

AT HOME IN THE OUTER LIMITS: *DAIMLERCHRYSLER V. BAUMAN* AND THE BOUNDS OF GENERAL PERSONAL JURISDICTION

TODD W. NOELLE*

I. INTRODUCTION

The Supreme Court’s jurisprudence on personal jurisdiction is often characterized as confusing¹: awash with conflicting justifications, labyrinthine plurality opinions,² and plain incoherence.³ But, amidst this sea of uncertainty, the Supreme Court’s rulings in one area of personal jurisdiction doctrine, that of *general* personal jurisdiction, have been remarkably consistent. Put simply, a tribunal has general personal jurisdiction over a defendant who is “essentially at home” in the forum state.⁴ This doctrinal brevity in general personal jurisdiction, however, belies the difficulties facing lower federal courts in trying to decide what “essentially at home” means.

The tangled webs of corporate and commercial relationships typifying modern international commerce exacerbate the difficulty of the “essentially at home” inquiry. In *DaimlerChrysler v. Bauman*,⁵ the Court will address these difficulties by answering two questions. First, can a multinational corporation that does millions of dollars worth of business in a forum state by means of a wholly owned subsidiary be properly “at home” in that state? And if so, does this exercise of

* J.D. Candidate, 2015, Duke University School of Law.

1. See Robin J. Efron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 869 (2012) (recognizing that the Supreme Court has not provided a complete and clear legal and political theory regarding the exercise of personal jurisdiction).

2. E.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

3. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006).

4. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

5. *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. argued Oct. 15, 2013).

jurisdiction accord with the “traditional notions of fair play and substantial justice” required by the Fourteenth Amendment?⁶ The Court’s resolution of these questions will have profound implications for any corporation seeking to do business in the United States.

II. FACTUAL & PROCEDURAL BACKGROUND

During Argentina’s so-called “Dirty War” from 1976 to 1983, German car manufacturer DaimlerChrysler AG’s (DaimlerChrysler)⁷ predecessor in interest owned a subsidiary, Mercedes-Benz Argentina, which operated a plant in Gonzales-Catan, Argentina.⁸ Plaintiffs, former employees and relatives of employees at the plant, allege that Mercedes-Benz Argentina collaborated with Argentina’s ruling military junta to commit human rights violations against them and their family members.⁹

According to Plaintiffs, Mercedes-Benz Argentina labeled certain workers as “subversives” and “agitators” and passed those workers’ names to state security forces.¹⁰ Those security forces kidnaped, punished, tortured, and killed the labeled workers.¹¹ Further, Mercedes-Benz Argentina allowed Argentine military and state police forces inside the plant for periodic raids. Mercedes-Benz Argentina also hired an officer of the state police—who had organized many of the raids within the Gonzales-Catan plant—as a security chief and paid for his representation in later Argentinian lawsuits concerning these events.¹²

In 2004, twenty-two of these plaintiffs sued DaimlerChrysler, among other defendants, in the Northern District of California under the Alien Torts Act and the Torture Victim Protection Act for the alleged human rights violations arising from Mercedes-Benz Argentina’s collaboration with the military junta.¹³

6. U.S. CONST. amend. XIV, § 2.

7. Though the named defendant below and petitioner before the Supreme Court is “DaimlerChrysler AG” (AG stands for “*Aktiengesellschaft*,” a designation for a German public stock company), it has since changed its name to “Daimler AG.” Brief for Petitioner at ii, *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. June 27, 2013), 2013 WL 3362080.

8. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 912 (9th Cir. 2011), *cert. granted sub nom. DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

DaimlerChrysler is a German stock company headquartered in Stuttgart, Germany.¹⁴ Following a merger in 1998, the American Chrysler Corporation became one of DaimlerChrysler's wholly owned subsidiaries.¹⁵ At the time of litigation, DaimlerChrysler had no offices or persistent operations in California. DaimlerChrysler's activities and contacts in California consisted of maintaining counsel in San Francisco and initiating lawsuits in California to challenge that state's clean air laws and to protect other various business interests.¹⁶ However, DaimlerChrysler manufactured product designs specifically for the California market,¹⁷ was listed on the Pacific Stock exchange in San Francisco,¹⁸ and was a corporate partner with the California-based Global Nature Fund.¹⁹

Rather than manufacture, market, and sell cars in California directly, DaimlerChrysler conducted its business operations in California, and the United States generally, through a series of corporate subsidiaries and holding companies. To wit, DaimlerChrysler wholly owned the DaimlerChrysler North American Holding Company, which in turn wholly owned Mercedes-Benz USA LLC.²⁰ Mercedes-Benz USA purchased luxury cars manufactured by DaimlerChrysler and sold them in the United States.²¹ Unlike its parent, Mercedes-Benz USA had extensive, permanent contacts in California, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irving.²²

14. *Id.* at 913.

15. *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at *1 (N.D. Cal. Nov. 22, 2005).

16. *DaimlerChrysler*, 644 F.3d at 917.

17. *DaimlerChrysler*, 2005 WL 3157472, at *7–8.

18. *Id.*

19. *Id.* at *8.

20. *DaimlerChrysler*, 644 F.3d at 913.

21. *Id.* The relationship between DaimlerChrysler and Mercedes-Benz USA is laid out in a “General Distributor Agreement.” *Id.* at 914–17. In short, the agreement states that Mercedes-Benz USA and DaimlerChrysler are to agree each year on sales figures and goals. It further allows DaimlerChrysler to oversee Mercedes-Benz USA's network of resellers, many of its systems such as accounting and control, and dealership standards. The agreement also requires Mercedes-Benz USA to abide by DaimlerChrysler guidelines concerning management personnel, vehicle servicing by authorized dealers, warranty terms, and vehicle alteration. Further, Mercedes-Benz USA is required to “actively market” Mercedes-Benz vehicles, display signs, maintain an “acceptable” level of working capital, and abide by a number of other strictures. *Id.*

22. *Id.* at 914. The parties both seemed to concede that Mercedes-Benz USA's contacts with California would be sufficient to subject Mercedes-Benz USA to general jurisdiction there; however, at oral argument, the Supreme Court was skeptical as to the sufficiency of the contacts and DaimlerChrysler denied it had conceded that issue below. Transcript of Oral Argument at

The district court held that DaimlerChrysler's direct contacts with California were insufficient to allow jurisdiction, but inquired whether Mercedes-Benz USA's contacts could be imputed or attributed to DaimlerChrysler, its corporate parent.

