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 *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF RESPONDENTS

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QUESTIONS ADDRESSED BY AMICUS CURIAE

The decision below held that in the personal jurisdiction context – as in virtually every other – an agent's acts committed on its principal's behalf can be attributed to the principal. Petitioner challenges that conclusion. *Amicus* herein demonstrates that:

1. Both the current conception and original understanding of due process permit attribution of jurisdictional contacts based on agency.

2. There is not now and never has been a constitutional right to corporate separateness, and thus there is no special, constitutional immunity from agency principles where a company's agent happens to be its subsidiary.

3. In assessing whether attribution is permitted, a foreign defendant is entitled to no more (and, if anything, less) due process protection than a domestic defendant. Petitioner's claim that jurisdiction will create diplomatic or economic difficulties does not raise a constitutional issue and cannot be squared with the fact that many countries exercise jurisdiction on grounds similar to, or broader than, those at issue here.

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INTEREST OF *AMICUS CURIAE*[1]

EarthRights International (ERI) is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide, including abuses in which corporations are complicit.

Amicus therefore has an interest in ensuring that this Court does not create new, unwarranted constitutional limits on the scope of personal jurisdiction or a previously unrecognized constitutional right to corporate separateness, contrary to ordinary conceptions of due process, the fundamental notion that a corporation must act through agents and the understanding of the due process clauses' Framers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below found personal jurisdiction based on Petitioner's agent's extensive contacts with the forum. Thus, the panel applied the hornbook, centuries-old understanding that an agent's acts on its principal's behalf can be attributed to the principal. This sensible approach conforms to the contemporary and original understanding of the due process clauses and the practice of other nations.

Petitioners below did not dispute that its alleged agent's contacts with the forum are *sufficient* for personal jurisdiction. Pet. App. at 21a, n.11. In

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution to this brief. The parties have given blanket consent to the filing of *amicus* briefs, through consent letters filed with the Court.

assessing whether those contacts may properly be *attributed* to defendants on an agency theory, the Court required Plaintiffs to show (1) "that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," or "alternatively [it would do so] through a new representative," and (2) "an element of control." *Id.* at 21a-22a (internal quotations and emphasis omitted).

This standard is tailored to personal jurisdiction. As the court noted, "[t]he purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence. . . a well-established basis for general jurisdiction." *Id.* at 23a (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 318 (1945)).

Petitioner claims attribution cannot be based on agency. But jurisdiction here fits comfortably within traditional notions of fairness. Attributing the contacts of an agent to the parent is consistent with the traditional principle that corporations, lacking corporeal existence, can only act through, and are responsible for the actions of, their agents. There is no constitutional bar to attributing to Petitioner the contacts of its subsidiary that conducted Petitioner's business in California.

It makes no difference that the agent here is Petitioner's subsidiary. A subsidiary is on the same footing as any other company; it can serve as a parent's agent, irrespective of whether the parent has

ignored corporate formalities such that the subsidiary is also the parent's alter-ego. Ownership does not immunize the principal from agency rules.

Even if Petitioner could show that in some contexts, the acts of a wholly-owned subsidiary that serves as its parent's agent should not be attributable to its parent based on agency, it could not show, as it must, that corporate separateness is a *constitutional right*. This Court has already rejected any such notion. *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980). And it cannot be reconciled with the original understanding of due process, since, at the passage of the Fifth and Fourteenth Amendments, a corporation could not own another corporation. Nothing in subsequent due process jurisprudence suggests that operating a unified business as legally distinct entities has morphed from a universally prohibited act into a due process right.

Indeed, while state and federal law often recognize a parent as separate from its subsidiary, they frequently do not. Creating such a right for the first time here would threaten existing law in fields as diverse as tax, ERISA, labor and anti-trust.

Although Petitioner ignores the potentially far-reaching effects of its position, it forecasts dire consequences – a flood of litigation and the flight of foreign corporations doing business with the United States – if personal jurisdiction may be based on the contacts of a subsidiary/agent. But the standard Petitioner challenges has been used for decades, and Petitioner presents no evidence of the harms it now predicts.

International practice confirms the fairness of exercising jurisdiction based upon the contacts of agent/subsidiaries acting on the parent's behalf. The fact that other nations, including Germany, exercise similar and sometimes broader jurisdiction refutes any claim that jurisdiction is out of step with international practice or that jurisdiction will chill investment in the United States or lead other nations to "retaliate" against us.

Petitioner's "reasonableness" arguments fall largely outside the scope of this brief. Nonetheless, its erroneous notion that applying foreign or state law to claims arising abroad interferes with other nations' sovereignty and thus implicates due process has such potentially far reaching effects that we address it here.

Applying another nation's law obviously does not infringe upon that nation's sovereignty. And this Court has expressly rejected the idea that applying forum law does so. Whether forum law applies at all is a choice-of-law question. This Court should decline Petitioner's invitation to create new constitutional limits that would have unforeseeable and potentially widespread impacts on established state choice-of-law rules.

ARGUMENT

I. Agency is a proper basis for evaluating personal jurisdiction.

A. This Court has already held that the contacts of an agent may be attributed to the principal.

Agency is central to a personal jurisdiction analysis. In *International Shoe Co. v. Washington*, this Court held that, in assessing a corporation's contacts with the state, courts must consider the "activities of the corporation's agent within the state." 326 U.S. 310, 316-17 (1945). Since "the corporate personality is a fiction," a corporation's "presence" in a jurisdiction "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* at 316.

