No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, AND THE FEDERATION OF GERMAN INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does it violate due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state?

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Amici Curiae, the Chamber of Commerce of the United States of America ("Chamber"), the National Foreign Trade Council ("NFTC") and the Federation of German Industries (*Bundesverband der Deutschen Industrie* or "BDI") respectfully submit this brief in support of the petition for a writ of *certiorari*.[1]

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their counsel or their members made any monetary contribution toward preparation or submission of this brief. Letters indicating the parties'

INTEREST OF *AMICI CURIAE*

Amici Curiae are business associations representing companies doing business across state lines and international boundaries:

- The Chamber is the world's largest business federation. It represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community.
- The NFTC is the premier business organization advocating a rules-based economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies. It represents its members' interests before all branches of Government, including this Court.
- The BDI serves as the umbrella organization for associations of industrial business and industry-related service providers in Germany and speaks for more than 100,000

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consent to the filing of this brief have been submitted to the Clerk. Counsel of record provided the required notice to the parties more than ten days before the filing deadline for this brief.

enterprises in Germany. It represents businesses that employ millions of people worldwide and has regularly sought to vindicate their interests in the courts of the United States.

Amici and their members have a keen interest in the law governing the jurisdiction of the United States courts, including the rules governing the imputation of jurisdictional contacts. Those rules directly affect *amici*'s members in several ways. As in this case, they may serve as the basis for asserting jurisdiction over the foreign parent – direct or indirect – of a United States subsidiary. Those same rules can be used by courts in one state to assert jurisdiction over a small business located in another state. They may permit jurisdiction over companies entering into distribution relationships, agency relationships, joint ventures, franchises or other forms through which different companies cooperate. Finally, those rules play a critical role on the international stage, affecting the enforceability of judgments rendered by United States courts, the extent to which foreign courts will assert jurisdiction over United States companies, and the prospects for greater legal harmonization between the United States and its important trading partners. *Amici* file this brief to vindicate these important interests.

INTRODUCTION

For more than a century, the Due Process Clause has served as an essential bulwark against assertions of personal jurisdiction over out-of-state defendants. *See Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Since this Court's decision in

International Shoe, the Clause has fulfilled this objective through the two-fold requirement that (1) the defendant have the necessary "contacts" with the forum state and (2) any exercise of jurisdiction comport with traditional notions of fair play and substantial justice. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court has consistently applied these requirements to cases involving all types of defendants, whether individual or corporate and whether foreign or domestic. *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Hanson v. Denckla*, 357 U.S. 235 (1958).

Central to this constitutional framework is the command that these requirements "must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added). Expounding on this principle in the corporate context, this Court has explained that "each [corporation's] contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). In cases where, as here, all parties admit that the out-of-state defendant's own contacts are constitutionally insufficient, *see* Pet. App. 20a, jurisdiction can be proper only if the Constitution permits imputation of another entity's contacts with the forum state to that defendant.

In *Cannon Manufacturing Company v. Cudahy Packing Company*, this Court considered whether a North Carolina court could exercise jurisdiction over a Maine corporation based upon service of the in-state agent of an Alabama corporation that was wholly owned by the Maine-based defendant. 267

U.S. 333 (1925). Such service, in the Court's view, was insufficient to establish personal jurisdiction over the Maine defendant. Acknowledging the commercial and financial control exercised by the Maine defendant over its Alabama subsidiary, the Court nonetheless concluded that the two entities were "distinct" and that the corporate separateness "though perhaps merely formal" was "real."

In *United States v. Scophony Corporation of America*, the Court considered whether the Clayton Act authorized jurisdiction over a foreign defendant based on its relationship with its subsidiaries. 333 U.S. 795 (1948). The Court stressed that it was "deal[ing] here with a problem of statutory construction, not one of constitutional import." *Id.* at 804. The Court interpreted the Clayton Act to permit jurisdiction and emphasized the "complex working arrangements … with [American subsidiaries that required] constant supervision and intervention beyond the normal exercise of shareholders' rights by the [foreign parent]." *Id.* at 816. The Court only made passing reference to *Cannon*'s constitutional holding. *Id.* at 813 n. 23.