In the Ninth Circuit, a subsidiary corporation's contacts can be attributed to a parent when the subsidiary corporation functions as the parent corporation's agent.²³ To make this determination the district court asks whether the "subsidiary represents the parent corporation by performing services 'sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation . . . would undertake to perform similar services.'"²⁴ The court found no such representation.²⁵ The district court held that California could not exercise general jurisdiction over DaimlerChrysler.²⁶

Plaintiffs appealed to the Ninth Circuit. The questions on appeal were (1) what factual showing was needed to satisfy the agency test, and (2) whether the district court had applied this jurisdictional agency test correctly. The Ninth Circuit found that DaimlerChrysler's agency relationship with an "at home" United States subsidiary subjected it to general jurisdiction in California.

III. LEGAL BACKGROUND

A. Personal Jurisdiction and Due Process

The doctrine of personal jurisdiction emanates from the Due Process Clause of the Fourteenth Amendment,²⁷ which states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."²⁸ California's long-arm statute allows California courts to exercise personal jurisdiction over all defendants

6. *DaimlerChrysler v. Bauman*, No. 11-965 (U.S. argued Oct. 15, 2013).

23. *DaimlerChrysler*, 2005 WL 3157472, at *11.

24. *Id.* (quoting *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003)).

25. *Id.*

26. *Id.* at *19. Despite the finding of insufficient contacts, the district court inquired as to the reasonableness of California exercising jurisdiction over DaimlerChrysler by analyzing seven factors and determined exercise of jurisdiction would be unreasonable. *Id.*

27. *See, e.g., Pennoy v. Neff*, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment . . . the validity of such judgments may be directly questioned . . . on the ground that proceedings in a court of justice . . . over [parties] whom that court has no jurisdiction do not constitute due process of law.").

28. U.S. CONST. amend. XIV, § 2.

to the extent permitted by the constitutions of California and the United States.²⁹

The modern regime of personal jurisdiction jurisprudence begins with the canonical “minimum contacts” analysis from *International Shoe v. Washington*,³⁰ but has since bifurcated into two related yet distinct lines of inquiry: *specific* and *general* jurisdiction. When a non-resident defendant carries on certain activities within the forum state, and is sued under a cause of action relating to that activity, the forum state tribunal has *specific* personal jurisdiction over that defendant.³¹ Under this doctrine, even “single or occasional acts” may be sufficient to render an otherwise out-of-state corporation “answerable in that State *with respect to those acts, though not with respect to matters unrelated to the forum connections.*”³²

Beyond specific jurisdiction, a nonresident defendant’s activities in the forum state may be so “continuous and systematic” as to subject that defendant to *general* personal jurisdiction.³³ Tribunals in a forum state having general jurisdiction over a defendant can hear “any and all claims against [that defendant],”³⁴ whether arising from activity in the forum state or not.³⁵ For an individual defendant, the “paradigm forum for the exercise of general jurisdiction is the individual’s domicile.”³⁶ In 2012, the Supreme Court noted a defendant-corporation’s equivalent forum would be “one in which the corporation is fairly regarded as at home”³⁷—often the state of incorporation and/or principal place of business.³⁸

29. CAL. CIV. PROC. CODE § 410.10 (West 2013).

30. 326 U.S. 310, 316 (1945).

31. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (noting specific jurisdiction obtains when a corporation’s “in-state activity is ‘continuous and systematic’ and *that activity gave rise to the episode-in-suit*” (quoting *Int’l Shoe*, 326 U.S. at 317)).

32. *Id.* (emphasis added).

33. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (“[D]ue process is not offended by a State’s subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation.”).

34. *Goodyear*, 131 S. Ct. at 2851.

35. Brief for Petitioner, *supra* note 7, at 15.

36. *Goodyear*, 131 S. Ct. at 2853.

37. *Id.* at 2853–54 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

38. *Id.* at 2854.

Though the determination of where a party is “essentially at home” for general jurisdiction purposes seems primarily based on that party’s formal, legal relationships with the forum—such as “domicile” or “incorporation”—any analysis into personal jurisdiction must additionally consider contacts with the forum state.³⁹ Presumably, a party that maintains its domicile in or incorporates within a forum state is deemed *per se* to have sufficient contacts for personal jurisdiction.

Even if a defendant has sufficient contacts with the forum state, any exercise of jurisdiction must accord with the “traditional notions of fair play and substantial justice.”⁴⁰ Put another way, exercise of jurisdiction must be “reasonable.” In practice, reasonability is determined on a case-by-case basis by the evaluation of several factors⁴¹: (1) the burden on the defendant; (2) the forum state’s interests; (3) the plaintiff’s interest in obtaining relief; (4) the interstate judicial system’s interest in obtaining efficient resolutions; (5) and the interest of the several states in furthering certain social policies.⁴²

At first glance, general personal jurisdiction seems uncomplicated—defendants are subject to general jurisdiction in their home states. The complex nature of corporate relationships, however, has made determining the states in which a corporation finds itself at home challenging. Can a corporate defendant ever be subject to general jurisdiction in a foreign state? The Supreme Court holds yes, but only in extremely rare, if not extraordinary, circumstances.

1. Continuous and Systematic Contacts: The *Perkins* Threshold

A tribunal has general adjudicative jurisdiction over a non-resident defendant only when that defendant performs activities so “‘continuous and systematic’ as to render [the defendant] essentially at home in the forum state.”⁴³ The Court has provided very little guidance to define exactly what continuous and systematic means in

39. See *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires . . . [that the defendant] have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

40. *Id.*

41. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

42. *Id.*

43. *Goodyear*, 131 S. Ct. at 2851 (quoting *Int’l Shoe*, 326 U.S. at 317).

practice.⁴⁴

*Perkins v. Benguet Consolidated Mining Company*⁴⁵ is the “textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.”⁴⁶ In *Perkins*, the president of a Philippine mining company effectively managed the company from his home in Ohio throughout the Japanese occupation of the Philippines during World War II.⁴⁷ The president kept files, managed company correspondence, issued salaries, maintained bank accounts, held directors meetings, and supervised the company’s wartime activities, all from his home in Ohio.⁴⁸ After the war, the company was sued in Ohio for various claims arising out of its Philippine operations.⁴⁹ The *Perkins* Court framed the jurisdiction issue as a question of “general fairness to the corporation,” placing the company’s activities in the wider context of due process: “Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”⁵⁰

Noting the “continuous and systematic supervision” of the company’s wartime interests taking place in Ohio, the Court found it was fair for Ohio to exercise personal jurisdiction over the company. It appears the *Perkins* Court took for granted that general adjudicative jurisdiction could be proper in fora where a defendant has no formal ties such as incorporation or residency. Yet *Perkins* indicates that, absent such formal ties, the quality and nature of a non-resident’s forum state activities must be of particular depth and ubiquity.