Petitioner concedes that an agent's contacts are relevant to specific jurisdiction, but claims that courts may not consider those contacts in analyzing general jurisdiction. Pet. at 24-25. There is no basis for such an artificial distinction. The above-quoted language from *International Shoe* on its face applies equally to general jurisdiction. The Court spoke in terms of "presence," which has always been the basis for general jurisdiction. And the nature of a corporation does not change according to the type of jurisdiction invoked.

Perkins v. Benguet Consol. Mining Co. confirms that *International Shoe* applies to general jurisdiction. There, this Court noted that the prior understanding of due process – which precluded state officials from accepting service over foreign corporations *in cases involving obligations arising*

outside of the forum – was "modified . . . particularly in *International Shoe.*" 342 U.S. 437, 444 (1952). Indeed, *Perkins* expressly held that the appropriate considerations for general jurisdiction mirror those for specific jurisdiction detailed in *International Shoe, id.* at 445-46 (citing 326 U.S. at 317-20), and applied those tests to general jurisdiction. *Id.* at 446-47.

Of course, the fact that the same contacts are *relevant* to both specific and general jurisdiction does not mean that contacts *sufficient* for specific jurisdiction are necessarily so for general jurisdiction. While the former can involve "single or occasional acts," the latter requires contacts that are "continuous and systematic." *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851, 2853-54 (2011). But the types of contacts that can be *considered* do not differ by the type of jurisdiction asserted.

Consistent with the recognition in *International Shoe* that corporations must act through their agents, the *only* connection in *Perkins* between the forum and the defendant was that a corporate agent conducted corporate business in the state. The mining company at issue was foreign, and all of its operations were located in the Philippines. 342 U.S. at 439, 447. During Japan's occupation of the Philippines in the Second World War, the president of the company discharged his corporate duties from Ohio. *Id.* at 447-48. Thus, the contacts found sufficient in *Perkins* were not that the company was incorporated or located or did its mining business in Ohio, but rather that an *agent* of the company acted there on the company's behalf.

Since the company was dormant, its agent's actions constituted essentially all of the company's activity. *Id.* at 447. But *Perkins* does not suggest such exclusivity is required. *See id.* at 447-48. And, *Perkins* considered the importance to the company of the forum contacts in determining whether those contacts were *sufficient*, *see id.* at 447-48 – a question not presented here. Resp. Br. at 12. It did not find importance to be an aspect of the prior question of whether the agent's acts are *relevant* and thus may be attributed to the parent at all. 342 U.S. at 447-48. Clearly, they may.[2]

B. The law has always understood that corporations must act through agents.

Agents and agency liability are part and parcel of the entire idea of a corporation. From the beginning of our law – indeed the beginning of corporate law – it has been recognized that corporations cannot act but through agents and are responsible for their agents' acts. History therefore confirms this Court's recognition in *International Shoe* that attributing the contacts of an agent to the principal complies with "traditional notions of fair play and substantial justice," 326 U.S. at 316-17 (internal quotations omitted), and shows that doing

[2] In any event, the court below required that the contact be "important" to the defendant in order for it to be relevant. Pet. App. at 21a-22a. The United States criticizes the panel for relying on importance, U.S. Br. at 32-33, but simultaneously claims jurisdiction should be assessed by comparing the contacts with California to those with the Petitioner's home forum, a different importance standard. *Id.* at 17. The panel's measure of importance is more than sufficient to ensure that attributing the contacts to Petitioner is not fundamentally unfair.

so is consistent with the original understanding of the due process clauses.

Corporate bodies have been recognized in law at least as far back as 533 A.D., in the Institutes of Justinian and the related Digests. Horace La Fayette Wilgus, 1 *Cases on the General Principles of the Law of Private Corporations*, 73 (1902). Even then, the law considered corporations to be "fictitious persons" that cannot act but through agents. *Id.* (discussing Digest of Justinian Vol 1. Section 3,4,1,1, and noting "the corporate body, as such, [could] sue and be sued, receive or part with property, bind itself or bind others, *through some agent or syndic who acts in the name of the whole*, just as any individual might act for himself" (emphasis added)).

That conception continued, such that over a thousand years later, Lord Coke, in his seminal opinion in the *Case of Sutton's Hospital,* noted that a corporation "is invisible, immortal, and rests only in intendment and consideration of law." (1613, K. B.) 10 Co. Rep. 1a at p. 32b; *see also* William Blackstone, I Commentaries on the Laws of England 476-77 (1765); W. S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L. J. 382, 387 (1922). Our law adopted that understanding. Thus, *Trs. of Dartmouth College v. Woodward* echoes Coke and Blackstone: "[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." 17 U.S. (4 Wheat.) 518, 636 (1819).

Although corporations are artificial legal persons, courts "have always been prepared to hold that a corporation is as capable of being held liable as a natural person." Holdsworth, *English Corporation*

Law at 388. And consistent with the law going back to Justinian, it was understood at the time the due process clauses were adopted that corporations could not act directly, but instead act through agents. *See e.g., Randel v. President, Directors & Co. of Chesapeake & Delaware Canal*, 1 Del. (1 Harr.) 233, 271 (1833) ("[A] corporation, cannot act of itself, but must act through its agents."); *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N.J.L. 57, 60-61 (N.J. Sup. Ct. 1855) ("[A]corporation acts nowhere, except by its officers and agents.").