Since *Cannon* and *Scophony*, this Court has not squarely addressed the propriety of – or standards governing – establishing personal jurisdiction by imputing one entity's contacts to another entity. *See Keeton*, 465 U.S. at 781 n. 13 ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."); *Rush*, 444 U.S. at 332 (declining to impute insurance company's contacts to insured). These sixty plus years of silence have spawned a variety of approaches in the lower courts. As to the controlling precedent, some lower courts follow *Canon*, others extend *Scophony*,

and yet others refuse to decide whether this Court has supplied a governing rule. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 178-80, 190-91 (5th ed. 2011) (discussing the competing approaches). Precedent aside, some courts such as the one below have suggested that two independent theories – labeled *alter ego* and agency – can support jurisdiction over parent corporations even though, as several other courts have recognized, neither *Cannon* nor *Scophony* offers any support for this binary approach. *See* Pet. 10-19. Even among those courts endorsing both theories, they disagree over the relevant standards, the applicable law and whether both theories are available in the parent-subsidiary context. *See id.* The result has been utter pandemonium in the case law.

This case offers an extreme example of the havoc wrought by this confusion in the case law. The Ninth Circuit has permitted plaintiffs to assert *general* jurisdiction over a foreign parent company based on the contacts of its indirectly held subsidiary and then try to hold that foreign parent accountable in United States court for the alleged conduct of an entirely different subsidiary that took place in a foreign country. The petition ably demonstrates why this case presents an especially good vehicle for resolving the above-described confusion among the lower courts. *See* Pet. at 10-20. *Amici* endorse those arguments but do not repeat them here. Instead, in this brief, *amici* explain why petition should be granted in light of the important issues presented by this case.

REASONS FOR GRANTING THE PETITION

Beyond the conflicts among the lower courts identified by Petitioner, *certiorari* should be granted for three additional reasons.

First, the imputation of jurisdictional contacts presents an important issue to the business community, both here and abroad. Businesses need clear and predictable jurisdictional rules. Such rules enable companies to manage risks, control liabilities and raise capital. Unclear and diluted standards for the imputation of jurisdictional contacts – whether in a parent/subsidiary relationship, manufacturer/distributor relationship or some other arrangement – deprive companies of that much-needed clarity and chill economic investment. These effects are especially harsh in cases such as this one where the imputation of contacts to support general jurisdiction potentially permits a company to be sued for conduct taking place anywhere around the world, even where that conduct is committed by a separate business entity.

Second, the imputation of jurisdictional contacts affects the commercial and foreign relations interests of the United States. Sweeping assertions of jurisdiction such as those countenanced by Judge Reinhardt's panel opinion discourage foreign direct investment in the United States. They also place the United States at odds with the rest of the world. Such conflicts invite retaliatory assertions of jurisdiction and frustrate any efforts at achieving international consensus toward a jurisdiction and judgments convention.

Third, certiorari should be granted to resolve conflicts exacerbated by Judge Reinhardt's panel opinion

about when an exercise of personal jurisdiction "comports with traditional notions of fair play and substantial justice." The panel's emphasis on "the existence of an alternative forum" conflicts with this Court's pronouncements (consistently heeded by other circuits) and erroneously collapses a constitutional inquiry about personal jurisdiction into a non-constitutional one about *forum non conveniens*. Moreover, the panel's treatment of the sovereign interests likewise cannot be reconciled with this Court's decisions. The panel's opinion grossly exaggerates California's interest in hearing a case between entirely foreign parties concerning conduct on foreign soil and inexcusably discounts Germany's interest in ensuring that its companies are not unfairly dragged into foreign forums for claims having nothing to do with their contacts with those forums.

