IN THE SUPREME COURT OF THE UNITED STATES

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DAIMLER AG, :

Petitioner : No. 11-965

v. :

BARBARA BAUMAN, ET AL. :

- x

Washington, D.C.

Tuesday, October 15, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

KEVIN RUSSELL, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-965, Daimler AG v. Bauman.

Mr. Dupree.

ORAL ARGUMENT OF THOMAS H. DUPREE, JR.,

ON BEHALF OF THE PETITIONER

MR. DUPREE: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit held that Daimler, a foreign corporation, is subject to general jurisdiction in California and thus may be sued in California on any claim arising anywhere in the world. The Ninth Circuit reached this conclusion by attributing to Daimler the California contacts of a Daimler subsidiary, Mercedes Benz USA, a separate corporation that respects all corporate formalities and that is not Daimler's alter ego. The Ninth Circuit's approach violates due process.

JUSTICE SCALIA: Do we have to reach that question? I mean, I guess the Ninth Circuit must have been interpreting the long-arm statute of California, right?

MR. DUPREE: That's correct, Justice Scalia.

JUSTICE SCALIA: Now, are there -- were there California cases that disregarded the -- the

corporate forum?

MR. DUPREE: California respects the corporate forum. The Ninth Circuit applied what appears to be a Federal common law of agency that the Ninth Circuit admittedly developed solely for purposes of the jurisdictional inquiry.

JUSTICE SCALIA: But the jurisdictional inquiry is conducted on the basis of the California statute, isn't it?

MR. DUPREE: It is, but at the same time, the California statute extends to the limit of due process. And so what the Ninth Circuit did was it construed what the permissible outer bounds of the due process clause was in this context.

JUSTICE SCALIA: I see. It's -- it's California's reference to the outer bounds of jurisdiction that causes -- causes this to be a constitutional case?

MR. DUPREE: That's correct, Justice Scalia.

CHIEF JUSTICE ROBERTS: There's nothing in the Constitution, is there that would prohibit a State from adopting a rule that a parent is responsible for any acts of a wholly-owned subsidiary?

MR. DUPREE: Well, Mr. Chief Justice, there may be a constitutional limit; certainly to the extent

that, say, California adopted a rule that said for purposes of some sort of liability, we are going to disregard the corporate forum, I think that could pose due process concerns to the extent that it is purporting to override, say, the corporate law of Delaware.

CHIEF JUSTICE ROBERTS: Well, even on a prospective basis, your brief talks about notice and fairness and predictability; but if California said going forward, this is the rule that we're going to apply, is there any constitutional problem with that?

MR. DUPREE: I -- I still think there would be, Mr. Chief Justice. In other words, I take Your Honor's point about fair notice, if California said going forward this is the rule we're going to apply. But at the same time, I'm not quite sure what in the Constitution would empower, say, California to essentially override, say, Delaware's corporate law and say for our State purposes, we're essentially going to rewrite the corporate DNA of a corporation that's chartered in Delaware in order to --

JUSTICE SOTOMAYOR: We permitted that in Container Corp.

MR. DUPREE: I beg your pardon, Your Honor?

JUSTICE SOTOMAYOR: We permitted that in

Container Corp. We permitted California law to tax the parent California corporation for the earnings of all its foreign subsidiaries. And we said the due process clause wasn't offended by that.

MR. DUPREE: Well, Justice Sotomayor, typically this Court has applied a less rigorous due process standard in the tax cases than it has in the personal jurisdiction cases. If one were to look at, say, Goodyear or McIntyre, of any of this Court's more recent jurisdictional decisions, it typically takes a much more rigorous view of the due process clause's limits on a sovereign's ability to adjudicate matters that arise outside the forum than it has in the tax context.

JUSTICE GINSBURG: We would never get to this question if you hadn't conceded that there is general jurisdiction over the U.S. subsidiary, over -- what is it -- MBUSA.

MR. DUPREE: Well, Justice Ginsburg, I respectfully disagree that we conceded the point below. I'm not sure, frankly, that we could concede something like that on behalf of a different corporation that's not a party to this lawsuit. But it is true that we focused on the attribution question in the Ninth Circuit. And at the end of the day, I don't think that

that point affects the outcome in this case, because --

JUSTICE GINSBURG: But if there were nothing to attribute, then that would be the end of it. If there was -- if there was not general jurisdiction over MBUSA, that would be the end of the case, wouldn't it?

MR. DUPREE: Yes, it would. That would be one way to resolve the case. Another way to resolve the case --

JUSTICE GINSBURG: But you didn't -- we can't resolve it that way since you -- you didn't challenge the general jurisdiction over the subsidiary.

MR. DUPREE: Well, again, we did not argue that point. Instead, we focussed on the attribution issue, but at the same time --

JUSTICE KAGAN: Mr. Dupree -- I'm sorry. Please.

MR. DUPREE: I was going to say, Your Honor, at the same time, I do think that that notion, that MBUSA was subject to general jurisdiction in California, was necessarily part of the Ninth Circuit's holding. So I do think it is properly preserved for this Court's review if the Court elected to resolve this case on that ground.

JUSTICE KAGAN: And, Mr. Dupree, even if you waived that point, if I understand it correctly, you did

not waive the point that even with all attribution in the world, there still is no general jurisdiction over Daimler. In other words, you could attribute all MBUSA's contacts and you still would not have general jurisdiction over Daimler; is that right?

MR. DUPREE: Justice Kagan, that is exactly right.

JUSTICE KAGAN: So in that sense, it really doesn't depend on the attribution standard, all these hard questions of is it an alter ego test or is it an agency test and how does the Constitution relate to State law, because we could apply any test we wanted, and there still wouldn't be general jurisdiction over Daimler in California.