Because corporate acts occur through agents, the corporation was held responsible under agency principles.[3] Thus, in the early case of *Gray v. President*, Judge Sedgwick noted that the principle that masters are responsible for the acts of their agents while acting under the authority delegated to them "has been so frequently recognized" that citation to authorities was "superfluous." 3 Mass. 364, 385 (1807). Further noting that "in innumerable instances, [corporations] cannot act but by their agents," he concluded that "[i]n no case is th[e] principle [of agency liability] of so much importance as in the relation of corporations to their servants." *Id.*

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[3] *See e.g., Chestnut Hill Springhouse Tpk. Co. v. Rutter,* 4 Serg. & Rawle 6, 17 (Pa. 1818) (corporation liable for its servants' trespass because corporation is responsible in the same manner as an individual for agent's acts); *Moore v. Fitchburg R. Corp.*, 70 Mass. 465, 465 (1855) (railroad corporation liable for assault and battery by officer); *see also* J. Grant, *A practical treatise on the law of corporations in general*, 278 (1854) (noting that corporation is liable for the tortious act of agent done in the course of ordinary service).

C. Courts have long asserted jurisdiction over corporations based on agency.

As the activities of corporations began to cross state lines through the actions of their agents, courts responded by recognizing that a corporation could manifest its presence in another state through the acts of its agents doing business on its behalf.

"[T]he fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168-170 (1939).

By 1856, this Court held that although a corporation "existing only by virtue of a law" of one state "cannot be deemed to pass personally beyond the limits of that state. . . it does not necessarily follow that a valid judgment could be recovered against it only in that State." *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1856); *see also R.R. Co. v. Koontz*, 104 U.S. 5, 10 (1881) (holding Maryland company was properly sued in Virginia for doing business through a franchise there, noting it is "well settled" that a corporation of one State doing business in another can be sued where its business is done) (collecting authorities); *R.R. Co. v. Harris*, 79 U.S. 65, 83-84 (1871) (jurisdiction in District of Columbia proper in suit against Maryland corporation on cause of action arising in Virginia).

Thus, in *Barrow S.S. Co. v. Kane*, this Court held that a New York federal court properly exercised jurisdiction over a British corporation sued by a New Jersey resident for a tort in Ireland. 170 U.S. 100 (1898). The Court explained that "a corporation of one

state, lawfully doing business in another state, and summoned in an action in the latter state by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought," even when the cause of action arose in another jurisdiction. *Id.* at 109. The defendant company was deemed to have been doing business through a firm that acted as its "general agents therein, managing the affairs of the said company within said city." *Id.* at 101, 105.[4]

Recognizing that the powers of corporations are "world wide" and that "for all practical purposes [corporations] may exist and act everywhere," the court in *Moulin* similarly found that although corporations were the creatures of the states in which they were incorporated, this "principle would not be held to apply to a corporation which did not confine its business within the state by which it was chartered." 25 N.J.L. at 60. Accordingly, the court held that a corporation that transacts business through agents in a foreign jurisdiction may be sued in that jurisdiction. *Id.*

In sum, although corporations were considered to be creatures of the states in which they were chartered or incorporated, courts understood that corporations could and did conduct business outside of those states through agents. Liability or jurisdiction could be found on that basis.

* * *

[4] Although the firm was the defendant's agent for purposes of conducting its steamship business, it was not designated as defendant's agent for service of process. *See id.* at 104.

Given that agency is an ordinary means of attribution, and in light of the history and nature of corporations, such attribution does not offend fundamental notions of fairness or due process, nor does it create unpredictability for corporations and investors.

II. Corporate parents have no special, let alone constitutional, immunity from agency principles.

According to Petitioner, courts may attribute the contacts of a subsidiary to the parent based *only* on veil-piercing, and cannot do so where the subsidiary is the parent's agent. Pet. Br. at 11-12, 24. Petitioner argues that "corporate separateness is deeply rooted in American law and business." *Id.* at 11. But while that is true as far as it goes, it does not go nearly far enough. Petitioner's argument also requires that the Court accept two additional propositions, both of which are wrong.

First, Petitioners must show that corporate separateness overcomes the "deeply rooted" principle that a corporation acts through agents and that those acts are attributable to the company. But the agency principle is, if anything, more firmly entrenched than any protection for corporate separateness. *See* Section I.B., *supra*; Section II.B., *infra*; U.S. Br. at 21 (noting that at passage of Fourteenth Amendment, limited liability was not established in substantive law) (collecting authorities); *accord* Resp. Br. at 33-34.[5]

[5] *See generally Meyer v. Holley*, 537 U.S. 280, 285 (2003) (holding that "[i]t is well established" that traditional vicarious liability rules make principals liable for acts of their agents in the scope of their authority).

More importantly, corporate separateness does not trump agency; agency principles apply even when the agent is a subsidiary.

Second, Petitioner's burden here is to demonstrate not just a principle of American law, but a *constitutional right*. This Court, however, has already rejected the claim that there is a due process right to corporate separateness. Indeed, at the time of the framing of the due process clauses, corporations were not allowed to own other corporations.

Thus, there is no warrant for this Court to pick one "deeply-rooted" doctrine (corporate separateness), find, contrary to existing attribution principles, that it excludes another, equally "deeply-rooted" doctrine (agency), and then elevate the first principle and the new exclusion rule into a never-before-recognized constitutional right.

A. Agency is distinct from alter-ego; notions of corporate separateness do not immunize parents from attribution of their agents' acts.