44. *Id.* at 2854 (“In only two decisions postdating *International Shoe* . . . has this Court considered whether an out-of-state corporate defendant’s in-state contacts were sufficiently ‘continuous and systematic’ to justify the exercise of general jurisdiction over claims unrelated to those contacts.”).

45. 342 U.S. 437 (1952).

46. *Goodyear*, 131 S. Ct. at 2856 (quoting *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

47. *Perkins*, 342 U.S. at 447–48.

48. *Id.*

49. *Id.* at 438–39.

50. *Id.* at 447.

2. Insufficient Contacts: Regular Business Dealings and “Stream of Commerce”

Regular and purposeful commercial activity within a forum state does not satisfy the *Perkins* “continuous and systematic” threshold. Three decades after *Perkins*, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*,⁵¹ the Court refused to find that a Colombian helicopter company was subject to general jurisdiction in Texas based on its regular purchase of machines and parts from a Fort Worth company.⁵² The Court stated that the Colombian company’s purchases and other intermittent relations with Texas did not “constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*.”⁵³

Similarly, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁵⁴ the Court rejected exercise of general personal jurisdiction over three of Goodyear USA’s foreign subsidiaries when some of those subsidiaries’ tires entered the “stream of commerce” in North Carolina.⁵⁵ Although the unanimous Court noted the flow of a manufacturer’s goods in the stream of commerce “may bolster an affiliation germane to *specific* jurisdiction,” it found the stream-of-commerce showing insufficient to allow exercise of *general* jurisdiction over a nonresident defendant.⁵⁶

Goodyear, decided after the Ninth Circuit disposed of *DaimlerChrysler v. Bauman*, is notable for several other reasons. First, it expanded the language in *Perkins* and *Helicopteros*, rephrasing the

51. 466 U.S. 408 (1984).

52. *Id.* at 418–19. The Court relied as well on *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), for the proposition that purchases and related trips to the forum state were insufficient to establish jurisdiction over the defendant. *Id.* at 417.

53. *Id.* at 416.

54. 131 S. Ct. 2846 (2011).

55. *Id.* at 2855–58. The “stream of commerce” concept in personal jurisdiction represents one of the more contentious areas of personal jurisdiction jurisprudence, though it is generally limited to *specific* personal jurisdiction and products liability cases. The notion is that if one places a good in the stream of commerce with the reasonable expectation or hope that it will reach the forum state, that party can be considered to have purposefully availed itself of the laws of that state, rendering it amenable to suit there. It has rarely, if ever, been invoked for a claim of general personal jurisdiction. *See, e.g., Asahi Metal Indus. Co., v. Superior Court*, 480 U.S. 102, 121 (1987) (Brennan, J., concurring) (reasoning that jurisdiction was proper over a foreign supplier of component parts to a foreign bicycle manufacturer selling products in the forum state because that supplier would benefit from sales in that state); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 313–17 (1980) (Marshall, J., dissenting) (noting the fact defendants purposefully put an automobile into the stream of commerce where it could reasonably be expected to go to Oklahoma could be sufficient to allow suit against it there).

56. *Goodyear*, 131 S. Ct. at 2855–56.

sufficiency of a defendant's contacts for general jurisdiction as "affiliations . . . so 'continuous and systematic' as to render [the defendant] *essentially at home* in the forum state."⁵⁷ Second, the plaintiffs in *Goodyear* claimed that Goodyear USA and all of its subsidiaries were a "single enterprise,"⁵⁸ thus allowing the attribution of Goodyear USA's contacts with the forum state to all of its other owned subsidiaries.⁵⁹ Though the *Goodyear* Court rejected this theory as not preserved, it opined without elaboration that such a theory would require the Court to "pierce Goodyear corporate veils, at least for jurisdictional purposes."⁶⁰

Simply put, "piercing the corporate veil" means ignoring the formal relationship between a parent corporation and its subsidiaries that shields one from liability for the other's activities.⁶¹ Thus, in a jurisdictional sense, a "single enterprise theory" can pierce the corporate veil by holding the parent of a wholly-owned subsidiary subject to suit in the forum state based on the subsidiary's relationship with that state, and vice versa. The Court was thus quite dismissive of a contemplated attribution of jurisdictional contacts, very much akin to the Ninth Circuit's holding in *DaimlerChrysler*.⁶²

None of these cases expressly limit a forum's exercise of general jurisdiction over a corporation solely to the states where it is incorporated or where it maintains its principal place of business. The contacts analysis required by *International Shoe* still obtains. The benchmark set by *Perkins* for satisfying the contacts requirement, however, is extraordinarily high.

Justice Brennan, dissenting in *Helicopteros*, suggested that the Due Process Clause might allow a state to exercise general jurisdiction over a nonresident defendant who did not maintain "continuous and systematic" contacts with that state: "Nothing in *Perkins* suggests, however, that such 'continuous and systematic' contacts are a necessary minimum before a state may constitutionally assert general jurisdiction over a foreign corporation."⁶³ Beyond

57. *Id.* at 2851 (emphasis added).

58. *Id.* at 2857.

59. *Id.*

60. *Id.*

61. See BLACK'S LAW DICTIONARY 1264 (9th ed. 2009) (defining "piercing the corporate veil" as "[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporations wrongful acts").

62. See *infra* notes 90–93 and accompanying text.

63. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 421 (1984) (Brennan,

vague allusions to purposeful availment, however, Justice Brennan did not discuss what circumstances would be required to allow a forum state to exercise general jurisdiction over a nonresident defendant in the absence of *Perkins*-level contacts.⁶⁴

B. General Jurisdiction Analysis and the Circuit Courts

Guiding Supreme Court precedent allows for few and limited circumstances when general jurisdiction over a nonresident defendant is proper. And in its modern jurisdiction jurisprudence, the Court has never suggested that imputation or attribution of a subsidiary's contacts to a parent corporation is proper. Indeed, only a single Supreme Court case decided nine decades ago, *Cannon Manufacturing Company v. Cudahy Packing Company*,⁶⁵ discussed *infra*, even tangentially addresses whether a corporation can be subject to general jurisdiction based on its subsidiary's contacts. Nevertheless, lower federal courts have filled this lack of guiding precedent with several tests for finding when a subsidiary's activity or presence (i.e. contacts) in the forum state renders the parent "essentially at home" there.

