No. 17-813

In The
Supreme Court of the United States

MICHAEL BARTH, et al.,

Petitioners,

v.

WALT DISNEY PARKS AND RESORTS U.S., INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

FREDERICK P. MARCZYK
DRINKER BIDDLE & REATH LLP
A Delaware Limited Liability Partnership
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700
Fax: (215) 988-2757
E-mail: frederick.marczyk@dbr.com

Attorneys for Respondents Walt Disney Parks and Resorts U.S., Inc. and The Walt Disney Company

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of the Barths' request for jurisdictional discovery on the issue of whether Defendants might be subject to general personal jurisdiction under *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) where it is (1) undisputed Defendants are not incorporated and do not have their principal places of business in the forum, (2) the Barths failed to allege any facts that suggest Defendants are otherwise "at home" in the forum and failed to explain how discovery might reveal such facts, and (3) Defendants submitted evidence establishing they engage in no significant activities in the forum.

CORPORATE DISCLOSURE STATEMENT

Imprint, Inc. is a wholly-owned subsidiary of ABC, Inc., which is a wholly-owned subsidiary of ABC Enterprises, Inc., which is a wholly-owned subsidiary of Disney Enterprises, Inc., which is a wholly-owned subsidiary of Respondent The Walt Disney Company. Imprint, Inc. and Disney Enterprises, Inc. own 100% of the stock of Respondent Walt Disney Parks and Resorts U.S., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

INTRODUCTION

This case does not merit the Court's attention. The Barths contend the district court should have allowed them to take discovery to try to establish that, under *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014), this is an "exceptional case" in which "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation" subject to general personal jurisdiction in that state. The court of appeals correctly affirmed the district court's denial of discovery on the ground that it would be futile as the Barths cannot explain how discovery could possibly help them sustain the very heavy burden of establishing that this is an "exceptional case." Regardless, the court of appeals' decision does not conflict with any decision of any other court of appeals. Moreover, given the predictability in the law of general jurisdiction as a result of *Daimler* and the extreme facts that would be necessary to find that a case is "exceptional," the question of whether a district court should allow discovery on the question of whether a case is "exceptional" under *Daimler* is obscure and unimportant. There is no reason for this Court to take up that question.

STATEMENT OF THE CASE

The Barths sued Walt Disney Parks and Resorts U.S., Inc. ("WDPR") and The Walt Disney Company

("TWDC") (together, "Defendants") in Pennsylvania state court after Michael Barth was allegedly bitten by a snake at Walt Disney World Resort in Florida. (Petition at 4a.) Defendants removed the case to the Eastern District of Pennsylvania and moved to dismiss for lack of personal jurisdiction. (*Id.*) Defendants submitted evidence establishing that WDPR is a Florida corporation with its principal place of business in Florida and that TWDC is a Delaware corporation with its principal place of business in California. (*Id.* at 8a.) Defendants also submitted evidence establishing they have no offices or places of business in Pennsylvania; are not qualified or licensed to do business in Pennsylvania; do not conduct business in Pennsylvania; have neither incurred nor paid taxes in Pennsylvania; have not appointed agents for service of process in Pennsylvania; own no real estate, bank accounts, or other assets in Pennsylvania; and should not be listed in any Pennsylvania telephone directories. (*Id.* at 9a.)[1]

The Barths concede specific personal jurisdiction did not exist (*id.* at 5a n.3), but argued that Defendants are subject to general jurisdiction. They did not contend Defendants are incorporated or headquartered in Pennsylvania. Nor did they allege any facts that suggest Defendants themselves engaged in any significant activities in Pennsylvania. Instead, the

[1] The evidence submitted by Defendants consisted of admissible certifications of officers of Defendants. *See* 28 U.S.C. § 1746. The Barths waived any objection they may have had to Defendants' evidence because they never objected to it in either the district court or court of appeals.

