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 THE RESPONDENTS


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## QUESTIONS PRESENTED

1. Whether the substantial in-state economic activity of an out-of-state defendant's wholly owned subsidiary must be disregarded for purposes of the "minimum contacts" analysis, unless a court determines that the two corporations are "alter egos" under the state law corporate veil piercing standard dictated by choice of law principles applicable to the litigation.

2. Whether an exercise of general jurisdiction over a foreign defendant for foreign conduct is per se unconstitutional when the defendant's contacts with the forum are established through its relationship with an "uninvolved domestic entity."

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## INTRODUCTION

Petitioner has made billions of dollars through sales of its luxury cars in California. Rather than sell those cars to dealers through a division of its company, petitioner created a wholly owned subsidiary that operated in materially the same way as a subdivision would: the subsidiary and parent company had the same chairman; the subsidiary sold cars solely for the parent company; the parent company set prices for the cars and had authority over virtually all aspects of the subsidiary's operations; and all profits went to the parent.

This case presents the questions (1) whether the subsidiary's contacts were properly considered in assessing the constitutionality of exercising general personal jurisdiction over petitioner; and (2) whether the fact that petitioner used a wholly owned subsidiary to sell its cars in California, rather than a subdivision, makes it per se unconstitutional for a court in that forum to hear a claim against petitioner for conduct that took place overseas.

Both are questions about the "outer boundaries" of legislative authority, not what rule strikes this Court as the most fair or the best policy. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). The Constitution assigns authority for developing rules of personal jurisdiction first and foremost to Congress and the states, subject only to the limits of the Due Process Clause. These democratically accountable bodies are best suited to respond to relevant changes in technology and business practices, the public's evolving conceptions of fairness, and the interstate and foreign relations

implications of exercises of jurisdiction over out-of-state defendants.

At the federal level, the Constitution empowers Congress to establish rules governing the jurisdiction of federal trial courts and, through its power to regulate interstate and foreign commerce, to preempt state jurisdictional practices that interfere with interstate or international trade. However, for better or worse, under the Federal Rules of Civil Procedure promulgated by this Court, federal courts ordinarily apply the personal jurisdiction rules of the states in which they sit, even though the majority of states have elected to extend their long-arm statutes to the full extent permitted by the Due Process Clause.

Because the limits of the Due Process Clause effectively provide the operative jurisdiction rule, there is a temptation to ask what is the best rule that should apply, as if the courts had been delegated the responsibility for developing rules of personal jurisdiction through the common law method. But the task at hand is not to fill the void in legislative decision making with judicial policy judgment, but to discern the outer limits of what the Constitution permits the people's elected representatives to adopt. The risk that the legislative branches may choose unwisely, or that the resulting rule might upset our international trading partners or be bad for the economy, is a reason for the Executive Branch to work with Congress to enact appropriate laws (including laws with preemptive effect) to avoid those ills. The Due Process clause is not a shortcut for avoiding difficult legislative or diplomatic work.

In this case, nothing in the Constitution requires a legislature to give determinative weight to the fact that rather than sell its cars through a subdivision,

petitioner has chosen to use a tightly controlled wholly owned subsidiary.

## STATEMENT OF THE CASE

1. Respondents are former employees, and representatives of deceased employees, of the González Catán plant of Mercedes-Benz Argentina, a wholly owned subsidiary of DaimlerBenz, petitioner's predecessor-in-interest. Pet. App. 3a. During the period of terror perpetrated by Argentina's military dictatorship between 1976 and 1983 – known as the "Dirty War" – Mercedes-Benz Argentina identified respondents as "subversives" or "agitators" to state security forces stationed within its plant, knowing that respondents would be kidnapped, detained, tortured, or murdered as a result. *Id.* 3a-4a & n.3. After respondents were arrested or "disappeared," Mercedes-Benz Argentina hired the police chief behind the raids as its Chief of Security, and provided him with legal representation when he was subsequently accused of human rights abuses. *Id.* 3a-4a.

2. Respondents brought suit in 2004 against petitioner, DaimlerChrylser AG, in the Northern District of California. The complaint included counts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. J.A. 49a (First Am. Complaint ¶ 57). Respondents also brought claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. *Id.* 55a-57a (First Am. Complaint ¶¶ 72-79). They alleged that petitioner was responsible for the acts of its Argentine subsidiary, and that suit was properly brought in California in light of the substantial and

systematic business petitioner conducts in that state through its wholly owned subsidiary, Mercedes-Benz USA (MBUSA). Pet. App. 95a, 104a.

Respondents originally attempted to serve process at petitioner's headquarters in Stuttgart, Germany. A German trial court allowed service, but its order was stayed pending an appeal. Pet. App. 4a & n.4. Respondents then attempted to serve petitioner in the United States in light of its 1998 merger with American auto manufacturer Chrysler Corporation, which formed DaimlerChrysler AG, the petitioner in this case. *Id.* 5a. In a proxy statement, petitioner stated that "[f]ollowing consummation of the Chrysler Merger, DaimlerChrysler AG will have its registered seat in Stuttgart, Germany and will maintain two operational headquarters – one located at the current Chrysler headquarters, 1000 Chrysler Drive, Auburn Hills, Michigan 48326-2766, and one located at the current Daimler-Benz headquarters, Epplestrasse 225, 70567 Stuttgart, Germany."[1] The company's website further announced that the former Chairmen/CEOs from Chrysler and DaimlerBenz were "Co-Chairmen and Co-Chief Executive Officers" of DaimlerChrysler AG." Pet. App. 5a. Each maintained "offices and staff in both" the Auburn

[1] Decl. of Brian P. Campbell in Supp. of Pls.' Opp'n to Mot. to Quash Serv. of Process & to Dismiss for Lack of Personal Jurisdiction, Ex. 1 at 8; *see also* Pet. App. 5a. In its cert. reply brief, petitioner claimed that this statement "refers to the DaimlerChrysler group of companies as a whole," Cert. Reply 11, but the statement quite clearly referred to "DaimlerChrysler *AG*" in a legal document that was carefully reviewed by petitioner's counsel for accuracy.

Hills and Stuttgart headquarters. *Id.* 6a. (internal quotation marks omitted).

Respondents therefore served petitioner at its headquarters in Auburn Hills, Michigan. Petitioner attempted to quash service but withdrew its motion after respondents produced documents showing that the Michigan and Stuttgart offices were "dual operational headquarters." Pet. App. 5a-6a (internal quotation marks omitted); *see also id.* 98a.

Petitioner then moved to dismiss for lack of personal jurisdiction. It did not dispute that if MBUSA's contacts were properly considered, they would be sufficient to establish general jurisdiction over petitioner. Instead, petitioner argued only that (1) MBUSA's contacts could not be considered because it was not petitioner's "agent" within the meaning of the Ninth Circuit's relevant precedent; and (2) "even if there were evidence that it had sufficient contacts with California, it would nonetheless be unreasonable to assert personal jurisdiction in this case." Def. Reply 5, 11.

Although the district court found the question a "close one," it granted petitioner's motion. Pet. App. 15a-17a.

3. Respondents appealed, arguing, among other things, that petitioner "should be subject to personal jurisdiction in California because it engages in 'continuous and systematic' business operations in California via its agent, MBUSA, sufficient for a finding of general jurisdiction." Resp. C.A. Br. 13.

In response, petitioner again did not question the assertion that if MBUSA's contacts were properly considered they would be sufficient to establish general jurisdiction over petitioner, even if

petitioner's place of incorporation or principal place of business were in Germany. Instead, petitioner argued only that MBUSA's contacts should not be considered because "[u]nder the proper test, plaintiffs do not have sufficient basis to impute the contacts of MBUSA" to petitioner. Petr. C.A. Br. 18.

The court of appeals reversed. It first addressed whether MBUSA's contacts were appropriately considered in support of jurisdiction over its parent company. It concluded that they were, for two basic reasons. First, MBUSA "functions as [its] parent corporation's representative" in the forum, Pet. App. 21a (citation omitted), given the importance of the services it performed there for petitioner. *Id*. 25a. "MBUSA's sales in California alone accounted for 2.4% of [petitioner's] total worldwide sales." *Id.*

Second, MBUSA's contacts were properly considered because petitioner enjoyed the "right to control nearly every aspect" of its subsidiary's operations. Pet. App. 23a. Petitioner's chairman, Dieter Zetsche, also served as chairman of MBUSA. *Id.* 11a. Moreover, under the companies' General Distributor Agreement, MBUSA could not replace key personnel, alter its management control or ownership interests, change its name or the form of its legal entity, or move the location of its principal place of business without petitioner's approval. *Id.* 11a, 13a. Petitioner also retained the right to unilaterally set the prices at which MBUSA sold vehicles and to specify the amount of working capital MBUSA must maintain. *Id.* 13a-14a. Its control extended even to minute aspects of MBUSA's operations, including the "type, design and size" of

any signs used by MBUSA. *Id.* 13a (internal quotation marks omitted).

Finally, the Ninth Circuit held, even if the agency test is met, the court must still independently determine "whether the assertion of jurisdiction is 'reasonable.'" *Id.* 30a. Among other things, the court considered that petitioner had "purposefully and extensively interjected itself into the California market through MBUSA," and had itself engaged in litigation in the state, established a research and development center in Palo Alto, and listed itself on the Pacific Stock Exchange in San Francisco. *Id.* 31a-32a. The court further explained that it would not be a significant burden on petitioner to litigate in California, since "technological advances" have lessened the cost for a multinational corporation to litigate there and because petitioner already had permanent counsel in California. *Id.* 32a-33a. Nor would the litigation pose a sufficient conflict with German sovereignty, given that petitioner had "manifested an intent to serve and to benefit from the United States market," which accounted for "nearly 50% of [petitioner's] overall revenue" and "1% of [Germany's] GDP." *Id.* 33a-34a (internal quotation marks and citations omitted).