The circuit courts employ either or both of two tests to decide when a subsidiary's contacts in the forum state can be imputed to the parent corporation, thus conferring jurisdiction over the parent. One, the alter ego test, is pervasive among the circuits and requires a showing that the parent and subsidiary are "not really separate entities."⁶⁶ The more controversial test, and the one at issue in this case, is the so-called agency test.

J., dissenting).

64. *Id.* at 420.

65. 267 U.S. 333 (1925).

66. *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (noting the proper inquiries in a general jurisdiction case are to find the extent of a subsidiary's contacts, whether imputation to the parent is proper, and whether exercise of jurisdiction is reasonable). Petitioners in this case urge the Supreme Court to adopt or at least "bless" the alter ego test as being both constitutional and desirable. Brief for Petitioner, *supra* note 7, at 18.

Only the Second and Ninth Circuits employ the agency test.⁶⁷ These courts attribute the subsidiary's contacts to the parent when the subsidiary acts as the parent's "agent."⁶⁸ To be an agent for jurisdictional purposes, the subsidiary's services must be "sufficiently importan[t]" to the parent corporation "that if it did not have a representative to perform them, the [parent] corporation's own officials would undertake to perform substantially similar services."⁶⁹ In addition to the "sufficient importance" prong, the Ninth Circuit also requires "an element" of parental control over the subsidiary.⁷⁰

The "sufficient importance" standard for finding an agency relationship is not found in agency law outside of the personal jurisdiction context.⁷¹ This standard does not examine whether the parent would perform the subsidiary's activities itself if that particular subsidiary disappeared, but rather asks whether the corporation would perform the subsidiary's activity itself if there was *no agent representative whatsoever* to engage in that activity.⁷² Evidence that

67. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (allowing jurisdiction over a foreign corporation when its in-state representative entity performs sufficiently important services on behalf of the foreign corporation that the corporation would perform those services itself if no agent were available); *Unocal*, 248 F.3d at 928 (noting that to satisfy the agency test, a party must demonstrate 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" (citations omitted) (internal quotation marks omitted)).

68. *Unocal*, 248 F.3d at 926 ("Nonetheless, if the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation." (citation omitted) (internal quotation marks omitted)).

69. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011) (quoting *Unocal*, 248 F.3d at 928), *cert. granted sub nom.* *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013).

70. *Id.* The necessity of a showing of "control" in the Ninth Circuit's agency test is questionable. When *Bauman v. DaimlerChrysler* first went to the Ninth Circuit, Judge Nelson's now vacated opinion averred that the agency test required a finding of parental control "so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent." *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1095 (9th Cir. 2009), *vacated*, 644 F.3d 909 (9th Cir. 2011), *cert. granted sub nom.* *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013). This formulation, especially the "instrumentality" language, seems to conflate the agency and alter ego tests. Judge Reinhardt's dissent in the earlier opinion excoriated the majority for making this benchmark showing so high and in the second *DaimlerChrysler* opinion he pares down the required showing to "an element." *DaimlerChrysler*, 644 F.3d at 920.

71. *DaimlerChrysler*, 644 F.3d at 923.

72. See *Wiwa*, 226 F.3d at 95 ("[A N.Y. court] may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services . . . sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available.").

the subsidiary's activities are sufficiently important to the parent corporation can include sales numbers by the subsidiary in the forum state,⁷³ or percentage of business conducted by that subsidiary.⁷⁴

The Seventh and Eighth Circuits have explicitly rejected the agency test for personal jurisdiction and use only the alter ego test.⁷⁵ The Fourth, Fifth, and Sixth Circuits exclusively employ the alter ego test, though they have not explicitly rejected the agency test.⁷⁶ The First and Eleventh Circuits employ a test for attributing contacts they call an "agency test" in name, but which actually requires a showing that the subsidiary and parent corporations are alter egos.⁷⁷

The Supreme Court has never addressed whether an agency relationship allows a court to attribute a subsidiary's contacts to the parent for personal jurisdiction purposes. Indeed, although Supreme Court dicta implies that an agency relationship may be important in a *specific* jurisdiction inquiry,⁷⁸ the *Perkins* threshold for general jurisdiction still applies. Justice Ginsburg, although noting that a court may have specific jurisdiction over a parent corporation based on a subsidiary's presence, nevertheless asserted: "[A]ll agree [a parent corporation] surely is not subject to general (all-purpose) jurisdiction in [forum state] courts, for that foreign-country corporation is hardly 'at home' [there]."⁷⁹

73. See *DaimlerChrysler*, 644 F.3d at 922 (noting that the auto company subsidiary's California sales comprised 2.4 percent of the parent's worldwide sales).

74. See *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1406 (1994) (refusing to decide whether a subsidiary was an agent when the record contained insufficient evidence of the percentage of the parent's business coming from the subsidiary).

75. See *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011) (finding imputation proper only with an alter ego showing); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) (holding that the use of a subsidiary's contacts for jurisdiction over a parent violates due process).

76. *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990).

77. *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293–94 (11th Cir. 2000) ("For Consolidated to persuade us that the district court had general personal jurisdiction over Viridian because of VFI's activities in the United States, it would have to show that VFI's corporate existence was simply a formality, and that it was merely Viridian's agent."); *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985) (refusing to exercise jurisdiction when subsidiary and parent were not, in reality, a single entity).

78. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 n.22 (1985) ("We have previously noted that when commercial activities are carried on in behalf of an out-of-state party those activities may sometimes be ascribed to the party . . . at least where he is a primary participan[t] in the enterprise and has acted purposefully in directing those activities." (citations omitted) (internal quotation marks omitted)).

79. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797–98 (2011) (Ginsburg, J.,

In the only case on point, *Cannon Manufacturing Co.*, the Court refused to allow a North Carolina court to exercise personal jurisdiction over an Alabama parent corporation when the parent established a North Carolina subsidiary that it controlled “immediately and completely.”⁸⁰ Noting that both entities observed all formal corporate distinctions and remained independent entities,⁸¹ the Court phrased the question as “simply whether the corporate separation carefully maintained must be ignored in determining the existence of jurisdiction.”⁸² The Court held “the corporate separation [between the two companies], though perhaps merely formal, was real” and refused to consider the parent corporation properly subject to personal jurisdiction in North Carolina.⁸³

Cannon Manufacturing Co. has not been overruled, although its holding has not been incorporated into the Supreme Court’s modern, contacts-based personal jurisdiction jurisprudence. However, by employing the agency and alter ego tests, the lower federal courts often ignore formal corporate separation in some general jurisdiction inquiries. The Supreme Court’s decision in *DaimlerChrysler* will determine whether this license is warranted.