Even assuming for the moment that there is a constitutional right to corporate separateness, it would not preclude attribution based on agency. Agency and alter-ego are two separate doctrines. Just as a corporation can be an agent of another, unrelated corporation, so too can a subsidiary can be the agent of its parent, even if they are not alter-egos. *E.g. Royal Indus. v. Kraft Foods*, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996); *Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1487 n.19 (C.D. Ill. 1996); *Kissun v. Humana*, *Inc.*, 479 S.E.2d 751, 753 (Ga. 1997); *Northern Natural Gas Co. v. Superior Court*, 64 Cal. App. 3d 983, 994

(1976). The subsidiary/agent's actions are attributed to the principal as in any other agency relationship; the parent/principal cannot escape attribution just because it owns its agent's stock. *E.g. Royal Indus.*, 926 F. Supp. at 412-13 (citing Restatement (Second) of Agency §14M & Appendix, Reporter's Notes at 68 (1958) (distinguishing liability imposed on parent because of the existence of an agency relationship from cases in which the corporate veil of the subsidiary is pierced)).

Petitioner's proposed right to corporate separateness would not implicate agency in any event because, unlike veil-piercing, agency does not treat the parent and the principal as a single entity; rather agency preserves the subsidiary's separate existence. *E.g. Northern Natural Gas Co.*, 64 Cal. App. 3d at 994. An agent, subsidiary or not, is a separate entity acting on the principal's behalf.

Petitioner's claim that ownership somehow immunizes it from ordinary agency principles defies not only this established law, but common-sense. To be sure, mere ownership standing alone is insufficient for attribution. But where a corporation wholly owns its agent, there is an additional tie between the two beyond agency, and thus, if anything, even more reason to find the agent's contacts attributable to the principal. It is a strange arithmetic that Petitioner posits, wherein one plus one equals zero.

B. There is no constitutional right to corporate separateness.

Corporations owning other corporations that carry on their business may be treated as a single entity for due process purposes, even if the subsidiary

is not the parent's alter-ego. This Court has so held in the taxation context. *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980); *see* Resp. Br. at 25-26. And such treatment fully accords with the understanding of corporate personality at the time of the passage of both the Fifth and Fourteenth Amendments, when corporations were not allowed to own other corporations. It is also consistent with the fact that federal and state law often refuse to treat parents as distinct from their subsidiaries.

A corporation's decision to separately incorporate a subsidiary may have any number of legal implications, but it simply does not create a constitutional requirement that the two entities be treated as separate.

1. This Court has rejected the notion that due process requires separate treatment.

In *Mobil Oil*, this Court considered Vermont's tax on companies doing business within the state, based upon a share of their total income earned inside or outside the state that was proportional to the business conducted in-state. 445 U.S. at 429. According to Mobil, due process required that dividends from a "foreign source" – subsidiaries that were not incorporated in, did no business in and were not managed from Vermont – must be excluded from the calculation of total income because they lacked a sufficient nexus to Mobil's business in Vermont. *Id.* at 428, 434, 437. This Court however, found there was no due process problem because, irrespective of corporate formalities, Vermont's tax treated a

"functionally integrated enterprise" as a unitary business based on economic realities. *Id.* at 440-41.

Mobil Oil therefore refutes Petitioner's claim that corporate separateness is a constitutional right. Pet. Br. at 20-21. Indeed, it shows that the "sufficiently important" test is permitted by the due process clause, since functional integration and economic realities are the essence of that test.[6]

2. Federal and state law often treat corporations and their subsidiaries as single entities irrespective of whether they are alter-egos.

The tax regime in *Mobil Oil* was hardly unique in treating the corporation and its subsidiaries as one entity. The "sufficiently important" test is fully consistent with the fact that both the federal government and the states often attribute the conduct of subsidiaries to parents without requiring alter-ego. That such an approach is common surely suggests that it is not barred by due process concerns.

Instances abound in which the law attributes the subsidiary's acts to the parent on grounds less rigid than veil-piercing. *See* Resp. Br. at 32-33; U.S. Br. at 26 & n. 8. Thus, corporate groups have been treated as single enterprises for the purpose of

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[6] In *Goodyear*, this Court declined to address the argument that jurisdiction could be based on a showing that a corporation managed its subsidiaries as a "unitary enterprise." 131 S. Ct. at 2857. *Goodyear* held only that the foreign subsidiaries of a domestic parent are not subject to general jurisdiction when their products were sold occasionally within North Carolina through no affirmative action of their own. *Id.* at 2851.

attributing civil liability or other obligations. The Employee Retirement Income Security Act of 1974, (ERISA), for example, holds corporate parents liable for the termination benefits that wholly-owned subsidiaries are required to pay if they discontinue their participation in retirement income plans; courts have found no problem with Congress abrogating veil-piercing requirements in this context. *See Pension Ben. Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983). The National Labor Relations Act similarly requires a corporation to engage in collective bargaining even if the petitioners are employed by a subsidiary, if the nominally separate entities are an "integrated enterprise," as determined by indicia of control and common management. *Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965) (per curiam).

In anti-trust law, parents and wholly-owned subsidiaries are deemed to have "unity of purpose or a common design"; it would be absurd to speak of a parent and a subsidiary entering into conspiracy, as this would be tantamount to conspiring with oneself. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984); *see also* Resp. Br. at 32-33.

Likewise, several states' courts have consistently found that the actions, obligations, and debts of companies within a group that are functionally operated as a single enterprise may be attributed to each other without piercing the veil. *See* Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 Calif. L. Rev. 195, 243-45 (2009) (collecting cases).

A holding that the Constitution requires separate treatment would conflict with, and could call into question the validity of, all of these laws.