The court furthermore concluded that California had "a significant interest in adjudicating the suit." *Id.* 35a. The court emphasized that although the case involved foreign parties and foreign conduct, "American federal courts . . . have a strong interest in adjudicating and redressing international human rights abuses," pointing out that respondents raised claims under the ATS and TVPA. *Id.* 36a.

The court also considered whether Argentina or Germany would provide an alternative forum. The court held that respondents bore "the burden of proving the unavailability of an alternative forum." *Id.* 38a (internal quotation marks and citation omitted). It concluded, however, that respondents met that burden with respect to Argentina because, among other reasons, a recent decision of the Supreme Court of Argentina had held that "human rights civil cases arising out of the Dirty War are subject to a two-year and three-month statute of limitations" that had long expired. *Id*. With respect to Germany, there was "conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed." *Id*. 40a. But even assuming that this dispute should be resolved in petitioner's favor, the court concluded that petitioner had not sustained its burden of demonstrating that the exercise of jurisdiction would be so unreasonable as to violate the Constitution. *Id*. 41a-43a.

4. The full court denied petitioner's petition for rehearing en banc on November 9, 2011. Pet. App. 134a-35a.

5. Petitioner sought certiorari. The petition was initially held pending this Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Five days after issuing its decision in *Kiobel*, the Court granted this petition. 133 S. Ct. 1995 (2013).

## SUMMARY OF THE ARGUMENT

I. Deciding whether a court may constitutionally exercise personal jurisdiction over a defendant requires three inquires: (1) what contacts are relevant to the analysis (including, as here, whether the contacts of a wholly owned subsidiary may be taken into account); (2) are those relevant contacts sufficient to support the particular kind of jurisdiction asserted (*i.e.*, specific or general); and (3) whether the exercise of jurisdiction was reasonable in this case. Petitioner preserved below, and raises here, only questions regarding the first and third steps.

II. Petitioner argues that a subsidiary's contacts are not even *relevant* to the Due Process analysis unless the two companies are "alter egos," meaning that they would satisfy the corporate veil piercing test of whatever state's law applied to the case under the forum's choice-of-law principles. That is wrong for several reasons.

First, the case presents a question of federal constitutional law, which should be resolved by adopting a federal rule (not state law) establishing the outer limits of states' authority to disregard corporate formalities for jurisdictional purposes.

Second, petitioner itself ultimately admits that the Court has applied the concept of "agency," not alter ego, in deciding whether a legally distinct entity's contacts are relevant to the "minimum contacts" analysis. Petitioner argues that the Court should limit that agency test to the specific jurisdiction context. But there is no reason for this Court to apply different attribution rules for different kinds of jurisdiction. Those differences are taken into

account at the second stage of the analysis, where a court must decide whether the nature and quantity of contacts supports the type of jurisdiction asserted.

Third, the alter ego test would be an inappropriate constitutional standard even if limited to general jurisdiction cases. The test is not tailored to the purposes of the Due Process clause and is inconsistent with this Court's deliberate abandonment of formalism in its Due Process analysis.

Fourth, it is no answer to claim that the alter ego test is deeply embedded in our legal system. It is not, and never has been. Even today, there are many less restrictive tests under which corporate distinctions are disregarded for various purposes in state or federal law. And at the time the Fourteenth Amendment was ratified, the alter ego test (and, indeed, limited liability corporations) were relatively new. No one would have thought the Due Process clause would significantly limit states' leeway in deciding when to disregard corporate formalities.

Finally, petitioner's policy objections are more appropriately addressed to Congress. While general jurisdiction over foreign corporations doing business in this country may be unpopular abroad, and may in fact be unwise, the judicial task here is to define the outer boundaries of legislative authority, not to develop a common law rule through the exercise of judicial policymaking judgment.

III. The California contacts of petitioner's wholly owned subsidiary were properly considered in this case. There is no dispute that MBUSA's contacts would be relevant if it were a subdivision of petitioner, rather than a subsidiary. A state is

justified in disregarding the formal distinction between subdivisions and subsidiaries at least when, as here, the subsidiary is wholly owned by the defendant, performs an important part of the defendant's business in the forum, and is subject to the parent's substantial control. In such cases, the defendant enjoys the lion's share of the benefits of operating a subdivision in the forum because it retains all of the profits and most of the control.

IV. The Court should also reject petitioner's request for a per se reasonableness rule gerrymandered to the facts of this case. The Court has emphasized time and again that the Due Process analysis is not susceptible to mechanical operations, but must instead proceed on a case-by-case basis.

Nor should the Court entertain petitioner's request for fact-bound review of the court of appeals' case-specific reasonableness determination. Instead, the Court should remand the case. In finding the exercise of jurisdiction sufficiently reasonable, the court of appeals relied in part on the fact that respondents brought federal claims under the ATS and TVPA. Petitioner has argued that those claims have been extinguished by this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012). The lower courts should be permitted to decide how these decisions affect the reasonableness calculus.

If the court were to reach the question, it should uphold the court of appeals' determination that the exercise of jurisdiction was reasonable on the facts of this case.

## ARGUMENT

The court of appeals correctly concluded that the California contacts of petitioner's wholly owned subsidiary were appropriately considered as part of the broader Due Process personal jurisdiction analysis. At the same time, the court rightly perceived that exercising personal jurisdiction over petitioner on the basis of those contacts was not rendered per se unconstitutional simply because the claim arose abroad.

Nonetheless, the Court should vacate the judgment and remand the case to allow the court of appeals to reconsider its reasonableness analysis in light of this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

### I. This Case Presents No Question Regarding What It Means For A Corporate Defendant To Be "At Home" Within The Meaning Of The Court's General Jurisdiction Cases.

Deciding whether an exercise of personal jurisdiction comports with the Due Process Clause requires three distinct inquiries:

1. *Relevancy.* The court first must decide what contacts with the forum are relevant.[2]
2. *Sufficiency*. Having collected the relevant contacts, the court must decide

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[2] *See, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 328-29 (1980).

whether those contacts are sufficient (that is, whether they constitute the constitutionally required "minimum contacts") for the type of jurisdiction being asserted.[3]

3. *Reasonableness*. If the contacts are sufficient, the defendant may defeat jurisdiction by "mak[ing] a compelling case that the presence of some other considerations would render jurisdiction unreasonable" to such an extent that exercising jurisdiction would violate the Due Process Clause.[4]

This case involves only the first and third inquiries – when are the contacts of a wholly owned subsidiary relevant to establishing the minimum contacts of its parent, and is the exercise of jurisdiction in cases like this constitutionally unreasonable? Petitioner has not raised or preserved any question regarding the second "sufficiency" step of the analysis. To the contrary, in the lower courts, petitioner accepted that if MBUSA's contacts were properly considered, they were sufficient to subject petitioner to general jurisdiction. *See* Pet. App. 7a-8a, 113a; *supra* 5-6. The United States questions whether that concession was correct, U.S. Br. 14-18, and petitioner's new counsel (retained after the panel decision) tries to walk it back, Petr. Br. 31-32 n.5, but

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[3] *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

[4] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

there can be no question that the argument has been forfeited. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011).

This is important because the proper test for general jurisdiction – *i.e.,* what kinds and quantities of contacts are needed to establish general jurisdiction – is one of great significance and controversy. The Ninth Circuit decided this case on the established understanding, shared by many lower courts, that general jurisdiction is permitted so long as a corporation conducts a sufficiently substantial, systemic, and continuous course of business in the forum. *See* Pet. App. 20a-21a.[5] Although petitioner openly embraced that standard below,[6] it now takes a

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[5] *See, e.g.*, Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 675 (2012) (noting that "lower courts [have] widely embraced the notion that any corporation 'doing business' in a state [is] subject to general jurisdiction there"); 4A FED. PRAC. & PROC. CIV. § 1069.2 (3d ed.) (same); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(h) (1987) (identifying as reasonable the exercise of jurisdiction over a corporation that "regularly carries on business in the state").

That understanding forms the basis of state long-arm statutes as well. *See, e.g.*, 735 Ill. Comp. Stat. 5/2–209(b)(4); Miss. Code Ann. § 13–3–57; Tex. Civ. Prac. & Rem. § 17.042; *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (applying New York law); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510 (D.C. Cir. 2002) (applying District of Columbia statute).

[6] *See, e.g.*, Petr. C.A. Br. 5-6 (question is whether petitioner's contact "are so 'continuous and systematic' as to 'approximate physical presence' in California") (quoting

very different position in this Court. Petitioner repeatedly quotes the Court's recent statement in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), that general jurisdiction is appropriate when a "corporation's contacts with the forum state are 'so continuous and systematic as to render [it] essentially at home in the forum State.'" Petr. Br. 14 (quoting 131 S. Ct. at 2851). It claims that by using the phrase "at home," the Court has now "limit[ed] the number of jurisdictions in which a corporate defendant is subject to general personal jurisdiction," perhaps to only the "States in which the defendant is incorporated and has its corporate headquarters." Petr. Br. 16; *see also* Chamber Br. § I. Indeed, establishing that premise is the only function of the first section of its brief, which nominally addresses a point petitioner ultimately acknowledges is uncontested. *See* Petr. Br. 14-17. And this understanding of what it means for a corporation to be "at home," forms the premise for much of its briefing on the actual questions presented by the case. *See infra*, at 27.