IV. NINTH CIRCUIT HOLDING

A Ninth Circuit panel affirmed the district court order dismissing the case for lack of personal jurisdiction.⁸⁴ Judge Nelson, writing for the majority, first rearticulated the Ninth Circuit agency test.⁸⁵ He averred that attribution of a subsidiary’s jurisdictional contacts to its corporate parent required, in addition to a finding that the subsidiary perform services of “sufficient importance” on behalf of the parent, that the parent exercise “pervasive and continual control” over the subsidiary.⁸⁶ Such findings, when the subsidiary corporation’s contacts

dissenting).

80. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925).

81. *Id.*

82. *Id.* at 336.

83. *Id.* at 336–38.

84. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1098 (9th Cir. 2009), *vacated*, 644 F.3d 909 (9th Cir. 2011), *cert. granted sub nom.* *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013). The panel consisted of Judges Schroeder, Nelson, and Reinhardt. *Id.* at 1099. After first affirming the district court with Judge Nelson writing for the majority and Reinhardt in dissent, the Ninth Circuit granted rehearing without comment and the same panel issued a second opinion, this time with Judge Reinhardt writing for the majority. *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 775 (9th Cir. 2011).

85. *DaimlerChrysler*, 579 F.3d at 1094–95.

86. *Id.* at 1095–96.

make it “essentially at home” in the forum state, would render the parent corporation similarly at home there. Objecting to this heretofore unnecessary requirement of “pervasive and continual control” in the agency test, Judge Reinhardt castigated the majority for “formulat[ing] a stringent new test for determining whether an agency relationship exists for the purposes of establishing personal jurisdiction.”⁸⁷

Nine months later, the Ninth Circuit granted the Plaintiffs’ petition for rehearing.⁸⁸ The very same panel then reversed the district court and vacated the previous panel opinion.⁸⁹ On rehearing, the new Ninth Circuit panel asked “whether [Mercedes-Benz USA’s] extensive contacts with California warrant[s] the exercise of general jurisdiction over [DaimlerChrysler].”⁹⁰ The panel, with Judge Reinhardt now writing for the majority, determined that an agency relationship existed. The court reasoned that because luxury car sales in California accounted for 2.4 percent of DaimlerChrysler’s total auto sales, and because nearly 50 percent of all DaimlerChrysler’s revenue came from the sales activities of Mercedes-Benz USA, Mercedes-Benz USA’s activities were of “sufficient importance” that, in the absence of any representative to perform them, DaimlerChrysler would perform them itself.⁹¹

The panel then rejected Judge Nelson’s second prong to the agency test—requiring a showing of “pervasive and continuous” corporate control over the subsidiary—which would have rendered the agency test much more akin to the alter ego test. Rather, the panel averred that the only showing necessary to satisfy the agency test was that the parent has the “right to control” the subsidiary.⁹² After exhaustively reviewing DaimlerChrysler’s distributor agreement with Mercedes-Benz USA, the court determined DaimlerChrysler had the “right to substantially control” Mercedes-Benz USA’s activities.⁹³

87. *Id.* at 1098 (Reinhardt, J., dissenting).

88. *Bauman v. DaimlerChrysler Corp.*, 603 F.3d 1141, 1141 (9th Cir. 2010) (granting rehearing and vacating opinion).

89. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 931 (9th Cir. 2011), *cert. granted sub nom. DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013).

90. *Id.*

91. *Id.* at 931.

92. *DaimlerChrysler*, 644 F.3d at 923.

93. *Id.*

DaimlerChrysler’s petition for rehearing en banc was denied.⁹⁴ Judge O’Scannlain, joined by eight other judges, wrote a blistering dissent to the en banc denial criticizing the Ninth Circuit’s decision as “extend[ing] the reach of general personal jurisdiction far beyond its breaking point,” and calling its holding “an affront to due process.”⁹⁵ Specifically, the dissent attacked the panel’s use of a more lenient agency test, with a relaxed “control” requirement, as “ignor[ing] the bedrock concerns of fundamental fairness that underpin Supreme Court due process jurisprudence.”⁹⁶

Judge O’Scannlain further castigated the panel for perpetuating the circuit split⁹⁷ and directly questioned the appropriateness of any agency test for personal jurisdiction whatsoever.⁹⁸ In his view, the panel decision rejected “respect for corporate separateness”—a fundamental feature of the economic and legal systems.⁹⁹ Finally, the dissent noted several foreign policy implications including the possibility of retaliatory jurisdictional laws in Europe impeding international agreements.¹⁰⁰

DaimlerChrysler petitioned for and was granted certiorari by the Supreme Court.¹⁰¹

V. ARGUMENTS

As a personal jurisdiction case, the overarching question before the Supreme Court is whether California’s exercise of general personal jurisdiction over DaimlerChrysler violates the Due Process Clause of the Fourteenth Amendment. However, this central question can be distilled into a more basic inquiry—whether maintaining a wholly-owned and independent subsidiary in the forum state can render a foreign parent corporation “essentially at home” in that state.

94. *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 774 (9th Cir. 2011).

95. *Id.* at 774–75. (O’Scannlain, J., dissenting).

96. *Id.* at 776–77.

97. *Id.*

98. *Id.* at 777–78.

99. *Id.*

100. *Id.* at 779.

101. *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (2013) (granting certiorari).

A. *DaimlerChrysler's Argument*

DaimlerChrysler argues California's exercise of general personal jurisdiction over it, based solely on its relationship with a wholly owned subsidiary in California, is contrary to the Court's precedent and a clear violation of the Due Process Clause.¹⁰² Though DaimlerChrysler's brief asserts several other grounds for reversal, the crux of its argument is a spirited attack on the constitutionality of the Ninth Circuit's agency test.¹⁰³

Using *Perkins* and *Goodyear* as a baseline, DaimlerChrysler trenchantly argues that the contacts, activity, and presence of a separate, subsidiary corporation in the forum state in no way renders the parent corporation "at home" there. However, rather than argue that attribution of a subsidiary corporation's contacts is never appropriate, DaimlerChrysler defends the prevalent alter ego test: "Only a showing of an alter-ego relationship is adequate to meet these constitutional requirements where an assertion of general jurisdiction over a defendant is premised on the attribution of another entity's contacts with the forum."¹⁰⁴