I. Murky Standards Governing The Imputation Of Jurisdictional Contacts Discourage Commercial Activity.

The issues in this case lie at the intersection of civil procedure and corporate law. In both areas, businesses need clear and predictable rules. "Predictability," this Court recently explained in a unanimous opinion, "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). In the context of jurisdiction, clear and predictable rules enable parties "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Woodson*, 444 U.S. at 297. In the context of corporate law, clear and predictable rules about the separate juridical status of different business entities enable those entities to manage their liabilities, predict risks, raise

capital and enter into mutually beneficial business relationships. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *Anderson v. Abbott*, 321 U.S. 349 (1944); *United Elec. Radio & Machine Workers of Amer. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992) (Selya, J., joined by Breyer, C.J., and Cyr, J.). *See generally* Phillip I. Blumberg, *The Law of Corporate Groups*: Procedural Problems in the Law of Parent and Subsidiary Corporations §1.01.1 (1983). By contrast, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 130 S. Ct. at 1193.

The decision below represents an especially egregious example of a "complex jurisdictional test." Judge Reinhardt's panel opinion trains on Daimler AG's alleged "right to control" the indirectly held subsidiary that functioned as its distributor. Pet. App. 25a-29a.[2] To support its conclusion that Daimler AG exercises this "right to control," it relies principally on the distribution agreement between the two companies. Yet Judge Reinhardt's panel opinion fails to explain what features of a given distribution agreement will subject any out-of-state manufacturer to general jurisdiction in its distributor's courts. Indeed, Judge Reinhardt's panel opinion expressly disavows any attempt to articulate a bright-line test, favoring instead a murky "case-by-case common law method for refining" the test in the future. Pet. App. 23a n. 12.

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[2] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the initial panel opinion that correctly held the Constitution did not permit the exercise of personal jurisdiction.

This foggy standard set by the panel opinion threatens an important instrument of international and interstate exchange. Distribution agreements are a routine part of international business transactions. *See, e.g., Rasmussen v. General Motors Corp.*, 803 N.W.2d 623 (Wis. 2011); *Estate of Thompson v. Toyota Motor Corp. Worldwide*, 535 F.3d 357 (6th Cir. 2008); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985). In such relationships, as in this case, both title and risk pass from the manufacturer to the downstream distributor. *See* Pet. App. 49a (noting that Daimler AG "sells its vehicles … to MBUSA in Germany, where title passes" to MBUSA). The distributor then passes the good on to either further regional distributors or end-use customers. The entire point of such an arrangement is to enable all parties to manage their risks and potential liabilities. The "case-by-case common law method" utilized in Judge Reinhardt's panel opinion throws the predictability of those risk-allocation relationships into doubt by subjecting manufacturers to the threat of general jurisdiction wherever they maintain distribution relationships.

The impact is not limited to distributorships. Courts may impute jurisdictional contacts in a variety of business relationships. *See, e.g., Stripling v. Jordan Production Co.*, 234 F.3d 863 (5th Cir. 2000) (upholding jurisdiction over out-of-state defendant based on its intent to purchase stake in another defendant's business venture); *Richard Knorr Intern. Ltd. v. Geostar, Inc.*, 2010 WL 1325641 (N.D. Ill. 2010) (upholding personal jurisdiction over out-of-state defendant based on activities of its independent contractor); *Murphy v. Cuomo*, 913 F. Supp. 671 (N.D.N.Y. 1996) (upholding jurisdiction over out-of-state defendant

based on its relationship with separate company that marketed its products). Until this Court clarifies the law in this area, these decisions leave companies in a haze about what commercial relationships, whether with a subsidiary, distributor or other business partner, will result in the imputation of one entity's jurisdictional contacts to another entity.

