a corporate subsidiary to its parent

Legislatures have seldom spoken directly to the rules governing attribution of forum contacts for jurisdiction-

al purposes. In the absence of clear legislative direction, courts have developed a range of approaches for attributing a subsidiary's contacts to its parent. See generally 1 *Blumberg* Pt. III (comprehensively surveying these approaches). We do not think the Due Process Clause countenances the complex, malleable, and unpredictable approaches that some lower courts have devised to justify the attribution of a subsidiary's forum contacts to its foreign parent for purposes of exercising general jurisdiction over the parent.

Rather, formally distinct corporations should presumptively be regarded as separate for jurisdictional purposes. Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities. See *Anderson*, 321 U.S. at 362 ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."). This Court has recognized that principle in general (see, *e.g.*, *First Nat'l City Bank* v. *Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611, 628 n.19 (1983) (*Bancec*)), and it has particular support in the Court's personal jurisdiction cases. See, *e.g.*, *Keeton*, 465 U.S. at 781 n.13 (emphasizing, in a case involving affiliated corporate defendants, that "[e]ach defendant's contacts with the forum State must be assessed individually").

But that baseline of separate corporate personality has always been qualified, most prominently in the field of substantive liability. Thus, for example, this Court has held in a number of cases applying federal law that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is

created, * * * one may be liable for the actions of the other," and that the corporate form "will not be regarded when to do so would work fraud or injustice" or "where it is interposed to defeat legislative policies." *Bancec*, 462 U.S. at 629-630 (citations omitted); see note 8, *supra* (noting array of federal laws that disregard or give only qualified regard to separate corporate personality).

Such background principles of federal law (when applicable), and the corresponding principles of state substantive law that speak to the circumstances in which a parent corporation is responsible for the acts of its subsidiary, would generally be a sound basis for attributing the subsidiary's contacts to its parent for the purpose of exercising general jurisdiction.[9] As we have previously suggested (U.S. *Goodyear* Br. at 26 n.9), that approach in practice permits the attribution of a corporate subsidiary's contacts to its parent if state substantive law would treat the two corporations as one for all purposes (*i.e.*, treats them as alter egos), or if the subsidiary acted as a traditional agent to establish contacts on behalf of its parent as principal (to the extent of its agency and its contacts).[10] See also Pet. Br. 21-22 (alter ego); *id.* at 27-29 (agency).

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[9] Merely attributing contacts of a subsidiary to its parent does not, of course, answer the ultimate general-jurisdiction question of whether the foreign parent is "essentially at home" in the forum. Contacts of the nature, diversity, magnitude, and continuity necessary for an assertion of general personal jurisdiction may in practice more often be found in a juridical person's direct contacts with a forum than in those contacts attributed to it from another juridical person.

[10] Although general jurisdiction must be decided without reference to the particular claim at issue, questions of specific jurisdiction would be informed not only by generally applicable alter ego and

Those traditional alter ego and agency principles are very likely to comport with due process. They are deeply embedded in our legal structure, and their general contours are similar (though not identical) from State to State.[11] They have proven to be predictable enough in application that there is no serious claim that they are arbitrary or unfair. And they are among the legal doctrines that commercial actors already account for because they govern matters of substantive liability in a wide range of contexts.

5. The Ninth Circuit's approach to attribution of contacts fails to satisfy due process

As articulated by the court of appeals, the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary * * * performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar ser-

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agency principles, but also by the particular law creating the cause of action. For example, due process would ordinarily permit the exercise of specific personal jurisdiction over a parent corporation on a claim under a law providing that a subsidiary's owner is liable for environmental damage caused by the subsidiary. Cf. *Bestfoods*, 524 U.S. at 61-64 (allowing for the possibility of such a "derivative * * * liability" statute).

[11] Reference to state law can raise choice-of-law questions, but analogous questions already arise in imposing substantive liability on veil-piercing, corporate-successor, and agency theories. Compare, *e.g.*, *Tomlinson* v. *Combined Underwriters Life Ins. Co.*, No. 08-cv-259, 2009 WL 2601940, at *2-3 (N.D. Okla. Aug. 21, 2009) (following veil-piercing law of State of subsidiary's incorporation), with, *e.g.*, *Chrysler Corp.* v. *Ford Motor Co.*, 972 F. Supp. 1097, 1101-1105 (E.D. Mich. 1997) (following successor liability law of State with most significant interest).

vices," and (2) there exists "an element of control" of the subsidiary by the parent. Pet. App. 21a-22a (citation and emphasis omitted). That approach is defective in two respects.

First, the Ninth Circuit's approach has no foundation in any state or federal law that governs the subsidiary-parent relationship more generally and that might reasonably have set petitioner's expectations about its responsibility for the California conduct of a New Jersey-based Delaware LLC (MBUSA) owned by petitioner's Michigan-based Delaware-chartered corporate holding company subsidiary (DCNAHC). Rather, that test ultimately traces to turn-of-the-century New York courts' practice of taking jurisdiction over any foreign corporation doing business in New York. See pp. 14-15, *supra*. Nothing about such an approach is calculated to identify the background principles of law against which the jurisdictional consequences of petitioner's relationship with MBUSA should be judged.

Second, the Ninth Circuit's approach is too malleable, ill-defined, and subjective to give a parent corporation fair and sufficiently predictable notice of when its subsidiary's forum contacts will be attributed to it. Indeed, the Ninth Circuit's caselaw itself was so unclear that the district court's decision (Pet. App. 113a-115a), the original panel decision (*id.* at 54a-57a), Judge Reinhardt's original dissenting opinion (*id.* at 62a-66a, 70a-72a), and the substituted panel opinion (*id.* at 20a-23a) each articulated a different combination of considerations.

The test the court of appeals ultimately applied forces a potential corporate-parent defendant to predict what activities a court might believe at some future time were "sufficiently important" to it, and whether a court would think that the parent would take over (or "sub-

stantially" take over) if it could not rely on its subsidiary to engage in those "important" activities. As shown by the differing views at different times of the four lower-court judges to hear this case (not to mention the eight judges dissenting from the denial of rehearing en banc), a persuasive case for the satisfaction (or not) of that test might be made on almost any record.

Layered over that uncertain inquiry would be the question whether the parent corporation has "an element of control" over the subsidiary. Inasmuch as the court of appeals refused to "define the precise degree of control required to meet that test or establish any particular method for determining its existence," Pet. App. 22a n.12, potential defendants could not hope to reliably predict the jurisdictional consequences of their business arrangements with corporate affiliates. The pervasive indeterminacy of the Ninth Circuit's approach does not "allow[] 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, and it "offend[s] traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, for that reason as well. It is therefore not a permissible basis on which to exercise general personal jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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