This Court should reject any effort (direct or subtle) to provoke a decision on the standard for general jurisdiction. Any such argument was forfeited below and not adequately raised in the petition for certiorari. Nor has the question percolated in the lower courts since this Court's decision in *Goodyear* two terms ago. And neither the parties nor the Government has adequately briefed

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*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004)).

the issue. *See* U.S. Br. 13-18 (offering general musings but no firm conclusions).[7]

Accordingly, the Court should decide the relevancy and reasonableness questions on the premise upon which the case was litigated below, accepting for purposes of its decision that a state may exercise general jurisdiction over a corporation that

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[7] Space does not permit respondents to undertake a full defense of the court of appeals' general jurisdiction standard but we will make two points. First, although a person or a corporation's "home" may be the "paradigm forum for the exercise of general jurisdiction," *Goodyear*, 131 S. Ct. at 2853, it is clearly not the only such forum. An individual is *also* subject to general jurisdiction wherever she is physically present and served with process. *See Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 610-19 (1990). And this Court has long been guided by the principle that for jurisdictional purposes, corporations should be put "upon the same footing as natural persons," treated no worse, but also no better. *Barrow Steamship Co. v. Kane*, 170 U.S. 100, 106 (1898). Second, the arguments in favor of narrow general jurisdiction cannot be squared with this Court's prior statements and examples of paradigmatic general jurisdiction cases. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952) (asking "whether, as a matter of federal due process, the *business done* in Ohio by [the defendant] was sufficiently substantial and of such a nature as to permit Ohio" to exercise general jurisdiction) (emphasis added); *id* at 446 & n.6 (citing as example of the proper exercise of general jurisdiction, *Tauza v. Sesquehana Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.) (upholding general jurisdiction based on a Pennsylvania mining company's maintenance of a sales office in New York) and *Barrow*, 170 U.S. at 100 (general jurisdiction in New York against British company on claim by New Jersey resident arising in Ireland, based on defendant's maintenance of shipping office in New York)); *Int'l Shoe*, 326 U.S. at 318 (citing *Tauza*).

engages in a substantial, continuous, and systematic course of business in the forum.[8]

If this Court thinks it would be unwise or overly artificial to handle this case this way, the Court should dismiss the case as improvidently granted. *See, e.g.*, *Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 105 (2001) (dismissing case when addressing the question upon which certiorari was granted "would require a threshold inquiry into issues" not preserved). Not only does the unbriefed antecedent question necessarily inform the resolution of the actual questions presented in the case, but it may render those questions entirely beside the point, as petitioner itself argues. Petr. Br. 31-32 n.5 (arguing that even if MBUSA's contacts are attributable to petitioner, there would be no general jurisdiction because petitioner "would still be a German corporation headquartered in Germany, and would still not be 'at home' in California.").

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[8] This Court held in *Goodyear* that "regularly occurring sales" of a defendant's product in the forum are insufficient to establish general jurisdiction when the products enter the forum through the stream of commerce. 131 S. Ct. at 2857 n.6. But the sales in that case were not undertaken by a wholly owned subsidiary of the defendant, *id*. at 2852, and the Court specifically declined to decide whether the sales would be relevant or sufficient if the distinctions between Goodyear's related companies were properly disregarded, *id*. at 2857.

## II. State Law Alter Ego Tests Do Not Define The Constitutional Outer Limits Of States' Authority To Disregard Corporate Formalities For Purposes Of Exercising Personal Jurisdiction.

The first question in this case is one of constitutional relevancy – when are the contacts of a wholly owned subsidiary properly taken into account in the minimum contacts analysis? Although this relevancy question arises in a general jurisdiction case, it is not limited to that context. It can also arise in cases asserting specific jurisdiction on the basis of a subsidiary's contacts.[9]

Here, petitioner does not dispute that MBUSA's contacts would be relevant if it sold its vehicles in the United States through a sales division, rather than through a wholly owned subsidiary. The question here is under what circumstances is a state prohibited by the Due Process Clause from giving the same jurisdictional treatment to business conducted in the forum by the defendant's wholly owned subsidiary.

Although the question arises in a case with foreign parties concerning conduct that happened overseas, those facts are immaterial to the relevancy question addressed here. The constitutionality of an exercise of jurisdiction has "never been based on the plaintiff's relationship to the forum." *Goodyear*, 131 S. Ct. at 2857 n.5; *see also Keeton v. Hustler*

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[9] *See, e.g.*, *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010); *Jet Wine & Spirits, Inc. v. Bacardi & Co. Ltd.*, 298 F.3d 1, 7-9 (1st Cir. 2002).

*Magazine*, 465 U.S. 770, 779 (1983) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). Likewise, the Due Process analysis draws no distinction between out-of-state and out-of-country defendants. *See Goodyear*, 131 S. Ct. at 2851 ("A court may assert general jurisdiction over foreign (*sister-state or foreign-country*) corporations . . . .") (emphasis added). Nor has the Court applied different tests depending on whether a claim arose across state lines or national borders. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (applying established general jurisdiction test to claims arising from plane crash in Peru).[10]

Accordingly, the Court's choice of a standard for attributing contacts will apply equally to a claim by a California resident against a Nevada company selling its products in Los Angeles through a wholly owned subsidiary, based on conduct occurring in the United States. Indeed, some of the cases in the circuit conflict involve suits by American plaintiffs against out-of-state American companies for claims arising in this country. *See, e.g.*, *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 575 (2011); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co*., 136 F.3d 537, 540 (7th Cir. 1998).

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[10] While these features of the case should have no bearing on the first step "relevancy" test, they may be considered at the final "reasonableness" determination. *See infra* § IV(C).

### A. This Case Presents A Federal Constitutional Question Governed By Federal Constitutional Law.

We start with the basic question of whether the relevance of a subsidiary's contacts is a matter of state or federal law.

Respondents agree that the Court should not "constitutionalize fixed rules governing the attribution of contacts from one juridical person to another for jurisdictional purposes." U.S. Br. 21. The Constitution leaves it to the states (or, with respect to federal claims or claims in federal court, Congress) to adopt in the first instance the necessary rules for deciding when to respect or disregard corporate formalities for purposes of deciding whether to authorize jurisdiction over corporate defendants. *See id.* There is no doubt, for example, that California could adopt an alter ego test for jurisdictional purposes, or that this Court could do so for federal cases through an amendment to the Federal Rules.

It may be that, in some cases, a state will not have spoken to the attribution issue, giving rise to a question of statutory interpretation in which it might be appropriate to assume an intent to adopt some pre-existing state law standard from another context. *Cf.* U.S. Br. 28-29. But this case presents no such state law question. California's statute extends the personal jurisdiction to the fullest extent permitted by the Due Process Clause. Cal. Civ. Proc. Code § 410.10. That must be understood to adopt the broadest corporate attribution rule permitted by the Fourteenth Amendment. Certainly, that has been the understanding upon which this case has been

litigated, and petitioner does not argue otherwise here.

Instead, the question presented to this Court concerns the outer limits of the Due Process clause. *See* Pet. i. And although the Court has referred to state law to decide when the requirements of Due Process are triggered, and has afforded states leeway to decide how best to meet the Constitution's requirements, U.S. Br. 19-20, it has not looked to state law to provide the substantive constitutional limits against which state laws are ultimately judged. *See, e.g., Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (adopting federal "minimum contacts" rule); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788-89 (2011) (plurality) (considering federal rule regarding "stream of commerce" contacts); *id*. at 2792 (Breyer, J., concurring in the judgment) (same); *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (applying federal rule for intentional torts directed at forum residents).

Petitioner nonetheless asserts in a footnote that the details of the constitutional alter ego test[11] it advances should be determined "through the forum State's choice-of-law rules" in order to "help ensure foreseeability." Petr. Br. 22 n.3. But it is difficult to fathom how requiring defendants to familiarize themselves with the choice of law rules of 50 states as well as the various versions of the veil piercing test those choice of law rules may ultimately adopt would

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[11] We understand petitioner's reference to "alter egos" to mean companies subject to veil piercing under the relevant corporate law standard.

be more predictable that adopting a single federal constitutional test.[12]

It is far better to follow the Court's traditional practice of establishing a federal rule to enforce the federal constitutional provision.

### B. As Petitioner Ultimately Admits, The Due Process Clause Does Not Categorically Limit States To Applying Alter Ego Tests In Determining Whether To Disregard Formal Corporate Distinctions For Jurisdictional Purposes.

The search for a proper Due Process rule must begin with this Court's path-breaking decision in *Int'l Shoe Co. v. Washington,* 326 U.S. 310 (1945). There, the Court abandoned prior "hairsplitting legal technicalities" in favor of "practical, business conceptions." *United States v. Scophony Corp. of Am.,* 333 U.S. 795, 808 (1948). The ultimate question in each case, the Court declared, is whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. And the principal consideration, the Court held, was the degree to which the defendant "enjoys the benefits and protections of the laws of that state" by virtue of its

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[12] Indeed, in a case like this, it is entirely possible that choice of law rules would dictate application of foreign law, which might be very different from ours. *See, e.g.,* David M. Albert, *Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine*, 23 U. PA. J. INT'L ECON. L. 873 (2002).