Barths pointed to activities of separate corporate affiliates of Defendants, namely Disney Store USA, LLC, which operates a website and several Disney Stores in Pennsylvania; ABC, Inc., which operates a television station in Philadelphia; and Disney Destinations, LLC, which is registered with the Pennsylvania Corporation Bureau (collectively, the "Affiliated Companies"). (*Id.* at 9a-10a.) In addition, the Barths alleged that "Disneyworld Reservation Center" is registered as a fictitious name with the Pennsylvania Corporations Bureau, that the "Walt Disney World College Program" has an office in Philadelphia, and that Defendants advertise in Pennsylvania. (*Id.* at 9a n.5, 10a.) In the alternative, the Barths asked for jurisdictional discovery. (*Id.* at 13a n.9.)

Defendants filed a reply with additional evidence establishing that the Affiliated Companies are separate and distinct from Defendants; the Disney College Program is a program, not a corporate entity; Defendants do not engage in any activities in Pennsylvania in connection with the Disney College Program; and the fictitious name "Disneyworld Reservation Center" was registered in 1978 by a person named Fay Oppenheim, wholly unrelated to any entity affiliated with Defendants. (*Id.* at 10a.) Defendants opposed the Barths' request for discovery, arguing it would be futile and wasteful in light of the uncontested evidence already submitted and the fact that the Barths had not even alleged any facts that could justify a finding of general jurisdiction.

The district court granted Defendants' motion and denied the Barths' request for discovery. The court first observed that the two "paradigmatic bases" for general jurisdiction are absent because neither of Defendants is incorporated or maintains its principal place of business in Pennsylvania. (*Id.* at 8a.) The court explained: "Since [the Barths] cannot show general jurisdiction under the two paradigmatic bases, [they] must show that this is an exceptional case where Defendants' 'affiliation with the state are so continuous and systematic as to render [them] essentially at home' in Pennsylvania." (*Id.*) The court held the Barths did "not come close" to sustaining that burden because they "failed to allege or show that Defendants undertook sufficient 'continuous, substantial activities' in Pennsylvania that would otherwise justify treating them as 'at home' in Pennsylvania." (*Id.* at 12a-13a.)

The court rejected the Barths' reliance on the Affiliated Companies' contacts with Pennsylvania because the Affiliated Companies are separate and distinct from Defendants and there is no basis to impute the Affiliated Companies' activities to Defendants. (*Id.* at 11a.) The court also held that the Affiliated Companies' contacts with Pennsylvania are insufficient to make them subject to general jurisdiction, much less the separate and distinct Defendants. (*Id.*) Therefore, the court held it lacked jurisdiction over Defendants.

Since the Barths failed to allege facts that might give rise to jurisdiction, the court exercised its discretion to deny their request for discovery, explaining that "the record shows that discovery would be futile as it is not likely to produce the facts needed to withstand Defendants' Rule 12(b)(2) Motion." (*Id.* at 13a n.9.) The Barths appealed.

The court of appeals, in a "disposition [that] is not an opinion of the full Court [of Appeals] and . . . does not constitute binding precedent" (*id.* at 17a n.*), affirmed. The court agreed with the district court that general jurisdiction was absent because "neither Defendant was incorporated or had its principal place of business in Pennsylvania" and the Barths failed to "establish that this was an 'exceptional' case such that the place of incorporation/principal place of business rule should be disregarded." (*Id.* at 18a-19a.) The court also "agree[d] with the District Court that jurisdictional discovery would have been futile." (*Id.* at 19a.)[2]

The Barths filed a Petition for Rehearing solely with respect to the issue of whether they should have been allowed to conduct jurisdictional discovery. The court of appeals denied the Barths' petition. (*Id.* at 20a.)

REASONS FOR DENYING THE WRIT

Nothing about this case warrants the Court's attention. The court of appeals' decision is correct and does not conflict with any other court of appeals'

[2] The Barths mistakenly assert that their request for discovery "was not addressed by the Court [of Appeals]." (Petition at 7.)

decision. Further, the issue of when a plaintiff should be allowed to conduct discovery on the alleged existence of general jurisdiction is not an important matter in light of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Court should deny the Barths' petition.