3. The Ninth Circuit's test is true to the original understanding of the due process clauses.

When the Fifth and Fourteenth Amendments were passed, a corporation could not separately incorporate a subsidiary. Thus, this Court's recognition in *Mobil Oil* that there is no constitutional right to separate treatment fully accords with the original understanding of the due process clauses.

So too does the test applied below: asking whether a service is "sufficiently important" that, absent the agent, the defendant would have to perform it itself answers the question of whether, at the time of the passage of the due process amendments, the corporation – unable to incorporate a subsidiary – would have conducted the activity through a single entity.

At the Founding, corporations were rare, and were almost exclusively municipal; business corporations were largely nonexistent.[7] For many years thereafter, "the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable." *Liggett Co. v. Lee,* 288 U.S. 517, 547-49 (1933) (Brandeis, J., dissenting in part).

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[7] The "archetypal" corporation was the municipality; as of 1780 there were only seven business corporations, and as of 1790 just forty. M. Horwitz, *The Transformation of American Law 1780-1860*, 112 (Harvard University Press, 1977).

Until the Nineteenth Century, every incorporation required a special act of the state legislature. *See* David Millon, *Theories of the Corporation*, 1990 Duke L. J. 201, 206 (Apr. 1990). And "incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes." *Liggett*, 288 U.S. at 548-49 (Brandeis, J., dissenting in part). General incorporation statutes gradually replaced special charters, but permission to incorporate for "any lawful purpose," did not become the norm until 1870. *Id.* at 554-56 (Brandeis, J., dissenting in part); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 Del. J. Corp. L. 283, 293 n.19 (1990). And even as this shift occurred, general incorporation laws "long embodied severe restrictions upon size and upon the scope of corporate activity," *Liggett,* 288 U.S. at 549 (Brandeis, J., dissenting in part); in particular, by prohibiting ownership of stock of other corporations. Millon, *Theories of the Corporation* at 209; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of William Hursts's Study of Corporations,* 49 Am. U. L. Rev. 81, 106-07 (1999).

Until the end of the Nineteenth Century, corporations, with limited exceptions, could not own or hold stock in other corporations. *Liggett Co.,* 288 U.S. at 556 (Brandeis, J., dissenting in part). Only the simple, single entity corporate structure was permitted; the parent-subsidiary relationship was essentially non-existent. *See* Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups,* 37 Conn. L. Rev. 605, 607 (2005); E. Merrick Dodd, Jr., *Statutory Developments*

in Business Corporation Law, 1886-1936, 50 Harv. L. Rev. 27, 29-30 (1936); *see also* U.S. Br. at 21 ("when the Fourteenth Amendment was ratified in 1868, the fact pattern of a parent-subsidiary relationship was rarely if ever observed"; "neither parent-subsidiary holding companies nor other intercorporate arrangements could exist anywhere in the nation").

Thus, it was uniformly recognized that corporations could not hold the stock of other corporations without express statutory authority to do so. *See e.g. De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.,* 175 U.S. 40, 54-55 (1899) (collecting cases); *People ex rel. Peabody v. Chicago Gas Trust Co.,* 130 Ill. 268, 284-85 (1889) (collecting authorities); *see also* Fred Freedland, *History of Holding Company Legislation in New York State: Some Doubts As to the "New Jersey First" Tradition*, 24 Fordham L. Rev. 369, 369 (1955) (noting "authority for such corporate activity is and always has been ultimately based upon positive legislative action" and "it has been uniformly held that a business corporation has no inherent authority to hold the stock of another business corporation, even if … engaged in exactly the same type of business venture").

A number of states, such as New York, had laws expressly *prohibiting* intercorporate stock ownership. *Liggett*, 288 US at 556 n. 32 (Brandeis, J., dissenting in part) (citing N.Y. Laws 1848, c. 40, s 8; 1876, c. 358; 1890, c. 564, s 40; 1890, c. 567, s 12); *De La Vergne Refrigerating Mach. Co.,* 175 U.S. at 55; Dearborn, *Enterprise Liability,* at 203 n. 44 (citing Act of 3.22.1811, ch. 67, sec. 7 (N.Y. Laws 111)); Resp.

Br. at 34.[8] In states without express prohibitions, intercorporate ownership was "unanimously prohibited by the courts[.]" Dearborn, *Enterprise Liability,* at 203 n. 44; *Liggett Co.*, 288 U.S. at 556 (Brandeis, J., dissenting in part) ("the holding company was impossible"). Intercorporate stockholding was generally deemed contrary to public policy. *See e.g. Kappers v. Cast Stone Const. Co.,* 184 Wis. 627, 200 N.W. 376, 378-79 (1924); *Texas Utilities Co. v. Story,* 85 S.W.2d 809, 812 (Tex. Civ. App. 1935) (same).

It was not until 1888 – well after the passage of the Fourteenth Amendment – that any state expressly allowed companies organized under its general incorporation laws to acquire and hold stock of other corporations. *Liggett*, 288 US at 556 n. 32 (Brandeis, J., dissenting in part); Dodd, *Statutory Developments,* at 29-30 n.7 (1936).[9]

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[8] Like other states, New York specifically prohibited intercorporate stockholding, "except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt." *Liggett*, 288 U.S. at 556 n. 32 (Brandeis, J., dissenting in part) (citing N.Y. Laws 1848, c. 40, s 8; 1876, c. 358; 1890, c. 564, s 40; 1890, c. 567, s 12.").