"contacts" with the forum. *Id*. at 319. As applied to corporations, the Court recognized, the inquiry necessarily focuses on the defendant's agents. The "corporate personality is a fiction," the Court explained. *Id*. at 316. It can enjoy the benefits of, and establish contacts with, a forum "only by activities carried on *in its behalf* by those who are authorized to act for it." *Id*. (emphasis added).

It is common ground that a subsidiary can carry out activities "in behalf" of its parent company for purposes of this rule in some circumstances, but not others. The parties agree that attribution is not automatic. *See Keeton*, 465 U.S. at 781 n.13. But by the same token, all agree that a subsidiary should sometimes be viewed as acting on behalf of its parent in a way that makes its activities in the forum relevant for the minimum contacts analysis. *See* Petr. Br. 18, 24. The question is when?

Petitioner says only when the two corporations are alter egos of one another. It reminds the Court that "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* 20 (quoting *Keeton*, 465 U.S. at 781 n.13). From there it reasons that only when two corporations are essentially the same is it fair to say that the parent itself has established contacts with the forum. *Id.* 20-21.

But that reasoning ignores that the justification for exercising jurisdiction is that the defendant has enjoyed the benefits of the forum state's law and economy. And a corporation can enjoy those benefits through agents acting "in its behalf," *Int'l Shoe*, 326 U.S. at 316, even if those agents maintain a distinct existence from the defendant.

The facts of *International Shoe* itself illustrate the point. There, a company incorporated in Delaware wished to enjoy the benefit of selling its shoes to consumers in Washington state. But it contrived to enjoy those benefits without subjecting itself to jurisdiction or taxation in that state by contracting with salesmen who would solicit orders in the state, which were then sent for formal acceptance and fulfillment in Missouri. *Id*. at 313-14. When Washington sued the company for not paying unemployment compensation tax for the salesmen, the company argued that the salesmen were not its employees (which, it said, made the tax liability unconstitutional) and that there was no jurisdiction because the corporation itself was not present in the state. *Id.* at 312, 315. This Court, however, had no difficulty in concluding that the corporation had established sufficient contacts with the state through the activities of its agents to satisfy the Due Process clause. *Id*. at 320. The Court did not pause to decide whether the salesmen were properly considered employees or, as the defendant apparently argued, independent contractors. While that formal distinction might be important for some legal purposes, it made no difference to the minimum contacts analysis as a constitutional matter.

This Court has since made clear that a manufacturer like petitioner can subject itself to personal jurisdiction in a state through the acts of agents, including, for example, by "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987) (O'Connor, J., joined by Chief Justice Rehnquist, and Justices Powell and

Scalia); *id*. at 117 (Brennan, J., joined by Justices White, Marshall, and Blackmun) (agreeing that such conduct is sufficient for jurisdiction); *see also Nicastro*, 131 S. Ct. at 2790 (plurality) (noting that manufacturer might be subject to specific jurisdiction in United States because it "directed marketing and sales efforts at the United States" undertaken by independent distributor); *id*. at 2801 (Ginsburg, J., dissenting) (same); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (explaining that jurisdiction may be premised on "the efforts of the manufacturer or distributor to serve directly *or indirectly*, the market for its product in other States") (emphasis added).

To hold otherwise would lead to intolerable evasions and gamesmanship. A "corporation should not be able to insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *IDS Life Ins.*, 136 F.3d at 541. Yet that is exactly what an alter ego test permits. It would allow, for example, a foreign car manufacturer to evade jurisdiction in the United States for design defect claims through the simple expedient of spinning off its American sales division into a wholly owned subsidiary, even while it continued to enjoy the entirety of the economic benefits of participating in the American economy. That is precisely the kind of "artful arrangement of agents' authority" and "hairsplitting legal technicalities" this Court abandoned in *International Shoe*. *Scophony,* 333 U.S. at 808 n.19.

### C. There Is No Basis For Adopting Different Attribution Rules For General And Specific Jurisdiction.

Twenty-four pages into its brief, petitioner ultimately agrees, acknowledging that this Court has embraced an agency – not an alter ego – test, at least in specific jurisdiction cases.[13] But, it insists, "this Court has never suggested that an agency relationship is sufficient to extend *general* personal jurisdiction over a foreign defendant." Petr. Br. 24-25 (emphasis in original). From this, it concludes that the Court has in fact limited the agency test to specific jurisdiction cases. *Id.* 25.

But that conclusion hardly follows. Throughout its brief, petitioner relies on Due Process principles established in specific jurisdiction cases (like *International Shoe* and *Keeton*), without questioning their application to the general jurisdiction context. Nor has petitioner provided any adequate doctrinal or practical reason for establishing different tests based on the nature of the jurisdiction asserted for deciding when a subsidiary's contacts are even *relevant*.

Petitioner says that "only an alter-ego test can provide defendants with the predictability mandated by due process." Petr. Br. 27. But why would an agency test be sufficiently predictable for specific jurisdiction cases, yet suddenly become

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[13] Petitioner did not favor this Court with such candor at the certiorari stage, where it – like the circuit cases it embraced – drew no distinction between the proper attribution test for specific and general jurisdiction. *See* Pet. 20-24.

incomprehensible when applied to a general jurisdiction case? Petitioner does not say.

Instead, petitioner argues that only an alter ego test can ensure that defendants "are subject to general jurisdiction only in those States in which their own jurisdictional contacts are so significant as to render them 'at home.'" *Id.* 27 (quoting *Goodyear*, 131 S. Ct. at 2851). But that does not follow either. If, as petitioner agreed below, a state may legitimately exercise general jurisdiction over a corporation conducting a substantial, systemic, and continuous course of business in the state, *see supra* 14-15, there is no reason why a company cannot carry out some of the relevant activities – for example, as here, selling its products – through representatives. To the extent petitioner means, instead, that only an alter ego test is consistent with some new, much narrower conception of general jurisdiction growing out of *Goodyear*'s "at home" formulation, the premise of the argument is forfeited and never openly defended in petitioner's brief.

Rather than adopt different relevancy tests, the Court should apply an agency test in all cases, but allow courts to take into account the nature of the contact (including whether it is direct, through an alter ego, or through a wholly owned subsidiary) in assessing whether the contacts are sufficient for the type of jurisdiction asserted. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 319 (minimum contacts analysis must consider "the quality and nature of the activity"). To be sure, petitioner made a strategic choice to put all its eggs in the "relevancy" and "reasonableness" baskets, waiving any right to argue that MBUSA's contacts, even if relevant, are insufficient for general

jurisdiction. But that is no reason to distort the analytical framework that will apply to many cases after this.

### D. Even If This Court Adopted A General Jurisdiction-Specific Rule, It Should Reject Petitioner's Alter Ego Standard.

Even if this Court were to adopt a relevancy rule applicable only to general jurisdiction cases, there is no basis for choosing petitioner's alter ego standard.

#### *1. There Is No Support For Petitioner's Alter Ego Rule In This Court's Modern Due Process Precedents.*

Petitioner identifies no decision of this Court adopting an alter ego test under the Due Process Clause. To the contrary, when confronted by Due Process objections to states' disregard of corporate formalities, this Court has applied a far more pragmatic approach.

To be sure, in certain statutory construction cases this Court has assumed that Congress intended to incorporate contemporary principles of corporate law into federal statutes, absent a reason to believe otherwise. *See* Petr. Br. 18-19. But the question here is one of constitutional law (not presumed congressional intent) and personal jurisdiction (not corporate liability). This Court has never suggested that the Constitution *requires* Congress (much less a state) to use particular conception of "corporate separateness" for liability purposes. Nor has it ever held that the Due Process Clause requires an alter ego test in the context of personal jurisdiction.

Petitioner suggests that this Court adopted a constitutional alter ego rule in *Cannon*

*Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). *See* Petr. Br. 19.[14] As the United States demonstrates (Br. 22-23), any such suggestion is baseless, as the Court in *Cannon* expressly disclaimed any constitutional basis for its decision. *See* 267 U.S. at 336. Indeed, the Court's observation that "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," *id.*, would have been entirely irrelevant if the Court believed that such a statute would be unconstitutional.

More importantly, in *International Shoe* this Court abandoned the strict formalism underlying *Cannon* and similar decisions of its era, in favor of a more pragmatic implementation of the Due Process Clause. In *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), for example, this Court held that the Due Process clause permits states to disregard formal distinctions between parents and subsidiaries for tax purposes when the subsidiary's operations are not "distinct in any *business or economic* sense." *Id.* at 439 (emphasis added). "[T]he form of business organization," the Court explained, "may have nothing to do with the underlying unity or diversity of business enterprise."

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[14] Petitioner likewise implies that the Court adopted a veil piercing standard as a Due Process test for personal jurisdiction in *Goodyear*, *see* Petr. Br. 20, but the Court expressly declined to consider the issue. 131 S. Ct. at 2857.

*Id*. at 440. For example, had a company "chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those division would meet due process requirements for appropriationability." *Id.* at 441. "Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly" made no difference in the Due Process analysis. *Id*.

The same reasoning applies here. The Due Process clause does not force states to accept formal distinctions between subdivision and subsidiaries when the relevant economic reality supports the exercise of state authority.[15] When there is no distinction in "any business or economic sense" between selling cars in the state through a subsidiary or a subdivision, *Mobil Oil*, 445 U.S. at 439, the Constitution does not require states to recognize the distinction.