Nor is the impact limited to international business relationships. Putting to one side the facts of the case, at bottom Judge Reinhardt's panel opinion held that the contacts of a corporation may be imputed to its indirect owner on the basis of the importance of the company's activities and the shareholder's right to control the company's operations. Nothing in Judge Reinhardt's panel opinion confines its holding to the foreign parent/domestic subsidiary context, and courts have relied upon theories of jurisdiction by imputation in purely domestic settings as well. *See, e.g., Alderson v. Southern Co.*, 747 N.E.2d 926, 944 (Ill. App. Ct. 2001) (relying on agency principles to pierce from local power plant through four layers of ownership to domestic, out-of-state defendant); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) (exercising personal jurisdiction over affiliated Nevada and California businesses based on use of an independent contractor in New York).

This extension of general personal jurisdiction can be especially devastating for small businesses. Small businesses represent the lifeblood of the United States economy. U.S. Small Business Administration, Office of Advocacy, The Small Business Economy: A Report to the President (2009). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real

gross domestic product (GDP), as well as a significant share of innovations." *Id.* at 1. The lax standard announced in Judge Reinhardt's panel opinion could equally be applied to assert jurisdiction over small businesses based on the contacts of their distributors or agents. Alternatively, it could be used to assert jurisdiction over their individual owners who obviously exert a great deal of "control" over the business. Several federal courts have done just that – considering, and in some cases relying upon, theories of jurisdictional imputation in cases against individual owners of such small businesses. *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 523-24 (9th Cir. 1989); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1459-60 (Fed. Cir. 1997); *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 652-54 (5th Cir. 2002). Unless promptly corrected, the expansive assertion of judicial jurisdiction represented by Judge Reinhardt's panel opinion could exacerbate this trend and force small business owners to choose between abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states.

II. The Imputation Of Contacts To Support General Jurisdiction Over Foreign Corporations Discourages Foreign Investment In The United States And Undermines United States Foreign Relations.

Just recently, the Solicitor General explained how exotic theories of general jurisdiction over foreign defendants can interfere with the foreign commercial and diplomatic relations of the United States. Assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full

benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tire Operations, S.A. v. Brown, No. 10-76, at 12. Such assertions also have prompted "foreign governments' objections" and "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* The watered-down standards articulated by Judge Reinhardt's panel opinion revive the very dangers against which the Solicitor General warned.

A. Foreign Investment

Foreign direct investment plays a vital role in the health of the United States economy. *See* U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 2 (2008) ("Litigation Environment"). Such investment, as President Obama recently explained, "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities." Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy. The litigation environment critically influences a foreign company's decision to invest in the United States. Litigation Environment at 7. Allowing personal jurisdiction on the basis of a subsidiary's contacts enhances the costs of the United States litigation environment and encourages foreign companies to invest their capital elsewhere.

The disincentive on foreign direct investment is especially pernicious where a court, like the one below, has determined that a foreign defendant is

subject to *general* jurisdiction based on its relationship with a subsidiary or distributor. Under the logic of Judge Reinhardt's panel opinion, any party anywhere in the world could conceivably attempt to assert jurisdiction over Daimler AG (or any other foreign corporation similarly organized) based on claims that have absolutely nothing to do with the United States or California. Regrettably, this is not an isolated instance. Several foreign companies now labor under findings of general jurisdiction based not on their own contacts but, instead, on their alleged relationship with some domestic business partner. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (upholding general personal jurisdiction over foreign corporation based on activities of separate New York Investor Relations Office); *King County v. IKB Deutsche Industriebank AG*, 712 F. Supp. 2d 104 (S.D.N.Y. 2010) (upholding general personal jurisdiction over German bank based on relationship with its wholly owned New York subsidiary); *In re Chocolate Confectionary Antitrust Litig.*, 641 F. Supp. 2d 367 (M.D. Pa. 2009) (upholding general personal jurisdiction over British companies based on contacts of domestic subsidiary); *Synopsis, Inc. v. Ricoh Co.*, 343 F. Supp. 2d 883 (N.D. Cal. 2003) (upholding general jurisdiction over Japanese company based on in-forum activities of its sales and marketing units); *Japax, Inc. v. Sodick*, 542 N.E.2d 792 (Ill. App. Ct. 1989) (same); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 376 (S.D.N.Y. 2002) (upholding general jurisdiction over German company based on its relationship with its wholly owned domestic subsidiary); *Newport Components, Inc. v. NEC Home Electronics, Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987) (finding *prima facie* evidence to support general jurisdiction over Japanese

corporation based on its relationship with California subsidiary).