[9] New York briefly permitted limited exceptions for insurance companies prior to this time, but the power was granted and subsequently revoked or otherwise restricted on more than one occasion. *See* Freedland, *Holding Company Legislation* at 373-75 & nn. 12, 13, 15, 16. New Jersey enacted a statute concerning intercorporate stock ownership in 1888, but it appeared limited to the ownership of stock in other New Jersey corporations. *See* Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. Rev. 687, 749-50 (1998). For this reason, most authorities cite the New Jersey statute of 1893, which

Given this nearly uniform position that intercorporate stockholding was impermissible and against public policy, the due process amendments could not have been contemporaneously understood to create a right to corporate separateness.

4. The ability to incorporate, including the ability to incorporate a subsidiary, remains a question of state law, not due process.

When states allowed corporations to own other corporations, they merely changed their law. They did not somehow create a constitutional right to intercorporate ownership and legal separateness, nor has any such right arisen in the interim.

Corporations are the creation of states, possessing only such rights as were expressly granted. Section I.B., *supra*; *De La Vergne Refrigerating Mach. Co.,* 175 U.S. at 54-55 (collecting cases). "Whether the corporate privilege shall be granted or withheld is always a matter of state policy." *Liggett Co.,* 288 U.S. at 545 (Brandeis, J., dissenting in part); *see also e.g. Clark v. Memphis St. Ry. Co.,* 123 Tenn. 232, 130 S.W. 751, 753-57 (1910) (holding that whether an out-of-state corporation could own stock was a question of state law).

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provided "virtually unlimited authorization to own and vote stock of other corporations both domestic and foreign." *Id.* Although New Jersey is widely credited with being the first state to generally allow this power, New York seems to have provided similar authority in 1892. *See e.g. Burrows v. Interborough Metro. Co.,* 156 F. 389, 393 (C.C.S.D.N.Y. 1907); Freedland*, Holding Company Legislation*, at 372.

Just as the legalization of intercorporate stock ownership was a product of state law, as of the mid-Twentieth Century "[i]t [wa]s the well settled rule in virtually every jurisdiction that the power of intercorporate stockholding is derived exclusively from an express or implied legislative grant." Freedland, *History of Holding Company,* at 369, n. 1, 370. And that is where the continued authority for such activity remains. *See generally CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (holding no corporate law principle is more firmly established than a State's authority to regulate domestic corporations). States retain the power to change their laws.

Indeed, "no corporation has a constitutional right to be a corporation," *Braeburn Sec. Corp. v. Smith,* 15 Ill. 2d 55, 65 (1958), let alone a constitutional right to a particular organizational structure. *See* U.S. Br. at 22 ("[A]ny attempt to constitutionalize fixed rules about the separation or unity of a juridical entity and its owners or managers would deprive legislatures of the latitude to shape the characteristics of the juridical forms they authorize.").

There is a "distinction between the status of the corporation as a separate juridical unit and the various rights— constitutional and otherwise— accorded to it by the law." Blumberg, *The Corporate Entity,* 375 n.170. This is so because:

> [t]o insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, . . . is to make of . . . corporate personality . . . a master rather than a servant, and to decide legal

> questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

Id. (quoting Bryant Smith, *Legal Personality,* 37 Yale L.J. 283, 298 (1928)).

There has never been a constitutional right to incorporation or to the separate incorporation of a subsidiary, and this Court should not create one now.

III. The fact that Petitioner is foreign, and Petitioner's speculation regarding the alleged policy implications of asserting jurisdiction over a foreign entity, do not counsel in favor of creating a new constitutional right.

A. Petitioner's foreign incorporation is irrelevant to whether due process permits attribution based on agency.

Petitioner relies heavily on the fact that it is a foreign corporation. *E.g.* Pet. Br. at 2, 3, 13, 34-37. That is irrelevant to the constitutional question of whether attribution based on agency is permitted, because the same question arises where the defendant is a domestic corporation. *See* Resp. Br. at 19-20. Certainly, there can be no claim that foreign defendants are entitled to *more* due process protection than domestic defendants.

On the contrary, the fact that defendant is foreign raises the issue of whether it has any due process rights at all. "[A]lthough courts often assume the minimum contacts test applies in suits against foreign 'persons,' that assumption appears never to have been challenged" and is "far from obvious" given that aliens outside the U.S. do not receive due process

protections. *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 302 , n.** (D.C. Cir. 2005) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)); *accord GSS Group Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring) (Judges Williams and Randolph noting that "it may be valuable for courts to reconsider [] the merits of the assumption . . . that private foreign corporations deserve due process [personal jurisdiction] protections").

This Court, of course, need not resolve that issue here. But the fact that *any* due process protection for foreign corporations is itself something of an anomaly further suggests that foreign corporations are not entitled to *stricter* constitutional attribution rules than domestic defendants, and that general rules that apply equally to domestic defendants should not be crafted to account for claims specific to foreign defendants.

B. Petitioner's claims of dire consequences are irrelevant and unsupported.

Petitioner speculates that the test applied below will cause everything from "a proliferation of suits against foreign defendants" to companies "limit[ing] or end[ing] their commercial ties to the United States." Pet. Br. at 13, 34-37; *see also* U.S. Br. at 2. As Respondents point out, these are properly considerations for Congress, not for this Court in determining the meaning of the Constitution. Resp. Br. at 30-31.