The alter ego test is thus singularly ill-suited to a modern Due Process inquiry. The test is not, as the United States claims, a state law standard for treating "two corporations as one *for all purposes*." U.S. Br. 30 (emphasis added). Instead, it is a

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[15] Although the power to tax and the power to subject a company to jurisdiction are distinct, this Court has recognized a logical connection between the two in assessing challenges to both kinds of state authority under the Due Process clause. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 321 (holding that same contacts that authorized state to assert jurisdiction established sufficient basis to impose a tax).

corporate law standard for allowing enforcement of a judgment against a corporation's owners. *See, e.g.*, STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (2011). As a consequence, it is tailored to determining when it is appropriate to disregard ordinary principles of corporate limited liability in light of the competing interests in promoting the basic purposes of the limited liability form, preventing fraud, and providing injured parties effective remedies. Accordingly, one of the essential inquiries under the alter ego test is whether the defendant not only disregarded corporate distinctions, but did so "to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

Those considerations have only passing relevance to Due Process limitations on personal jurisdiction. A corporation need not engage in fraud or act through a dummy subsidiary in order to take sufficient advantage of a state's markets and laws to warrant treating it like the state's other businesses for jurisdictional purposes.

*2. The Alter Ego Test Is Not So Deeply Embedded In Our Legal Traditions As To Have Attained Constitutional Status.*

Because the alter ego test is not adapted to the concerns of the Due Process Clause, it makes no difference whether its use for other purposes is deeply rooted "in American law and business." Petr. Br. 11. Moreover, the alter ego test is not now, nor has it ever been, the pervasive legal instrument for disregarding formal corporate distinctions.

a. The "law has developed a variety of doctrines supporting the attribution of the legal consequences" of a subsidiary's act to the parent. 1 BLUMBERG ON CORPORATE GROUPS § 10.01, at 10-4 (2d ed. 2012). Alter ego is one of them, but the United States' brief catalogs examples of others from a wide range of contexts. *See* U.S. Br. 26 & n.8. There are more as well. *See, e.g., Mobil Oil*, 445 U.S. at 439 (permitting states to apply a flexible "unitary-business principle" for taxation of subsidiaries' earnings).[16]

In the antitrust context, for example, the Court has "eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2209 (2010). Thus, the Court has recognized that "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are

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[16] *See also, e.g.*, *Engelhardt v. S.P. Richards Co., Inc.*, 472 F.3d 1, 4-7 (1st Cir. 2006) (applying an "integrated employer" test under the Family Medical Leave Act); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) (under the Worker Adjustment and Retraining Notification Act, applying an "integrated enterprise test" which focuses on "economic realities as opposed to corporate formalities" and is "demonstrably easier on plaintiffs than traditional veil piercing."); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (applying "integrated employer" test to enforcement of federal antidiscrimination statutes); *Murray v. Miner*, 74 F.3d 402, 404-05 (2d Cir. 1996) (applying "single employer doctrine" under state labor law); *see also* 26 U.S.C. § 1561 (applying a "controlled group" test to disregard corporate distinctions for purposes of certain tax benefits).

controlled by a single center of decisionmaking and they control a single aggregation of economic power." *Id*. at 2211. Accordingly, focusing on "substance, not form," the Court has ignored the distinction between the two for antitrust purposes. *Id*. (holding that parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.") (citation omitted).

b. There is even less support for petitioner's alter ego rule in the broader history of the Due Process Clause. At the "crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted," *Burnham v. Super. Ct. of Cal., Cnty. of Marin*, 495 U.S. 604, 611 (1990), the alter ego doctrine was only just emerging. *See* I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 156 (1912) (identifying an 1865 case as "one of the earliest in point"). Doing business through the corporate form was still a relatively new phenomenon. *See* U.S. Br. 21. The features of early corporations were highly variable, in part because incorporation often required a special act of the state legislature, which fixed the attributes of corporate charters on a case-by-case basis. *See* Handlin & Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 9-10 (1945).

In those days, limited liability (the premise of the alter ego doctrine) was a relatively recent, controversial, and far from universal feature. *See, e.g.*, RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 49-55 (1982); E. MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, 387-88 (1954). For example, Massachusetts and Pennsylvania had statutes

imposing unlimited liability on manufacturing corporations. DODD, *supra* at 387-88. And an 1848 New York statute made railroad stockholders fully liable for unpaid wages. SEAVOY, *supra* at 203.

At the same time, wholly owned subsidiaries were new and uncommon. As the United States notes, the first statute generally permitting stock ownership by corporations was not enacted until after ratification. U.S. Br. 21. In fact, at the time the Fourteenth Amendment was ratified, many states prohibited corporations from having wholly owned subsidiaries. *See* William R. Compton, *Early History of Stock Ownership by Corporations*, 2 GEO. WASH. L. REV. 125, 130 (1940); SEAVOY, *supra* at 195.

Accordingly, there is simply no historical basis for any claim that "corporate separateness" between parent companies and subsidiaries, much less the alter ego test, was such an essential feature of our legal system that those who enacted the Fourteenth Amendment would have thought the topic beyond the reach of state legislatures. Quite to the contrary, they would have believed that the Constitution leaves the formation, nature, and treatment of corporate relationships to the political process.

*3. Petitioner's Policy Objections Are No Basis For Judicial Imposition Of An Alter Ego Test.*

Petitioner and its *amici* argue at length that a narrow alter ego test is required to mitigate a host of predicted policy ills. While those arguments are a perfectly appropriate basis for limiting general jurisdiction through legislation, treaties, or amendments to the Federal Rules, they are not a

ground for this Court to impose an alter ego test upon the political branches.

To start, we should be frank about the source of the policy objections and international friction. It is not the rules for disregarding corporate distinctions for jurisdictional purposes.[17] What "places the United States courts out of step with international jurisdictional standards," Petr. Br. 36, is the American tradition of general jurisdiction over corporations based on their doing business in a state. *See, e.g.*, Freidrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 161-62 (2002). But the continuing viability of that practice is not before the Court. And while the potential for international friction may be an appropriate consideration in construing ambiguous statutes (*see, e.g.*, *Kiobel*, 133 S. Ct. at 1664), international opposition to American legal tradition is not an appropriate basis for constitutional decision making.

The politically accountable branches have ample authority – and the constitutional responsibility – for addressing the policy and diplomatic objections petitioner raises. Even if there were reason to worry that states might take too narrow a view of the national interest, Congress plainly has the authority to intervene and preclude by legislation exercises of state jurisdiction that interferes with international

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[17] *See, e.g.*, Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 63 S.C. L. REV. 697, 723 (2012).

commerce. *See Pierce Cnty. v. Guillen*, 537 U.S. 129, 147-48 (2003). And, of course, Congress has plenary authority over the jurisdiction of the lower federal courts. *See* U.S. Const. art. III, § 1. Indeed, this Court itself could address concerns about excessive exercises of general jurisdiction by federal courts through its role in the promulgation of the Federal Rules. That process should not be short-circuited by resorting to constitutional litigation.

## III. The Court Of Appeals Correctly Concluded That MBUSA Was Petitioner's Agent For Purposes Of Attributing Contacts.

The court of appeals also rightly concluded that MBUSA's California contacts were relevant to assessing petitioner's amenability to general jurisdiction in that State.

### A. The Due Process Clause Permits Consideration Of The Contacts Of A Wholly Owned Subsidiary Performing Important Services For The Defendant While Subject To Its Significant Control.

The forum contacts of a wholly owned subsidiary are properly considered as part of the Due Process analysis when the subsidiary performs important services for the defendant while subject to its significant control.

1. The purpose of the Due Process inquiry is to ensure that exercising jurisdiction over the defendant is consistent with traditional notions of fair play and substantial justice. *See Int'l Shoe*, 326 U.S. at 316. Traditionally, it has been recognized as fair to require a defendant that has taken advantage of the

forum's laws and economy to shoulder the reciprocal obligation of submission to its courts. *See, e.g.*, *id*. at 319; *Barrow*, 170 U.S. at 107. While defendants are entitled to sufficient notice of the jurisdictional consequences of their actions so they can "structure their primary conduct" to avoid unwanted exposure to jurisdiction, *World-Wide Volkswagen*, 444 U.S. at 297, they are not entitled to enjoy the real economic benefits of participating in a forum's economy while altering their activities in only a formal sense to avoid jurisdiction. *See Int'l Shoe,* 326 U.S. at 319-20.

Of course, businesses can take advantage of a forum in various ways and to varying degrees. The appropriate agency test should aim to distinguish between two cases, the results of which should be reasonably uncontroversial. At the one extreme, a corporation can do business in the forum directly, through a branch office or subdivision. Petitioner does not dispute that the activities of a division are appropriately attributed to the parent, even if the parent gives the office a different name or treats it for internal purposes as a distinct entity. At the other end of the spectrum, a corporation does not itself participate in the economy of a forum simply by selling its products to a wholly separate and independent third party that resells the products in the forum. The contacts of Wal-Mart in Michigan are not attributable to Apple simply because Wal-Mart sells Apple products there.

The critical difference between these two extremes is the degree of benefit realized by, and control retained by, the defendant corporation. When a manufacturer sells its own goods in a forum, it reaps the entirety of the economic benefit of the sales.

At the same time, by selling the products itself, the company avoids placing a substantial part of its economic success in the hands of a third party over which it has no control. On the other hand, when a manufacturer sells its goods to an independent dealer, it gives up both the right of sole benefit and a great deal of control. But in exchange, the corporation avoids the financial and other risks of operating a sales office in the forum.