Theories of imputation are not limited to the assertions of jurisdiction by the state where the subsidiary or agent is incorporated. Other states, where the agent or subsidiary does business, may assert jurisdiction over the foreign principal or parent through theories of imputation. *See, e.g., In re Phenylpropanolamine (PPA) Products Liability Litig.*, 344 F. Supp. 2d 686 (W.D. Wash. 2003) (upholding personal jurisdiction under Oregon law over Swiss corporation based on the conduct of its Delaware subsidiary headquartered in New Jersey); *Gantzert v. Holz-Her U.S., Inc.*, 1994 WL 532134 (N.D. Ill. 1994) (upholding personal jurisdiction in Illinois over a German corporation based on the conduct of its North Carolina subsidiary); *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wisc. 1983) (upholding personal jurisdiction in Wisconsin over Japanese company based on the conduct of its California subsidiary); *Cascade Steel Rolling Mills Inc. v. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980) (upholding personal jurisdiction in Oregon over Japanese company based on conduct of its New York subsidiary). Thus, not only are foreign corporations at risk of personal jurisdiction in the "home" of their subsidiaries, they ultimately might be answerable in any state where their subsidiaries do business. These potentially boundless extensions of jurisdiction by imputation further threaten to chill foreign direct investment in the United States.

B. Foreign Relations

The United States largely stands alone in permitting theories of jurisdiction by imputation. *See* Brian Pearce, Note, *The Comity Doctrine as a Barrier to*

Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 Stan. J. Int'l L. 525, 534 (1994). The aggressive expansion of those theories, exemplified by Judge Reinhardt's panel opinion, consequently places the United States further at odds with the views of other nations, including its important trading partners. Unless corrected, these views invite retaliation by foreign nations and frustrate important efforts at harmonization in the area of jurisdiction and judgment enforcement.

As the judges dissenting from rehearing *en banc* correctly recognized, sweeping notions of jurisdiction by imputation threaten United States companies with retaliatory assertions of judicial jurisdiction by foreign courts. Pet. App. 144a. In most foreign countries, the notion of jurisdiction by imputation would be unfathomable. *See, e.g.*, European Council Regulation 44/2001; Jose Engracia Antunes, Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law 240-41 (1994). Despite the unfamiliarity of the principle, several countries have enacted "retaliatory jurisdictional laws." Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Under these retaliatory laws, the courts of these countries may exercise jurisdiction over foreign persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." *Id.* Applied to the rule announced by Judge Reinhardt's panel opinion, these laws would allow foreign courts to assert jurisdiction over United States companies – and only United States companies – based simply on the availability of jurisdiction over their subsidiaries or other agents. Moreover, because Judge Reinhardt's panel opinion permits jurisdiction over claims completely unrelated

to a party's relationship with the forum, such punitive assertions of judicial jurisdictions by foreign courts would be virtually boundless. Such an outcome would undermine the export of United States products and undercut the foreign commercial interests of the United States.

Such risks of retaliatory jurisdiction are more than hypothetical. Other nations, including close trading partners of the United States, have engaged in similar retaliation in response to aggressive assertions of prescriptive jurisdiction (such as in the antitrust context). Perhaps most famously, the United Kingdom enacted clawback statutes entitling United Kingdom citizens to recover damages equivalent to the amounts recovered by plaintiffs in suits before United States courts. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 679-83. Similarly, in the discovery context, nations such as France have enacted statutes that punish compliance with discovery orders of United States courts. *Id.* at 969-73. Unless corrected, aggressive assertions of jurisdiction by imputation invite similar retaliation in the context of judicial jurisdiction.