Regardless, Petitioner's predictions are no substitute for evidence. The "sufficiently important"

test has been recognized by the court below for over 35 years, *see Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), and by the Second Circuit for a decade more. *See Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967). If this standard were going to open the courts to a flood of litigation, or if foreign companies were going to decline to invest, that would have long since become apparent. Yet Petitioner provides no evidence that foreign companies have limited their economic contacts with, for example, New York or California. Nor can they show any torrent of cases; their claim that the test applied below can be met in virtually every case is demonstrably false. Pet. Br. at 13. Courts applying that standard have had no difficulty finding jurisdiction to be factually unwarranted. *See e.g. Doe v. Unocal Corp.*, 248 F.3d 915, 928-931 (9th Cir. 2001); *Focht v. Sol Melia S.A.*, 2012 U.S. Dist. LEXIS 5930 at **33-34 (N.D. Cal. Jan. 19, 2012); *In re W. States Wholesale Natural Gas Antitrust Litig.,* MDL 1566, 2009 U.S. Dist. LEXIS 14183 at **35-41 (D. Nev. Feb. 23, 2009).

C. Other nations' courts exercise jurisdiction on similar and broader grounds than the contacts of agent/subsidiaries acting on the parent's behalf.

Petitioner's claim that the jurisdiction asserted here is out of step with that exercised by other nations is simply wrong. Pet. Br. at 36. International practice makes clear that the attribution of a subsidiary-agent's contacts to a parent is well within the range of permissible options for asserting personal jurisdiction. Many nations have personal

jurisdiction regimes that easily encompass – and in a number of cases go far beyond – the agency test applied below.

Some countries attribute all subsidiaries' contacts to their parents – regardless of agency. Others attribute the contacts of managers or representatives to the parents. A number attribute *plaintiffs'* contacts to the defendant, assuming that the identity and nationality of a plaintiff is sufficient to put a defendant on notice that he may be haled into the courts of that plaintiff's country. And Petitioner's home jurisdiction of Germany, among others, allows courts to hear cases against foreigners based on the presence of any property, where the defendant's connection to Germany is significantly weaker than the employment of important subsidiaries as functional agents.

Significantly, many of these countries – including Germany – are members of the European Union, and are thus bound by the Brussels I Regulation, which requires member states to apply fairly restrictive jurisdictional rules to defendants domiciled in other member states, but leaves them free to apply their own traditional civil procedure rules as against defendants based in non-European countries. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 4, art. 4. Petitioner cites the rules governing member-state defendants, Pet. Br. at 36, but ignores the rules those nations apply to everyone else, including the United States.

General jurisdiction based on presence of subsidiary, representative, or manager.

A number of countries automatically provide for plenary jurisdiction over foreign parent companies, simply by virtue of the existence of a domestic subsidiary, agent, representative, or manager. *See* C.P.C. art. 86.2 (Portugal) (". . . but an action against . . . foreign companies that have a branch, agency, subsidiary, delegation, or representative in Portugal may be brought in the court where the latter are based . . ."); C.P.C. art. 88 (Brazil) ("The judicial authority of Brazil is competent when 1) the defendant, regardless of its nationality, is domiciled in Brazil . . . For the purposes of paragraph 1, a foreign juridical person that has an agency, branch, or subsidiary here is considered to be domiciled in Brazil."); Minsohō, art. 3-2, para. 3 (Japan) ("With regard to actions against corporations, associations, foundations, or other entities . . . if there is no business office or its location is unknown, [the court has jurisdiction] if a representative or responsible person is domiciled in Japan.");[10] Lov om rettens pleje [Administration of Justice Act] art. 238 ¶ 1 (Denmark) ("Companies, associations, private institutions and other organizations that may be a party to legal proceedings [may be sued in] the home court of the district where the head office is situated,

[10] Both Japan and Brazil also prescribe something akin to specific jurisdiction over cases involving the activities of branches or business offices of foreign corporations, and for foreign persons doing business in Japan, for contractual obligations incurred, *see* Minsohō, art. 3-3, paras. 4 & 5; C.P.C. art. 100 – IV(a) (Braz.), but these more restrictive provisions do not appear to limit general jurisdiction based on the address of the subsidiary or representative.

or, if not feasible, in the place where one of the administrative or management members reside.").[11]

These nations all provide jurisdiction based on rules less stringent than that applied here. This belies Petitioner's speculation that failing to limit our own jurisdictional rules would spark some sort of retaliatory jurisdiction legislation.

General jurisdiction based on domicile or residence of plaintiff.

Other countries attribute the contacts of a completely different person – the plaintiff – to the defendant for the purposes of personal jurisdiction. In these countries, resident or citizen plaintiffs have an innate right to sue in local courts in *any* tort case – even one where the defendant is foreign and the injury took place abroad. The very fact of injury to a person is deemed sufficient notice to the defendant that he may be haled into the victim's local courts. *See e.g.*, C. CIV. art. 14 (France) ("A foreigner, even if not resident in France . . . can be brought before the French courts for obligations contracted in foreign countries in favor of French persons.");[12] C. CIV. art. 14 (Luxemburg) (same); Civilprocesa likums [Law on Civil Procedure] art. 28(4) (Latvia) (tort action for personal injury or death "may also be made according

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[11] This provision applies equally in cases where the defendant is foreign as where it is simply based in a separate district within Denmark. *Id.* art, 246 ¶ 1.

[12] The French Court of Cassation has ruled that this provision applies equally to non-contractual matters, including torts. *See* Cass. 1e civ., May 27, 1970, Rev. Crit. 1971, 113, note Battifol (noting that "article 14 . . . has a general scope" and "applies notably to all litigation based in extra-contractual liability.").

to the place of residence of the plaintiff or the location where the delicts were inflicted"); Civilinio proceso kodeksas [Civil Code] arts. 30(5) & (6) (Lithuania) (claims for injury to person or property may be brought in place of plaintiff's residence); КОДЕКС НА МЕЖДУНАРОДНОТО ЧАСТНО ПРАВО [Kodeks mezhdunarodnoto chastno prabo] [Private International Law Code] art. 4(1) & ¶ 2 (Bulgaria) ("[C]ourts and other authorities shall have international jurisdiction where: . . . the claimant or applicant is a Bulgarian national or is a legal person registered in . . . Bulgaria.").