There should be no question that these differences in ownership and control are material to businesses in the real world. In this case, for example, petitioner created MBUSA to sell its cars in the United States after it experienced disappointing sales through independent third party distributors. *See* Pet. App. 8a.

2. In light of the foregoing principles, we submit that at the very least, a court may appropriately consider, as part of the overall minimum contacts analysis, the contacts of a corporate defendant's subsidiary when the subsidiary (1) is wholly owned by the defendant; (2) undertakes an important part of the defendant's business in the forum; (3) exclusively for the defendant; and (4) does so while subject to substantial control by its owner.

**Wholly Owned Subsidiary**. Although the court of appeals did not expressly limit its rule to wholly owned subsidiaries, the fact that MBUSA is wholly owned by petitioner substantially weighs in favor of attributing its contacts to its parent. A parent company necessarily enjoys the benefits of a wholly owned subsidiary's participation in a forum's economy for the simple reason that the parent is entitled to all of the profits of the venture and all the

value that accumulates in the business, were it ever to be sold. At the same time, the parent's ability to ensure that the sales are conducted in the way it prefers is greatly enhanced by its sole ownership of the subsidiary. *See, e.g.*, *Am. Needle*, 130 S. Ct. at 2212 (parents and wholly owned subsidiaries "have a complete unity of interests and thus with or without a formal agreement, the subsidiary acts for the benefit of the parent, its sole shareholder") (internal quotations omitted); 19 C.J.S. CORPORATIONS § 562 (2013) (noting that wholly owned subsidiaries owe a fiduciary duty to their parents).

**Performing An Important Part Of The Defendant's Business In The Forum**. The fairness of considering a subsidiary's contacts is enhanced when the subsidiary undertakes an important part of the defendant's business in the forum. *Cf. Mobil Oil Co.*, 445 U.S. at 440 (Due Process clause permits states to treat dividends from wholly owned subsidiaries as earnings for the parent when they "reflect profits derived from a functionally integrated enterprise").

Here, it is incontestable that by selling petitioner's product in one of its biggest markets, MBUSA was engaged in a critically important part of petitioner's enterprise. There is no point in making cars if you cannot sell them.[18] On the other hand, if a

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[18] The Ninth Circuit has implemented the importance requirement by asking whether the parent would otherwise undertake the subsidiary's task itself or through another third party. Pet. App. 24a & n.13. We do not believe that this gloss is particularly helpful.

company simply owns an unrelated business – if, for example, petitioner bought a paper mill as an investment – it would not be appropriate to consider that unrelated company's contacts.

**Exclusively Serving The Defendant**. A defendant's ability to benefit from, and effectively control, a subsidiary's forum activities is further enhanced when, as in this case, the subsidiary provides its services exclusively for the parent, avoiding the prospect of competing loyalties.

**Subject To Substantial Control**. When a parent retains significant control over the operations of a subsidiary, beyond that incident to its status as a stockholder, it substantially erodes the other principal difference between subsidiaries and subdivisions – the extent of the corporation's control over operations in the forum.

As reflected in traditional agency law, it is enough that the parent company retains the right of substantial control; actual exercise of that control need not be proven. *See* RESTATEMENT (THIRD) AGENCY § 1.01 cmt. c. As a practical matter, one need not overtly direct an agent's conduct in order to ensure that the agent conducts himself in the way the principal prefers. The facts of this case illustrate the point.

Here, petitioner's control, and right to control, MBUSA were pervasive. Petitioner not only selected its subsidiary's board of directors (installing its own Chairman as Chairman of MBUSA as well, Pet. App. 11a), but also approved MBUSA's top managers. *Id*. 10a-11a. MBUSA further required petitioner's approval of any replacements on the management team. *Id*. 10a-11a, 13a. When one selects the

decision makers, exercising detailed control over the subsidiary's day-to-day decisions is less important.

Nonetheless, petitioner retained control of large swaths of MBUSA's basic operations in other ways as well. For example, under its General Distributor Agreement, MBUSA had to pay whatever price petitioner set for its vehicles. *Id.* 13a. At the same time, petitioner retained the right to modify the prices MBUSA charged its own customers. *Id*. And MBUSA was required to make "any changes or adjustments" to its sales network that petitioner deemed advisable. *Id*. 9a.

Petitioner also exercised pervasive control over how MBUSA conducted its day-to-day operations by requiring the subsidiary to comply with detailed Dealership Standards, manuals, and guidelines. *Id.* 10a-11a. Petitioner further retained the right to change those documents at any time, *id*., and to issue additional directives, with which MBUSA was obligated to comply, *id*. 10a.

Even when petitioner was not directly telling MBUSA how to conduct its operations, it required the subsidiary to seek its approval of such basic business decisions as sales targets, what dealerships to sell its cars to, what information to collect about its customers, what accounting and other business systems to use, and how big its signs should be. *Id*. 9a-10a, 13a.

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In these circumstances, the practical difference between subsidiary and subdivision is minimal. At the very least, there should be no question that petitioner obtained sufficient benefit from, and retained sufficient control over, MBUSA's California

business activities that it would be fair to at least take MBUSA's forum contacts *into account* in the minimum contacts analysis.

### B. Petitioner's Objections Are Meritless.

Petitioner's objections to allowing a state to consider a subsidiary's contacts in such circumstances are meritless.

**Not an Alter Ego Test.** Petitioner first argues that the only acceptable agency rule is one that effectively applies an alter ego test. If the Court adopts an agency rule, petitioner argues, it should require a "bona fide agency relationship sufficient to pierce the corporate veil under applicable agency principles." Petr. Br. 27. Specifically, the foreign defendant must "exercise pervasive and total control over the in-state agent's day-to-day operations." *Id*. 28. "Only in such circumstances is the agency relationship sufficient to pierce the corporate veil between the principal and agent." *Id*.

It should be transparent that the "agency" rule petitioner proposes is simply a repackaged alter ego test. Moreover, there is no merit to petitioner's attempt to portray the alter ego test as part of agency law. Quite to the contrary, piercing the corporate veil is a rule of corporate law. Under agency law, a principal is automatically liable for most acts of the agent within the scope of his agency; there is no requirement of effective identity between the two. *See, e.g*., RESTATEMENT (THIRD) AGENCY §§ 2.04, 7.08. And under agency law, all that is required to establish vicarious liability is a "right to control" – actual exercise of control (much less "pervasive and total" actual control) is not required. *See id.* § 1.10 cmt. c.

**Not A Common Law Agency Test.** Having just urged the Court to adopt an "agency" test that has little to do with common law agency principles, petitioner faults the Ninth Circuit for adopting a rule that does not duplicate traditional common law agency in every detail. That objection has no merit. While a state surely could choose to apply a common law agency test for jurisdictional purposes, the Due Process Clause does not require it. Like the alter ego test, the common law of agency was not developed with personal jurisdiction (much less Due Process constraints on personal jurisdiction) in mind. And, as discussed earlier, legislatures and this Court have regularly applied legal tests substantially departing from agency law principles in various contexts. *See, e.g.*, *Am. Needle*, 130 S. Ct. at 2211-12 (antitrust). Nor has this Court construed the Due Process clause to require states to apply a common law agency test to parent companies and their subsidiaries for tax purposes. *See, e.g.*, *Mobil Oil*, 445 U.S. at 440-41.

The test advanced here appropriately focuses on the features of agency law most pertinent to the underlying concerns of the Due Process Clause in this context. That is sufficient.[19]

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[19] The United States seems to argue that the Due Process attribution rule must duplicate *some* pre-existing legal standard that "governs the subsidiary-parent relationship more generally." U.S. Br. 32. But as noted, this Court has imposed no such requirement in the tax context, where predictability is also important. Moreover, none of the other parts of this Court's personal jurisdiction test duplicate existing legal standards. To the contrary, companies' "expectations" about the "jurisdictional consequences" of their methods of operations, *id*., must be set by

**Insufficiently Predictable**. Petitioner further claims that only an alter ego test "provides the predictability necessary for due process." Petr. Br. 21. Not so.

It is not difficult to decide whether a subsidiary is wholly owned or whether it serves only the parent company. The concept of retaining a right to control the subsidiary's operations is taken directly from the common law of agency, which petitioner admits is familiar to corporate defendants. *Id.* 27-28. And while petitioner complains that the requirement that the subsidiary perform a sufficiently important task for the defendant is insufficiently limiting, *id*. 32-33, importance is a common standard in the law, comparable to other considerations already a part of the Due Process analysis. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (requiring courts to consider the strength of the forum's interest in adjudicating the dispute).

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reference to this Court's "minimum contacts" and "reasonableness" tests. That is because such tests serve to set the outer boundary of states' and Congress's legislative authority, a function that defies the drawing of arbitrary, bright line rules. To be sure, the Due Process limit functions as the operative jurisdictional rule in this case, but only because this Court has allowed states to adopt jurisdictional statutes that simply embrace the constitutional outer limit, and because this Court has seen fit to incorporate those statutes by reference for most suits in federal court. In any event, as discussed next, the constitutional rule respondents propose is sufficiently predictable.

At the same time, the rule respondents propose allows corporations to "structure their primary conduct" to avoid unwanted exposure to jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297; *see also* Chamber Br. 29 (urging Court to establish "a set of safe-harbor factors"). Petitioner could confidently avoid general jurisdiction in the United States by selling its cars to a truly independent third party distributor, as Toyota and many other foreign companies do. *See* Pet. App. 49a. To be sure, petitioner would thereby give up some of the benefits and control it exercises by using a wholly owned subsidiary over which it retains substantial operational authority. But that is the quid pro quo the Due Process Clause permits a state to demand of those who would seek to participate in its economy.