Not only do theories of jurisdiction by imputation invite retaliation, they also frustrate more general efforts to achieve any harmonization between the United States and its trading partners in this area of the law. The United States presently is not a party to any bilateral or multilateral convention governing jurisdiction or judgment enforcement. *Id.* at 1081-85. Though diplomats spent the better part of the last decade attempting to achieve some degree of consensus, lack of agreement on common principles of jurisdiction presented a central stumbling block. *See* Brief for the United States as *Amicus Curiae* Sup-

porting Petitioners in *Goodyear Dunlop Tire Operations, S.A. v. Brown*, No. 10-76, at 12. Sweeping theories of jurisdiction by imputation, such as that approved by Judge Reinhardt's panel opinion, do not help matters. They widen the chasm between the United States and its trading partners, further complicating any effort to achieve consensus in this area of the law. *See Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 115 (1987) (instructing courts to consider the "Federal interest in Government's foreign relations policies."); *Howe v. Goldcorp, Inc.,* 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.) ("The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes.").

III. The Ninth Circuit's Standard For Determining Whether An Exercise Of Jurisdiction Comports With "Traditional Notions Of Fair Play And Substantial Justice" Conflicts With The Decisions Of This Court And Other Circuits.

After concluding that Daimler AG, through its subsidiary, had constitutionally sufficient minimum contacts with California, Judge Reinhardt's panel opinion assessed the reasonableness of that assertion of jurisdiction under the Due Process Clause by reference to a seven-factor "balancing" test. That test, especially as applied in Judge Reinhardt's panel opinion, conflicts both with clear Supreme Court

precedent and the views of other federal appellate courts.

Judge Reinhardt's panel opinion instructs courts to "weigh seven factors" including

> the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiffs; and the existence of an alternative forum. Pet. App. 31a.

The problem with this seven-factor test is that it contradicts this Court's commands. The critical opinion here is *Asahi*. There, this Court explained the proper test for reasonableness:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiffs' interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

480 U.S. at 113 (citation and internal quotations omitted). Consistent with this clear guidance, courts in other circuits have found that the exercise of jurisdiction over a nonresident parent based on the activities of its subsidiary would be unreasonable. *See, e.g., Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990). Judge Reinhardt's panel opinion deviates from this consistent line of precedent in two respects – (1) its

emphasis on the existence of an adequate alternative forum and (2) its weighing of the respective sovereign interests.

A. Adequate Alternative Forum

The roots of the panel's flawed approach lie in the Ninth Circuit's continued adherence to stale precedents. The seven-factor test articulated by Judge Reinhardt traces to the Ninth Circuit's 1981 decision in *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). Tellingly, while *Marina Salina* cited supporting authority for most of the factors in its seven-factor test, it cited absolutely no authority for the proposition that the "existence of an alternative forum" was relevant to the personal jurisdiction analysis. *See Marina Salina*, 649 F.2d at 1270. That decision obviously predated this Court's decision in *Asahi*. Yet no decision of the Ninth Circuit, including those immediately after *Asahi*, appeared to consider explicitly whether *Asahi*'s formulation of the "reasonableness" test required reconsideration of the *Marina Salina* formulation. *See, e.g., Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988). While a few hew more closely to the *Asahi* formulation, *see, e.g., CARIB v. Dillon*, 976 F.2d 596, 599 (9th Cir. 1992), most decisions, such as Judge Reinhardt's panel opinion, simply parrot the *Marina Salina* formulation. As this case exemplifies, that flaw in the Ninth Circuit precedent compounds the impact of its flawed theory of jurisdiction by imputation and enhances the risk that a court will assert personal jurisdiction in a manner inconsistent with the Constitution.