General jurisdiction based on presence of assets in the jurisdiction.

Another group of countries authorizes general jurisdiction over defendants who have *any* property whatsoever within the country – most notably Germany, the Petitioner's home jurisdiction. *See* Zivilprozessordung [ZPO] [Code of Civil Procedure], Jan. 30, 1877, § 23 (F.R.G.). Germany's courts have required a modest "further domestic connection" with the lawsuit, which has been found to be satisfied when the defendant operates a branch on German territory, *see* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1990, Neue Juristische Wochenschrift [NJW] 423, or when the plaintiff merely has an address in Germany. *See* BGH, Dec. 13, 2012, III ZR 282/11 ¶ 16. Petitioner's claim (and the United States' suggestion) that Germany would not assert jurisdiction in a case reciprocal to this one therefore rings hollow. Pet. Br. at 36-37; U.S. Br. at 17. Assuming that Daimler has any assets in the United States – which it almost certainly does, even excluding its ownership of its California subsidiary –

its connections to Chrysler, its listing on U.S. exchanges, and the large-scale sale of its cars in California would easily meet the requirement of the "further domestic connection."

Austria has a similar asset-based jurisdictional provision, *see* Jurisdiktionsnorm [JN] [Courts Jurisdiction Act], Reichsgesetzblatt [RGBl] No. 1895/111 (Austria), which has been interpreted by Austrian courts to be bounded only by the outer limits of international law. *See* Oberster Gerichtshof [OGH] [Supreme Court] Nov. 7, 2002, 6 Ob 174/02k. Other countries allow plenary asset-based jurisdiction with no further connection between the subject matter of the lawsuit and the property in question. *See* Civilinio proceso kodeksas [Civil Code] art. 30(2) (Lithuania) (establishing that suit against non-resident "may be brought according to the location of its property or the last known place of residence in the Republic of Lithuania."); Civil Jurisdiction and Judgment Act, 1982, c. 27, § 2(g), sched. 8 (Scotland) (establishing that a person not domiciled in the United Kingdom may be sued "in the courts for any place where— (i) any movable property belonging to him has been arrested; or (ii) any immovable property in which he has any beneficial interest is situated").

* * *

Seen through this lens of multinational practice, it is clear that attributing the contacts of agent/subsidiaries to parents under the standard at issue here is well within internationally accepted bounds. There is no evidence that standard unsettles expectations, creates unpredictability, or impinges on fundamental notions of fair play.

D. This case does not intrude upon other nations' sovereignty.

In asserting that jurisdiction would be unreasonable, Petitioner argues that because Respondents have pled claims under both foreign and California law, this case has the potential to invade Argentine and German sovereignty. Pet. Br. at 38, 40. It is mistaken.

Petitioner's claim that applying foreign law raises the "obvious probability of incompatibility" with foreign law makes no sense. Pet. Br. at 38 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct 2869, 2885 (2010) (internal quotations omitted). Indeed, the quoted passage from *Morrison* is about applying U.S. statutory law, not foreign law. 130 S.Ct at 2885. Federal and state courts apply foreign law all the time. Virtually every state has choice-of-law rules that sometimes point to foreign law, federal courts sitting in diversity look to those choice-of-law rules, *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and Federal Rule of Civil Procedure 44.1 details the procedure for determining the foreign law to be applied. U.S. courts are perfectly capable of applying foreign law without contradicting it.

Petitioner's objection to applying California law is similarly misplaced. There has been no finding that California law applies. That is a choice-of-law question, and Petitioner's argument is properly addressed through that framework, not due process. Resp. Br. at 57 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

Amicus takes no position on whether, and does not suggest that, California law would apply here.

But if a choice-of-law analysis ultimately pointed to forum law, this Court has already rejected any notion that this intrudes upon foreign sovereignty:

> If a transaction takes place in one jurisdiction and the forum is in another, the forum does not . . . by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely. . . makes applicable its own law to parties or property before it.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).[13]

There is every reason not to place new constitutional limits on ordinary choice-of-law rules. Forty states and the District of Columbia have abandoned the *lex loci delecti* approach in favor of more modern doctrines, and thus have choice-of-law rules that direct courts hearing cases involving foreign conduct to apply forum law under at least some circumstances. Lea Brilmayer & Jack Goldsmith, *Conflict of Laws: Cases and Materials* 12, 21 (5th ed. 2002). Petitioner's suggestion that due process bars courts from applying forum law to harms arising abroad might limit all of those rules. Regardless, if this Court were inclined to consider a

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[13] The cases Petitioner cites are inapposite. Pet. Br. at 38, 40. These cases applied canons of construction to federal statutes, *Morrison*, 130 S.Ct at 2885; *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), or principles underlying such a canon to a federal common law claim. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). None purport to displace the choice-of-law analysis applied to ordinary common law claims or to establish a constitutional norm.

constitutional rule that could have such sweeping effects on settled choice-of-law understandings, it should do so in a case that, unlike this one, raises the issue directly.

CONCLUSION

For the foregoing reasons, this Court should decline to create a new constitutional right that would bar attributing to the parent/principal the contacts of its subsidiary/agent.

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Respectfully submitted,

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