Goodyear and *Daimler* dramatically increased the clarity and predictability of the law of general jurisdiction. *See Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) ("In recent years, the Supreme Court has clarified and, it is fair to say, raised the bar for this type of jurisdiction."). *Goodyear* established a corporate defendant is subject to general jurisdiction only where it is "at home." 564 U.S. at 919. *Daimler* made clear a corporation is only "at home" in a state where it is incorporated or has its principal place of business, save (perhaps) for an "exceptional case." 134 S. Ct. at 761 n.19 ("We do not foreclose the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.") (citation omitted).

Daimler cited *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), as an example of the type of extreme facts that would be necessary to potentially warrant deviating from the rule that a corporation is only subject to general jurisdiction in the state where it is incorporated or headquartered. *See Daimler*, 134 S. Ct. at 761 n.19. In *Perkins*, the defendant was incorporated under the law of the Philippines, where it operated mines. 342 U.S. at 448. When Japan occupied the Philippines during World War II, the company ceased operations in the Philippines and its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw all of the company's wartime activities. *Id.* The *Perkins* Court held that the company was subject to general jurisdiction in Ohio.[3]

Courts of appeals have recognized the clarity and predictability ushered in by *Goodyear* and, even more so, *Daimler*. *See Chavez v. Dole Food Co.*, 836 F.3d 205, 223 (3d Cir. 2016) ("it is 'incredibly difficult to establish general jurisdiction [over a corporation] in a forum *other* than the place of incorporation or principal place of business' ") (quoting *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014)) (alterations in original); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016) ("*Daimler* established that, except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business – the 'paradigm' cases"); *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1205 (11th Cir. 2015) ("A foreign corporation cannot be subject to general jurisdiction in a forum unless the corporation's activities in the forum closely approximate the activities that ordinarily characterize a corporation's place of

[3] *Perkins* did not actually deviate from the general rule. The result in *Perkins* was dictated by the fact that "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984).

incorporation or principal place of business."); *Kipp*, 783 F.3d at 698 ("Thus far, the Court has identified only two places where that condition will be met: the state of the corporation's principal place of business and the state of its incorporation. Any additional candidates would have to meet the stringent criteria laid out in *Goodyear* and *Daimler*. Those criteria require more than the 'substantial, continuous, and systematic course of business' that was once thought to suffice.") (citation omitted); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) ("*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation.").

The Barths concede Defendants are not Pennsylvania corporations and do not have their principal places of business there. But the Barths requested discovery on the issue of whether this might be an "exceptional case" under *Daimler*. The court of appeals affirmed the denial of discovery because it would be futile. (Petition at 19a.) That decision was correct because the Barths cannot explain how discovery might allow them to prove this is an "exceptional case" under *Daimler*. The Barths failed to even allege Defendants engaged in any significant activities in Pennsylvania, let alone activities that might be comparable to the forum-based activities of the defendant in *Perkins*, and Defendants submitted evidence establishing that, in fact, they engage in no such activities in Pennsylvania.

The district court and court of appeals correctly concluded the Affiliated Companies' contacts with Pennsylvania cannot be imputed to Defendants.

Defendants submitted evidence establishing the Affiliated Companies are separate and distinct from Defendants. The Barths never alleged any facts that suggest otherwise or that the Affiliated Companies were alter egos of either of Defendants. Regardless, under *Goodyear* and *Daimler*, the Affiliated Companies' contacts with Pennsylvania would not even render *them* subject to jurisdiction. The Barths do not contend the Affiliated Companies are incorporated or headquartered in Pennsylvania or that their contacts are exceptional like those in *Perkins* such that general jurisdiction might nevertheless exist. (Petition at 11a.) In any event, as in *Daimler*, even if the Affiliated Companies were "at home" in Pennsylvania and even if their contacts were imputable to Defendants, there would still be no basis to subject Defendants to general jurisdiction. *See Daimler*, 134 S. Ct. at 760 ("Even if we were to assume that [the subsidiary] is at home in California, and further to assume [the subsidiary's] contacts are imputable to [the parent], there would still be no basis to subject [the parent] to general jurisdiction in California, for [the parent's] slim contacts with the State hardly render it at home there.").