The panel's emphasis on "the existence of an alternative forum" collapses two distinct inquiries – personal jurisdiction and *forum non conveniens*. *See*

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1175 n. 5 (9th Cir. 2006) (acknowledging that the "alternative forum" factor of the Ninth Circuit's reasonableness analysis "is at the heart of the *forum non conveniens* analysis"). Personal jurisdiction is a constitutional doctrine concerned with limits on a state's sovereign power and considerations of fairness to a nonresident defendant. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). By contrast, *forum non conveniens* is a prudential doctrine of federal common law concerned with identifying the most convenient forum for resolving a dispute. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). By allowing the "existence of an alternative forum" to influence the jurisdictional inquiry, Judge Reinhardt's panel opinion allows a constitutional determination to turn on the answer to a nonconstitutional question.

This case illustrates the pitfalls of collapsing the two inquiries. Judge Reinhardt's panel opinion stresses the "conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed." Pet. App. 40a. Under the *forum non conveniens* doctrine, those concerns could easily be allayed by conditioning dismissal on the defendant's waiver of any limitations defense. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 428, 449-52. By contrast, the personal jurisdiction doctrine does not permit the same degree of flexibility. Consequently, any consideration of the "availability of an alternative forum" at the jurisdictional stage of a case necessarily focuses on the most pessimistic view about the foreign forum and skews the inquiry in favor of retaining jurisdiction.

B. Interest Balancing

Apart from the Ninth Circuit's flawed grafting of *forum non conveniens* principles onto personal jurisdiction law, the panel's treatment of the respective sovereign interests in this case conflicts irreconcilably with this Court's decision in *Asahi*.

First, Judge Reinhardt's panel opinion overstates the forum state interest. In *Asahi*, this Court found that, after the plaintiff had settled his claims, California had a minimal interest in adjudicating the leftover impleader action between a Taiwanese and Japanese company. 480 U.S. at 115. Here, as the lower court acknowledged, "the events at issue did not take place in California … [and] the plaintiffs are not California residents." Pet. App. 35a. Nonetheless, Judge Reinhardt's panel opinion found that California had "a strong interest in adjudicating and redressing international human rights abuses." Pet. App. 36a. That argument cannot survive *Asahi*. If a state lacks a constitutionally sufficient interest to adjudicate a products liability case predicated on injury to its *own* resident once that resident has settled the matter, then it can hardly have a weightier interest in resolving disputes over alleged injuries to foreign parties based on conduct that never occurred in the state.

Second, Judge Reinhardt's panel opinion understates the interests of foreign states, particularly Germany. *Asahi* highlighted the importance of foreign states' interests in cases like this one involving assertions of personal jurisdiction over foreign defendants. 480 U.S. at 115. Those interests should weigh especially heavily in a case such as this one where (unlike *Asahi*) the basis for jurisdiction bears absolutely no relationship to the alleged conduct giving rise to the

claim. Instead of treating Germany's interests with "great care," Judge Reinhardt's panel opinion gave them short shrift. While acknowledging that "German courts have expressed some concern that this case may impinge upon Germany sovereignty," Pet. App. 34a, the panel opinion promptly discounts those same concerns. The panel found that Germany's sovereignty interests "weighed less heavily" in light of the alleged benefits that Daimler AG derived from the United States market. *Id.* This analysis does not respect the balance conducted by this Court in *Asahi*. In *Asahi*, the Japanese corporation also derived benefits from the California market, yet this Court concluded that those benefits did not outweigh the "procedural and substantive interests" of Japan. Proper consideration of the *Asahi* factors, rather than the Ninth Circuit's stale pre-*Asahi* methodology, compels the same result here.

At bottom, Judge Reinhardt's panel opinion represents the culmination of a circuit precedent that has drifted too far from the standards set forth by this Court. Its confused treatment of *forum non conveniens* principles and flawed weighing of sovereign interests unfairly tilts the scales against defendants.

CONCLUSION

For the foregoing reasons, in addition to those offered by Petitioner, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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