DaimlerChrysler's argument in support of the alter ego test as the only acceptable means of jurisdictional contact attribution is an implied rejection of the agency test. It centers on the necessity of preserving the venerable doctrine of corporate separation and maintenance of the corporate veil as well as the due process principle that jurisdictional rules provide notice and predictability to potential defendants.¹⁰⁵ Embracing the agency test would essentially destroy the doctrine of corporate separateness—that "'a corporation and its stockholders are generally to be treated as separate entities,' regardless of 'the control which stock ownership gives to the stockholders.'"¹⁰⁶ This in turn would allow the Court to "pierce the corporate veil"—holding stockholders, in this case the parent, accountable for the actions of the corporation.¹⁰⁷ Maintaining

102. Brief for Petitioner, *supra* note 7, at 14.

103. *Id.* at 17. DaimlerChrysler argues initially that its direct contacts with California are wholly insufficient to subject it to general jurisdiction there, though this is uncontested by either party. *Id.* at 14. It also asserts that a California court's exercise of jurisdiction over DaimlerChrysler would be unreasonable when analyzed in terms of the factors enumerated in *Burger King Corp. v. Rudzewicz*, but this section focuses only on the agency argument. *Id.* at 37–38.

104. *Id.* at 18.

105. *Id.* at 27.

106. *Id.* (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1988)).

107. *Id.* at 19.

corporate separateness, thereby protecting stockholders from liability, is imperative because such corporate relationships constitute “the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities.”¹⁰⁸

DaimlerChrysler points to *Cannon Manufacturing Co.* as being part of a “long tradition” of honoring the formalities of corporate separateness in the personal jurisdiction context.¹⁰⁹ In *Canon Manufacturing Co.*, the out-of-state parent was not subject to jurisdiction in the forum state even though it completely dominated the in-state subsidiary’s activities.¹¹⁰ Judicial deference to corporate separateness is bolstered by the Supreme Court’s assertion that personal jurisdiction inquiries demand the contacts of each party be assessed *individually*.¹¹¹

Relying on this tradition, DaimlerChrysler argues, corporations have become accustomed to working under the alter ego doctrine.¹¹² Upholding a test based on that doctrine would thus allow corporations to better predict when their activities will expose them to suit in a particular state, making corporate business decisions easier and facilitating commerce.¹¹³ As a means for attributing contacts, the alter ego test makes intuitive sense because when two corporations are alter egos they are “not really separate entities.”¹¹⁴ Because an alter ego finding means that the subsidiary is actually a “mere instrumentality” of the parent,¹¹⁵ there is, *de facto*, no separation between the subsidiary and parent. Due process cannot be offended by the imputation of subsidiary contacts when those contacts are actually those of the parent itself.

In contrast to the universality of the alter ego test, DaimlerChrysler notes the “sufficient importance” showing for agency, used only in the personal jurisdiction context and nowhere else in agency law,¹¹⁶ is heavily disfavored among the federal circuits.¹¹⁷

108. *Id.* at 18 (citing STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:1 (2012)).

109. *Id.* at 19.

110. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925). *See also supra* notes 80–83 and accompanying text.

111. Brief for Petitioner, *supra* note 7, at 20 (citing *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1984)).

112. *Id.* at 21.

113. *Id.*

114. *Id.*

115. *Id.* at 23 (citing *NetJets Aviation, Inc. v. LHC Commc’ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008)).

116. *Id.* at 25.

And pointing to the “essentially at home” threshold in *Goodyear*, DaimlerChrysler asserts that any jurisdictional agency test would affront due process because no principal-agent relationship would “ensure that defendants are subject to general jurisdiction only where they—and not just their agents—have sufficient contacts to render them ‘at home’ in the forum State.”¹¹⁸

The policy reasons for abandoning the Ninth Circuit’s test include its rejection of the “well-settled requirements for agency,” potentially allowing states to catch defendants off-guard and subject them to suit without any regard for that defendant’s actual contacts.¹¹⁹ Finally, DaimlerChrysler echoes the concerns about foreign policy in Judge O’Scannlain’s dissent, including concerns for the chilling effects on international trade, and placing the United States’ jurisdictional practices out of step with international standards.¹²⁰

B. Plaintiff-Respondents’ Argument

Plaintiffs present a novel and complex argument, essentially asking the Court to fundamentally reexamine its general jurisdiction jurisprudence. Specifically, Plaintiffs try to reframe the issue as an examination of the very outer jurisdictional limits of what the Due Process Clause will allow and whether California’s exercise of general jurisdiction is beyond those limits.

Plaintiffs characterize any personal jurisdiction decision (specific or general) as requiring three inquiries: (1) what contacts with the forum are relevant; (2) are those contacts sufficient for the type of jurisdiction asserted; and (3) if sufficient, has the defendant made a compelling case that renders jurisdiction unreasonable under the Due Process Clause.¹²¹ For Plaintiffs, this case concerns only whether the California contacts and activities of DaimlerChrysler’s subsidiary, Mercedes-Benz USA, are relevant to the jurisdiction inquiry.¹²²

Plaintiffs first argue that forums where a defendant is subject to general jurisdiction are not expressly limited in number by the phrase “at home” in *Goodyear*.¹²³ Second, Plaintiffs dismiss

117. *Id.*

118. *Id.*

119. *Id.* at 34.

120. *Id.* at 36.

121. Brief for Respondents at 12–13, *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. Aug. 19, 2013), 2013 WL 4495139.

122. *Id.*

123. *See id.* at 15 (refuting DaimlerChrysler’s argument that the phrase “at home” refers

DaimlerChrysler's contention that the alter ego test is the only acceptable means of attributing a subsidiary's contacts to its parent. Endorsing the alter ego test, they say, is inconsistent with federal constitutional law because the rules outlining when two separate corporations are really alter egos are almost entirely products of state law.¹²⁴ Rather than providing a desirable predictability in personal jurisdiction rules that corporations can use to guide their business decisions, endorsing the alter ego test could subject a corporation doing business in the United States to fifty different standards. Further, state long arm statutes, such as California's,¹²⁵ "extend[] . . . personal jurisdiction to the fullest extent permitted by the due process clause."¹²⁶ This "fullest extent" of federal constitutional law cannot be set by state-specific standards. Thus, the court should not limit constitutional due process by subjecting it to the vagaries of fifty different state veil-piercing provisions.¹²⁷

Plaintiffs invoke *International Shoe*, noting that in any exercise of jurisdiction, the "ultimate question is whether . . . [the exercise] comports with 'traditional notions of fair play and substantial justice.'"¹²⁸ The principal consideration is "the degree to which the defendant 'enjoys the benefits and protections of the laws of that state' by virtue of its 'contacts' with the forum."¹²⁹ A formalistic "alter ego" test concentrates only on the relationship between parent and subsidiary, not on whether the defendant enjoyed the benefits of the forum state's laws—even if through its agents.¹³⁰ Rather, courts should be allowed to consider the nature of jurisdictional contacts, including their potential attribution or imputation to a corporate parent, in each personal jurisdiction inquiry. A formality like corporate separateness should not foreclose a court's analysis of minimum contacts.¹³¹

only to a limited number of jurisdictions such as incorporation or location of corporate headquarters).