The Barths also alleged Defendants advertised and participated in activities related to the Disney College Program in Pennsylvania. Defendants submitted evidence that contradicts those allegations. But, even if the Barths' false allegations were true, it would not matter because those activities do not remotely resemble the type of activities that could render Defendants "at home" in Pennsylvania.

Because the Barths cannot explain how Defendants could possibly be subject to general jurisdiction, there was no basis for allowing discovery. The court of appeals' decision affirming the denial of discovery is in accord with the decisions of every other court of appeals that has reviewed a similar case. *See Wolf v. Celebrity Cruises, Inc.*, 683 F. App'x 786, 792 (11th Cir. 2017) (affirming denial of discovery where plaintiff "did not specify what information he sought or how that information would bolster his allegations"); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 57 (D.C. Cir. 2017) (affirming denial of discovery "because the additional discovery requested by the appellants would not change our analysis"); *AM Tr. v. UBS AG*, 681 F. App'x 587, 589 (9th Cir. 2017) (affirming denial of discovery because plaintiff did not provide "any reason to suppose that jurisdictional discovery would reveal facts that would demonstrate that [the defendant] is subject to general personal jurisdiction"); *Whitener v. Pliva, Inc.*, 606 F. App'x 762, 765 (5th Cir. 2015) (explaining that, because the plaintiffs "identify no evidence that they are likely to discover that would call our lack of personal jurisdiction into question, the district court did not abuse its discretion in denying the [plaintiffs'] motion for additional jurisdictional discovery"); *Cont'l Indus. Grp. v. Equate Petrochemical Co.*, 586 F. App'x 768, 772 (2d Cir. 2014) (affirming denial of discovery where plaintiff had "not alleged that [the defendant] is headquartered or incorporated in New York, nor has it alleged facts sufficient to show that it is otherwise 'at home' in New York"); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014) (affirming denial of discovery where plaintiff was "unable to state how the discovery he requested would change the jurisdictional determination"). *See also Malik v. Cabot Oil & Gas Corp.*, No. 16-2829, 2017 U.S. App. LEXIS 18540, at *6, 2017 WL 4260816, at *3 (3d Cir. Sept. 26, 2017) (affirming the denial of discovery where the plaintiff did "not present factual allegations that suggested with reasonable particularity the possible existence of the requisite contacts between appellees and the forum state to warrant jurisdictional discovery").

None of the cases cited by the Barths conflict with the court of appeals' decision in this case. They all were decided before *Daimler*. None involves a request for discovery on the issue of whether a case might be "exceptional" under *Daimler*. And, none suggests a district court should grant jurisdictional discovery notwithstanding that it is readily apparent that discovery would be futile.

Moreover, given the clarity and predictability in the law of general jurisdiction since *Daimler* was decided and the extremely high bar set by *Daimler* for what might constitute an "exceptional case," the issue of when a plaintiff should be able to conduct discovery on the existence of general jurisdiction is an obscure matter, particularly where, as here, the sole issue is whether the case is "exceptional" under *Daimler*. *Cf. Daimler*, 134 S. Ct. at 760, 762 n.20 ("it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home"). Therefore, even if there were a split among courts of appeals, it would not be an issue of sufficient importance to warrant this Court's attention.

Regardless, this case would not be a good vehicle to resolve such a conflict if one existed. The Barths failed to allege any facts that suggest this could possibly be an "exceptional case" and they cannot explain how discovery might nevertheless be useful. Further, Defendants submitted evidence establishing that they engage in no significant activity in Pennsylvania, let alone activity resembling the activities of the defendant in *Perkins*. If this Court intends to take up the issue, it should do so in a case with facts that provide at least some plausible basis for the requested discovery.

CONCLUSION

For the reasons set forth above, the Court should deny the Barths' petition.

Dated: January 8, 2018

Respectfully submitted,

FREDERICK P. MARCZYK
DRINKER BIDDLE & REATH LLP
A Delaware Limited Liability Partnership
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700
Fax: (215) 988-2757
E-mail: frederick.marczyk@dbr.com

Attorneys for Respondents Walt Disney Parks and Resorts U.S., Inc. and The Walt Disney Company