In any event, respondents' rule is no more vague or less predictable than other tests this Court has adopted to implement the Due Process Clause. *See, e.g., Int'l Shoe*, 326 U.S. at 316 ("minimum contacts"); *id*. at 317 ("continuous and systematic" activities); *id*. at 318 ("continuous corporate operations . . . so substantial and of such a nature as to justify" general jurisdiction). The Court has recognized that under these flexible standards "few answers will be written 'in black and white.'" *Kulko v. Cal. Super. Ct. of Cal. In & For City & Cnty. of San Francisco,* 436 U.S. 84, 92 (1978) (citation omitted). Instead, the "greys are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545 (1948).

Finally, petitioner's alternate alter ego test is itself notoriously unpredictable in application. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel,

*Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) (likening veil piercing under the alter ego test to lightning strikes, in that both are "rare, severe, and unprincipled"); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2011) ("The inherent imprecision in metaphors has resulted in a doctrinal mess. Courts have resorted to compiling ever-expanding lists of ex post fact-specific factors, no one of which is dispositive or necessarily connected to the underlying harm."). That unpredictability is only multiplied by petitioner's claim that the Constitution adopts whatever alter ego formulation is dictated by the forum's choice of law rules. Petr. Br. 22 n.3

**Sweeps Too Broadly.** Petitioner and its *amici* complain that an agency test sweeps too broadly, potentially subjecting out-of-state corporations to jurisdiction wherever "they have distributors, independent contractors, or other ordinary business relationships." *Id.* 31. Again, not so. Under the rule respondents advance, contacts are deemed constitutionally relevant only when the business partner is a wholly owned subsidiary, performing important services for the defendant while subject to the parent's substantial control. That rule obviously excludes ordinary independent third party businesses, like independent distributors.

Moreover, the rule will not sweep in "virtually every case involving a parent and subsidiary," on the theory that a "corporate parent always has the *right* to control a subsidiary" by virtue of its ownership of the subsidiary's stock. Petr. Br. 33. The test requires, and petitioner exercised here, a degree of control far beyond rights, like the power to elect directors, that are "incident to the legal status of

stockholders." *Id*. (internal quotation marks and citation omitted). If those ownership rights were as comprehensive as petitioner pretends, *id*., it would not have needed its detailed contract with MBUSA.

Petitioner nonetheless asserts that "the distribution agreement in this case is typical of relationships between foreign parent companies and domestic subsidiaries." *Id.* 31. The four cases it cites for this assertion, *id*., certainly do not support it; none describes a retained right of control anything like the one reflected in this record. But in any event, even if petitioner is right, the fact that corporations have structured themselves to maximize their control over, and benefit from, market activities here, while also seeking to avoid jurisdiction is neither surprising nor a reason to conclude that the Constitution gives them the right to continue to reap those benefits while avoiding the responsibilities associated with doing business here.

Finally, petitioner's objection ignores that the relevance test is only one part of the overall Due Process analysis. Attributing contacts only means that the contacts are appropriately *considered*. The court still must decide whether the aggregate contacts are sufficient to warrant the exercise of general jurisdiction. *See* Petr. Br. 31 n.5 (acknowledging as much).

## IV. The Court Should Reject Petitioner's Reasonableness Challenge.

Petitioner makes two reasonableness arguments. First, it devotes two paragraphs of its brief to urging this Court to adopt a per se rule holding that general jurisdiction is *never* permitted over a foreign defendant, for foreign conduct, based solely on its

relationship with an uninvolved domestic entity. Petr. Br. 37-38. Second, it argues that the exercise of jurisdiction was unreasonable on the facts of this particular case. *Id.* 38. The Court should reject the first argument and decline to reach the second, instead remanding the case to allow the Ninth Circuit to consider the effect of this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1659 (2013), and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012), on its reasonable determination.

### A. There Is No Basis For Petitioner's Proposed Per Se Rule.

This Court has never applied a per se rule to any part of the Due Process analysis, much less to the reasonableness prong. To the contrary, this Court has "reject[ed] any talismanic jurisdictional formulas," instead instructing that "'the facts of each case must always be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 485-86 (quoting *Kulko*, 436 U.S. at 92); *id*. at 486 n.29 ("This approach does, of course, preclude clear-cut jurisdictional rules."); *see also, e.g.*, *Int'l Shoe*, 326 U.S. at 319 (the Due Process test "cannot be simply mechanical or quantitative").

Indeed, the principal authority petitioner cites in support of its per se rule, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), unambiguously declined to adopt a per se rule. *See id.* at 113 ("We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors."); *id*. at 116 (reaching reasonableness

conclusion based on the combination of many facts); *see also, e.g.*, *Perkins*, 342 U.S. at 445 ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.").

The rule petitioner proposes is a particularly poor candidate for the Court's inaugural per se rule. For one thing, it is debatable whether it would even apply to this case: although petitioner claims to be a "foreign company," at the times relevant here it was, as a practical matter, a joint American-German company, formed through a merger with Chrysler and maintaining dual operational headquarters in Michigan and Germany. *See* Pet. App. 5a-6a & n.6.[20]

In addition, there is no rational basis for the gerrymandered contours of the rule petitioner proposes. Petitioner says that the rule is necessary to avoid international friction because "[c]onduct

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[20] Petitioner disputes that it had dual headquarters here and in Germany, but neither court below was required to resolve the issue. Pet. App. 6a n.6, 35a. Notably, if respondents are correct, then personal jurisdiction is proper in Michigan even under a rule limiting general jurisdiction to the state in which the company is incorporated or has a principal place of business. Accordingly, if this Court holds that jurisdiction is unavailable in California, the Court should remand to allow the court of appeals to decide whether a remand is appropriate to allow respondents to make any needed amendments to their complaint, or otherwise conduct proceedings to determine whether a transfer the Eastern District of Michigan is appropriate. *See, e.g.*, *id.* 17a n.9; BIO 17-18; *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

occurring in a foreign nation is already governed by that country's laws." Petr. Br. 38. But that objection applies whether jurisdiction is based on the contacts of a company's subsidiary or subdivision. Were the Court to adopt petitioner's per se rule, it would simply be a matter of time before defendants like petitioner were back in the Court arguing that the limitation petitioner proposes should be abandoned as unprincipled, seeking instead an across-the-board prohibition against litigation in U.S. courts against foreign defendants for foreign conduct.

Which returns us again to the premise of much of petitioner's and its *amici*'s briefing – a general dissatisfaction with general jurisdiction over foreign companies in the United States. While there may be sound policy reasons for Congress to prohibit such litigation, for this Court to hold that such litigation is per se unconstitutional would be a very substantial change in the law. For example, it would draw into question the constitutionality of a number of extraterritorial federal statutes that reach foreign defendants engaged in foreign conduct. *See, e.g.*, 15 U.S.C. § 22 (antitrust); 22 U.S.C. §§ 2780(b)(1), (l)(3)(D) (ban on international weapons trade with certain countries supporting terrorism); 18 U.S.C. § 174 (biological weapons offenses against U.S. citizens abroad); *see also Kiobel*, 133 S. Ct. at 1669 (leaving open possibility of extraterritorial application of ATS in some cases); *id*. (Kennedy, J., concurring) (same).

### B. The Court Nonetheless Should Remand The Case To Allow The Court Of Appeals To Reconsider Its Reasonableness Holding In Light Of *Kiobel* and *Mohamed*.

In its final alternative argument, petitioner asks this Court to review the court of appeals' fact-bound reasonableness determination. But there is no need to do so and every reason not to. Instead, the Court should vacate and remand to allow the court of appeals to reassess its reasonableness determination in light of this Court's intervening decisions in *Mohamed* and *Kiobel*.

1. The petition presented a general question: whether exercising jurisdiction is constitutional "based *solely* on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state." Pet. i (emphasis added). This Court can fully answer that question by accepting or rejecting petitioner's alter ego and per se reasonableness rules. Petitioner's additional fact-bound challenge to the court of appeals' overall reasonableness analysis – which asks this Court to take into account not only "the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state," *id.*, but also a variety of other case-specific considerations, such the alleged availability of other forums, *see* Petr. Br. 41-43 – falls outside the scope of the Question Presented and, in any event, is not worth this Court's time. The task would consume considerable time and resources. For example, petitioner asks this Court to evaluate whether either Argentina or Germany would provide an alternative forum for this litigation, which would

require the Court to evaluate the competing testimony of the parties' experts, as well as underlying source materials regarding Argentine and German law applicable to the unusual facts of this case. *See id.* And whatever the Court concludes likely would affect no other case but this.

2. A remand is advisable in any event. One of the factors the Ninth Circuit considered in its reasonableness analysis was California's interest in providing a forum for the litigation of federal law claims under the TVPA and ATS. Pet. App. 35a-37a. Petitioner now argues that the Court's intervening decisions in *Mohammed* and *Kiobel* have extinguished those claims. Petr. Br. 41. Where an intervening decision arguably undermines the basis of a lower court's decision, a remand is appropriate. *See, e.g.*, *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996).

In addition, if, as petitioner argues (Br. 3 n.1), the only remaining basis of federal jurisdiction in this case is supplemental jurisdiction, the district court would have discretion to decline to exercise that jurisdiction over the remaining non-federal claims. *See* BIO 15-16. In that circumstance, it would be appropriate to remand the case to the district court to allow it to exercise that discretion in the first instance, potentially obviating the need for a constitutional ruling.