124. *Id.*

125. *See supra* note 29.

126. Brief for the Respondents, *supra* note 121, at 20.

127. *Id.* at 21–22.

128. *Id.* at 22 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

129. *Id.* at 22–23 (quoting *Int'l Shoe*, 326 U.S. at 319).

130. *Id.* at 23.

131. *Id.* at 28.

Plaintiffs distinguish *Cannon Manufacturing Co.*, noting that the Court there claimed no constitutional basis for its refusal to allow personal jurisdiction, but rather cited a lack of statutory authority for maintaining jurisdiction.¹³² The alter ego test is not enshrined in federal constitutional law and *Canon Manufacturing Co.* was decided well before *International Shoe* denounced the “strict formalism underlying *Cannon* and similar decisions of its era, in favor of a more pragmatic implementation of the Due Process Clause.”¹³³ Finally, any decision to endorse the alter ego test as a correct basis for attributing jurisdictional contacts is correctly left to Congress—it is not a matter of federal constitutional law.

Supporting the agency test, Plaintiffs claim that nothing in the Due Process Clause prohibits a court from considering the contacts of a defendant corporation’s subsidiary when that subsidiary undertakes important duties and is controlled by the parent.¹³⁴ Plaintiffs contend that courts should be allowed to consider a subsidiary’s contacts in a minimum-contacts analysis when “the subsidiary (1) is wholly owned by the defendant; (2) undertakes an important part of the defendant’s business in the forum; (3) exclusively for the defendant; and (4) does so while subject to substantial control by its owner.”¹³⁵

VI. ANALYSIS AND LIKELY DISPOSITION

A. *The Attribution of Contacts*

The most compelling question in this case is whether the Due Process Clause allows the attribution of Mercedes-Benz USA’s contacts to DaimlerChrysler. As noted above, the Supreme Court has not authorized any method whatsoever whereby one organization’s contacts with a forum can be attributed to another.

A tribunal with general jurisdiction has enormous power over a defendant. That tribunal can hear any suit, arising out of any activity, performed anywhere in the world. This enormous grant of power is likely why the Supreme Court so steadfastly restricts the exercise of general jurisdiction. In the modern business landscape, large corporations and their interrelated networks of franchisees, agents, and contractors are spread across multiple jurisdictions. This suggests

132. *Id.* at 29.

133. *Id.*

134. *Id.* at 36–37.

135. *Id.* at 38.

a corporation can be “essentially at home” in places other than its formal “residences.” The current paradigm of general and specific jurisdiction is neither wholly reflective of nor adequately tailored to deal with the nuances of modern corporate relationships.

The circuit courts, by creating the agency and alter ego tests, implicitly acknowledge that some form of jurisdictional contact attribution is necessary to manage this corporate landscape. However, the two attribution tests at issue here are not equal, and the Court will almost assuredly reject the constitutionality of the agency test.

1. Evaluating the Agency Test

The Ninth Circuit agency test provides an extraordinarily liberal metric for attributing a subsidiary corporation’s contacts to its parent. The two-prong test asks first whether the parent corporation would take on the activities of the subsidiary if no representative existed to perform them. There is almost a presumption of agency in the parent-subsidiary context; otherwise why does the subsidiary exist? Further, it requires hypothetical reasoning to determine what a corporation would do in a completely imaginary situation. Judge Reinhardt’s reasoning in the Ninth Circuit opinion is illustrative.

Judge Reinhardt found the 2.4 percent of total sales (through Mercedes-Benz USA) in California as “sufficiently important to [DaimlerChrysler] that they would *almost certainly* be performed by other means.”¹³⁶ He cited no evidence for this conclusion. He further saw no difference in whether the subsidiary’s activity would likely be performed by the company itself, another subsidiary, or a separate representative.¹³⁷ This prong of the agency test becomes such a grant of judicial discretion as to be no test at all.

The additional prong, requiring a showing of “right of control” rather than actual control, also provides little if any judicial guidance. In this case, Judge Reinhardt, after listing all the instances in which DaimlerChrysler had authority over Mercedes-Benz USA, concluded DaimlerChrysler had a “right to substantially control” its subsidiary.¹³⁸ The nature of corporate subsidiaries, especially wholly-owned corporate subsidiaries, will always allow some degree of control. Case law has established no clear line at all for determining when

136. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 922 (9th Cir. 2011) (emphasis added), cert. granted sub nom. DaimlerChrysler AG v. Bauman, 133 S. Ct. 1995 (Apr. 22, 2013).

137. *Id.*

138. *Id.* at 924.

customary contractual provisions go beyond establishing an ordinary and unexceptional corporate relationship to creating a right to control.

For Judge Reinhardt, the agency test allows courts to better hold corporate entities to account for their misdeeds. Corporations are able to benefit tremendously from American markets and evade litigation through creative corporate structuring, “den[ying] the plaintiffs, out of hand, a judicial forum and the opportunity to seek redress of grievous wrongs.”¹³⁹ The facts in this case underscore the inapplicability of Judge Reinhardt’s justifications for the agency test. In the first place, California would undoubtedly have *specific* jurisdiction over DaimlerChrysler if the harm in this case were committed in California. The idea that DaimlerChrysler’s derivation of even enormous benefit from business in California can render it amenable to *any suit whatsoever* in that state goes far beyond the bounds of any applicable precedent. Though it might be difficult to think a multi-billion dollar corporation is terribly burdened compared to the benefits it receives, the practical effect of the agency test would be to subject a corporation to suit in an indeterminate number of states, based on an arbitrary percentage of sales analysis, subject to a haphazard exercise of judicial discretion.

Because of this essential arbitrariness, corporations would be uncertain as to where they are subject to suit, faced with the possibility of adjudicating any claim against them in any number of fora. Whereas the doctrine of specific jurisdiction allows a corporation to anticipate suits in places where it has contacts, general jurisdiction would allow the worst form of forum shopping. Corporations may decide to exercise less control over and grant more independence to their subsidiaries to evade the agency test. This could result in less efficient trade and business models.