### C. Petitioner's Objections To The Court Of Appeals' Reasonableness Determination Are Meritless.

In any event, petitioner's reasonableness objections are meritless.

When a plaintiff has established sufficient minimum contacts between the defendant and the forum, the defendant may yet avoid jurisdiction, but it "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The fact that litigation in the forum would be burdensome, that some other forum might be available or more convenient, or the "potential clash of the forum's law with" the interests of another sovereign is not enough. *Id*. "Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional," such as through "choice-of-law rules" or allowing the defendant to "seek a change of venue." *Id*.

Viewed in light of this standard, and the relevant reasonableness factors, petitioner has not met its burden here.

**Interests of the Forum State**. As the court of appeals recognized, states, as members of our federal system, have an important interest in enforcing applicable federal laws over those falling within the state's jurisdiction. Pet. App. 35a-37a. Accordingly, respondents agree that the continued viability of their ATS claims after *Kiobel* is an important consideration, Petr. Br. 41, one the court of appeals obviously did not consider in its pre-*Kiobel* opinion.

But even if petitioner is right that there are no longer any viable federal claims in the case, that would not be determinative. While states' interest in providing a forum is enhanced when the case involves local law or parties, *see Asahi*, 480 U.S. at 114-15, a state nonetheless retains an important interest in

adjudicating claims against those who conduct sufficient business in a state to warrant general jurisdiction in the forum. Indeed, adjudicating claims that arose elsewhere, and therefore may require application of foreign law, is the principle function of general jurisdiction.

Thus, this Court has never questioned that it is reasonable to exercise jurisdiction over a defendant who otherwise has satisfied the requirements for general jurisdiction, whether the defendant is a corporation "at home" in the forum, or an individual simply passing through, *Burnham*, 495 U.S. at 612-15 (Scalia, J.); *id*. 628-29 (Brenan, J.). At the very least, there should be a strong presumption of constitutional reasonableness when the defendant has sufficient minimum contacts with a state to warrant general jurisdiction.[21]

Accordingly, this case is clearly distinguishable from *Asahi*, in which there was no claim to general jurisdiction over the defendant. *See Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting) (noting that the defendant in *Asahi* "engaged no distributor to promote its wares" in the United States). To the contrary, the Japanese defendant's only connection to

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[21] We note again that as the case comes to the Court, petitioner has conceded that if MBUSA's contacts are appropriately taken into account, they are sufficient to establish general jurisdiction over petitioner. *See supra* 14-15. Accordingly, the Court must proceed on the assumption that minimum contacts sufficient to support general jurisdiction have been established unless the Court decides that the subsidiary's contacts are irrelevant (in which case there is no reason to consider petitioner's reasonableness arguments).

California was that it sold its valve stem assemblies to an unrelated company in Taiwan, which used the parts in assembling tires that eventually made their way to California through the stream of commerce. *Asahi,* 480 U.S. at 106-07. Here, petitioner participates substantially and directly in the California economy through its extensive control over its wholly owned subsidiary. *See* Pet. App. 31a-32a. Its activities there, and the benefits it receives from them, dwarf those of many California-based corporations (including some of petitioner's direct competitors) who are unquestionably subject to the state courts' general jurisdiction. California has a substantial and legitimate interest in ensuring that companies equally at home in the state in an economic sense are treated on equal footing in its courts.

The state's interests in providing a forum are also enhanced when, as here, the plaintiff seeks to vindicate fundamental human rights recognized by all civilized nations, whether enforced through statutes like the ATS or more general causes of action under applicable local law. *Compare Asahi*, 480 U.S. at 114-15 (California has little interest in adjudicating indemnification claim between tire manufacturer and valve stem supplied). There should be no constitutional barrier, for example, to a state exercising jurisdiction over former military officials accused of human rights abuses when those officials are found within the United States, regardless of the source of law providing the plaintiffs' relief. *Cf. Samantar v. Yousef*, 560 U.S. 305 (2010) (considering such a claim).

**Burden on the Defendant**. Ordinarily, concerns of litigation convenience are resolved through motions for transfer of venue or *forum non-conveniens*, *see Burger King*, 471 U.S. at 477, which petitioner has not yet sought. Regardless, if any foreign corporation can be expected to litigate in California, it is petitioner, a large sophisticated multi-national corporation that has previously availed itself of California courts to enforce its rights and further its interests. *See* Pet. App. 31a.

Moreover, given that petitioner insists that Argentina is an available alternative forum, the question should be whether litigation in California is more burdensome than litigation in Argentina, which is even farther away. There is no reason to believe that it is. *See id.* 39a n.18 (noting the State Department's expressions of concern about the Argentine legal system).

Nor are the alleged language difficulties so significant as to render the exercise of jurisdiction unconstitutional. *Contra* Petr. Br. 39-40. The official language of petitioner's company is English, Pet. App. 33a, and the Spanish documents and testimony would need to be translated wherever this case was litigated.

**Sovereignty of Foreign Nations**. Nor is it any invasion of German sovereignty to require petitioner – which earns nearly half its income from U.S. sales and was formed through a merger with an American company, *id.* 34a – to bear the same burdens as other American companies conducting far less business in this country, which must nonetheless submit to general jurisdiction here.

In any event, petitioner's principal claim is that Germany's sovereignty would be offended by extraterritorial application of California law. Petr. Br. 40-41. But that is precisely the kind of question this Court directed be resolved through choice of law principles, not the Due Process Clause. *Burger King*, 471 U.S. at 477.[22]

**Availability of Alternative Forums**. Petitioner faults the court of appeals for allegedly requiring petitioner "to prove that courts in Germany or Argentina were more appropriate forums than California" when, it says, *Asahi* "made clear that it is a *plaintiff's* burden to show that a more convenient forum is *not* available." Petr. Br. 42. Petitioner overreads *Asahi*, which did not directly address the distribution of burdens, 480 U.S. at 114, much less openly overrule the Court's prior holding that the defendant bears the burden of establishing unreasonableness. *See Burger King*, 471 U.S. at 477. But in any case, the court of appeals expressly put the burden on respondents. *See* Pet. App. 38a. It simply concluded that petitioners met their burden with respect to Argentina, *id*. 38a-39a, and that it did not need to resolve the various disputes between the experts with respect to Germany because, even

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[22] Although this Court in *Asahi* took into account the sovereignty interests of other nations as part of the Due Process reasonableness analysis, 480 U.S. at 115, it did not explain why foreign sovereigns' interests should play a role in implementing a U.S. constitutional provision focused on the due process rights of litigants and the "limits imposed on [American states] by their status of coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

assuming it was an available forum, the overall balance of considerations permitted jurisdiction, *id*. 41a.

Nor do petitioner's other complaints have merit. Petitioner does not dispute the Ninth Circuit's legal conclusion that a forum is not available if the plaintiffs' claims would be barred by a statute of limitations. *See* Pet. App. 39a; Petr. Br. 43-44; *see also Keeton*, 465 U.S. at 778. And it says nothing to explain why the court of appeals was wrong in finding that "[a] recent Supreme Court case in Argentina has held that human rights civil cases arising out of the Dirty War" made clear that respondents' claims would be time barred under the applicable "two-year and three-month statute of limitations." Pet. App. 38a-39a. Instead, petitioner simply quotes the district court's general conclusion that Argentina is an available forum, Petr. Br. 43, without acknowledging that neither the district court nor petitioner's expert addressed the statute of limitations issue, which arose from an Argentine Supreme Court decision that post-dated the district court proceedings. *See* Pet. App. 38a-39a, 124a-25a; J.A. 76-89.

With respect to Germany, petitioner complains about the quality of respondents' expert report, but does not engage the (quite complicated) legal issues underlying the experts' disagreement. Pet. App. 42-43a. The fact that the district court "accepted" petitioner's expert's representation that "'German law would allow a human rights action against a corporation,'" Petr. Br. 42a (quoting Pet. App. 91a), is hardly conclusive. For one thing, that assertion fails to address the various other barriers respondents and

the Ninth Circuit identified, including petitioner's amenability to service in such a suit. Pet. App. 40a. And while the district court credited petitioner's expert's overall conclusion that Germany was an available forum, it was not because the court actually evaluated the substance of the experts claims; instead, the court simply thought that petitioner's expert report was "much more thorough." *Id.* 91a. But in the absence of an evidentiary hearing at which credibility questions could be resolved, that was not a proper basis to resolve the experts' differences. *See id.* 19a.

Finally, even assuming that Germany was an available forum, that fact alone is not determinative. When a company makes itself at home in many places, taking advantage of the markets throughout our country or the world, it is reasonably subject to jurisdiction in those places even if it would also be amenable to suit in its place of incorporation or principle place of business. Thus, for example, this Court has upheld the constitutionality of tag jurisdiction over individuals physically present in a state, even though they are (virtually by definition) also subject to suit in their home state. *Burnham*, 495 U.S. at 619 (Scalia, J.); *id*. 628-29 (Brenan, J.). Corporations have no claim to better treatment.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and remanded.[23]

Respectfully submitted,

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[23] Even if the Court were to hold that California courts have no personal jurisdiction over petitioner, it should nonetheless remand to allow the court of appeals to decide whether respondents should be permitted to pursue their argument that jurisdiction is permitted under Fed. R. Civ. P. 4(k)(2), *see* Pet. App. 17a n.9, or seek a transfer to the Eastern District of Michigan, *see supra* 49 & n.20.