Further, the ubiquity of corporate subsidiaries throughout the world would turn melting-pot states like California into a forum for all the world’s disputes. Perhaps a real palpable interest in seeing human rights violations redressed would justify turning America into such a forum. However, the judicial resources of the federal courts would be severely taxed. Moreover, it would lessen domestic courts’

139. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1096 (9th Cir. 2009) (Reinhardt, J., dissenting), *vacated*, 644 F.3d 909 (9th Cir. 2011)), *cert. granted sub nom. DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (Apr. 22, 2013).

ability to address issues of more tangible import to these fora. The agency test, though perhaps a laudable attempt to redress corporate wrongs, is an unwieldy tool at best.

2. Evaluating the Alter Ego test

The alter ego test, while not precisely at issue in this case, provides a more workable, if also flawed, means of attribution. On its face, the alter ego test makes more intuitive sense because an alter ego finding is akin to finding the parent and subsidiary are the same entity.¹⁴⁰ The contacts of one are *per se* the contacts of the other—and if the subsidiary is at home in a forum then the parent must also be essentially at home in the forum. Thus, as a practical matter, it is less likely to offend due process than the agency test.

The concept of the alter ego is generally known to corporate entities and allows them more predictive ability to know where they will be haled into court. However, as Plaintiffs note, the specific tests for finding alter egos have their genesis in state corporate law.¹⁴¹ The Supreme Court, should it embrace the alter ego test, would be in the position either of effectively creating a wholly new and original standard for alter egos that applies only in the personal jurisdiction context, or admitting that what is allowed by the Fourteenth Amendment Due Process Clause is ultimately a matter for individual state law.¹⁴²

Although the alter ego test seems a workable answer to the problem of attribution, the quandary facing the Court if it adopts the alter ego test underscores the inadequacy of its prior jurisprudence. Unquestionably some attribution mechanism is needed, but neither test simultaneously accords with both its general and specific jurisdiction precedents, or strikes an adequate balance between the burdens on corporate clients and the interests of the several states.

140. See, e.g., *Sys. Div., Inc. v. Teknek Electronics, Ltd.*, 253 Fed.Appx. 31, 37 (Fed. Cir. 2007) (“The exercise of jurisdiction over an alter ego is compatible with due process because a corporation and its alter ego are the same entity—thus, the jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of the *International Shoe* due process analysis.”).

141. Brief for Respondents, *supra* note 121, at 20.

142. *Id.*

B. *The Court's Likely Disposition*

On the facts, this is an easy case for the Court. Unless the Court decides to expand its general jurisdiction jurisprudence far beyond where it currently stands, the Court will almost certainly reverse.¹⁴³ *Goodyear* was likewise an easy case in light of *Perkins* and *Helicopteros*. Yet the *Goodyear* Court took that opportunity to bolster the “continuous and systematic” language in *Perkins* with the phrase “essentially at home” as the necessary predicate for the exercise of general jurisdiction. The Ninth Circuit decided this case before *Goodyear*. And it would be an extraordinary step to say the presence and activity of a wholly owned subsidiary providing 2.4 percent of total sales in California renders DaimlerChrysler “essentially at home” there.

Moreover, the policy implications are also particularly persuasive, in part because they are generally supported by the United States as amicus curiae. Specifically, the United States’ statement of interest in the case points to the need for jurisdictional consequences of economic activity to be predictable,¹⁴⁴ the deleterious effect such expansive jurisdictional rules have had on international agreements and reciprocal enforcement of judgments,¹⁴⁵ and the political branches’ interest in seeing American international interests protected.¹⁴⁶

Several members of the court have expressed particular concern that foreign corporations could hide behind domestic distributors to avoid liability for damages they cause.¹⁴⁷ However, even those

143. There are two other plausible possibilities for disposition. First, the court could decide that Mercedes-Benz USA’s contacts with California in no way render it “at home” there, thus even the attribution of its contacts to DaimlerChrysler would be unavailing, requiring dismissal as improvidently granted. Transcript of Oral Argument, *supra* note 22, at 55. Second, this case arose under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA); the Court recently determined that the ATS does not apply to activities overseas, and the TVPA does not apply to organizations. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (“We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.”); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (“The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not.”). Thus, it is unclear whether Plaintiffs have a cognizable claim and the Court may remand to determine this, or dismiss.

144. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *DaimlerChrysler AG v. Bauman*, No. 11-965 (U.S. July 5, 2013), 2013 WL 3377321.

145. *Id.* at 2–3.

146. *Id.*

147. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794–95 (2011).

concerned members have explicitly acknowledged that, despite a parent's use of a domestic distributor, that parent was "hardly at home" in the forum state.¹⁴⁸

Though the Plaintiffs present a creative argument for why the agency test is theoretically allowed by the Due Process Clause, they do not succeed in bringing it in line with the Supreme Court's other general jurisdiction cases. In asking the court to essentially go back to the drawing board and ignore the specific showings required by general personal jurisdiction, Plaintiffs simply ask too much.

More curious is whether the Court will decide to adopt the alter ego test, or wait for a day when an application of the test is more directly before the court. In all probability, the question of whether attributing the contacts of a subsidiary corporation to its parent on a showing of alter egos offends due process will wait for another day.

VII. CONCLUSION

DaimlerChrysler represents a singular opportunity for the Court to either solidify or completely reformulate a major jurisprudential problem. In the end, the court is more likely to be persuaded by the more staid, precedent-based argument of *DaimlerChrysler* and reverse the Ninth Circuit to hold that exercise of general jurisdiction over a foreign corporation cannot be predicated on an agency relationship with an in-state subsidiary. Plaintiffs, however, present a nuanced argument that exposes some important inconsistencies in current doctrine and suggests that the outer limits of what due process allows in personal jurisdiction are far wider than heretofore tested. Though creative, this argument is likely unpersuasive to a Court that has been steadfastly united in its recent general jurisdiction decisions.¹⁴⁹ Despite this steadfastness, *DaimlerChrysler* shows how even a seemingly settled area of personal jurisdiction doctrine is rife with inconsistency and contradiction, and in desperate need of Supreme Court guidance. Though it may not in this case, the Court should seek an opportunity to redefine jurisdiction to match the modern business landscape.

148. *Id.* (citations omitted) (internal quotation marks omitted).

149. *See Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (rejecting the exercise of general jurisdiction in a unanimous opinion).