MR. DUPREE: Justice Kagan, that certainly would be an acceptable route for this Court to resolve the case. And Your Honor has it exactly right, in that even if one were to attribute the constitutional contacts of MBUSA to Daimler, you would still be left with a joint enterprise that plainly is not at home in the State of California. It would still be a German corporation headquartered in Stuttgart that draws only approximately 2 percent of its overall vehicle revenue from California sales. So yes.

JUSTICE SOTOMAYOR: Is that a reasonable --

JUSTICE SCALIA: How do foreign -- foreign countries resolve this attribution question? Would -- would we be standing alone or are there a lot of other countries that assert jurisdiction over the parent, if there is general jurisdiction over the sub?

MR. DUPREE: By and large, Justice Scalia, most other countries respect the corporate forum and that includes parent/subsidiary relations.

JUSTICE SCALIA: By and large? Who are the small?

MR. DUPREE: I'm not aware of anyone who disrespects it; and, in fact, our amici talk at length about how California's exercise of general jurisdiction in this case would not be appropriate in virtually any other nation. I'm frankly not sure where what the Ninth Circuit did here would be viewed as tolerable.

JUSTICE BREYER: How do we deal with that? That's what's -- I mean, it's in your interest to argue that -- tell me how to deal with this.

It's perhaps true -- I think it's true that a State doesn't have to allow companies to have wholly-owned corporations. Under the Constitution of the United States, nothing says they do. Or a State could say, wholly-owned corporations? Well, there's no limited liability. Or they could say in certain kinds

of accidents, there's no limited -- et cetera. You see, they have lots of choice.

So what really seems to have been going on here is the Ninth Circuit, from your perspective, just really misstated California law by out to lunch. When they say when we want it to be as broad as the Constitution, they don't mean, because we could get rid of limited liability, that that's what we do. So, how can we deal with a circuit court that seems to seriously misstate the law of a State?

MR. DUPREE: Well, I think the way this Court should deal with the Ninth Circuit in this case is simply to reverse it, Your Honor.

JUSTICE BREYER: I understand that that's what you would like as the bottom line.

(Laughter.)

JUSTICE BREYER: I would like to know the chain of reasoning that gets --

(Laughter.)

MR. DUPREE: The chain of reasoning, Your Honor, is simply that California, like all States, generally respects the corporate form, certainly with regard to liability determinations. In fact, this is a point that Professor Brilmayer makes at length in her amicus brief, where she says that it is anomalous for a

1 State on one hand to respect the corporate form as to
2 liability determinations, but then when it comes to
3 making these sorts of personal jurisdictional
4 determinations, it applies a completely different
5 standard.
6 So I think --
7 JUSTICE GINSBURG: Suppose -- but suppose we
8 had a case of an accident on a California highway
9 injuring California people and they sued charging that
10 the Mercedes Benz was defectively manufactured. Would
11 there be jurisdiction over both the parent and the sub
12 in that situation?
13 MR. DUPREE: If it were the case Your Honor
14 hypothesized, I think there may well be specific
15 jurisdiction available, depending on whether Daimler
16 purposefully availed itself of the California forum.
17 JUSTICE GINSBURG: And what does that mean?
18 I mean, it certainly wanted to have its cars sold in --
19 in California.
20 MR. DUPREE: Right. What this Court has
21 said in its opinions in Asahi and then, of course, in
22 McEntyre is that you look whether the corporation
23 targeted the forum. And in Asahi, Justice O'Connor's
24 opinion identified several facts that could support such
25 a finding. For example, whether the parent targeted

advertising at the forum, whether the parent designed a product specifically for use in that forum. And, of course, this Court has said repeatedly that questions of specific jurisdiction are highly fact dependent.

And so in Your Honor's hypothetical, I think what the plaintiffs would do to establish specific jurisdiction over the foreign parent would be precisely to attempt to amass evidence showing that Daimler targeted the forum where they intend to bring the suit.

JUSTICE SOTOMAYOR: Counsel --

JUSTICE GINSBURG: Well, there was injury in the forum and it was caused by defective manufacturing abroad. That's a typical basis for jurisdiction under long arm statutes.

MR. DUPREE: Well, certainly courts have exercised specific jurisdiction in that situation. But, of course, as this Court's ruling in McEntyre illustrates, that's not necessarily always the case and there may, of course, be situations where a product does cause injury in the forum, yet the foreign parent is not necessarily subject to specific jurisdiction in that forum.

JUSTICE KENNEDY: Well, how -- how would you answer Justice Ginsburg's question if you were writing the opinion in your favor? Would you say that in the

1 hypothetical, Daimler Chrysler put in motion a course of
2 events that caused an injury in California? Is that the
3 way our jurisprudence works?
4 MR. DUPREE: Well --
5 JUSTICE KENNEDY: If you're going to answer
6 the hypothetical in an opinion, how would you -- what
7 would you say?
8 MR. DUPREE: Well, I think I would go back
9 to what this Court has articulated, first of all, is the
10 standard for specific jurisdiction, which is purposeful
11 availment or purposeful direction. I think as far as
12 what constellation of facts --
13 JUSTICE KENNEDY: Well, Daimler has
14 purposely availed itself of California jurisdiction by
15 establishing the sub that -- that operates there by
16 establishing Mercedes U.S., that it operates there.
17 MR. DUPREE: Well, Mercedes --
18 JUSTICE KENNEDY: So -- so creating a
19 subsidiary is not availing itself of jurisdiction?
20 MR. DUPREE: Well, Justice Kennedy, I think
21 in some cases a subsidiary's work could give rise to
22 specific jurisdiction, but I think that's not
23 necessarily true across the United States in all cases.
24 JUSTICE KENNEDY: I agree. And I'm asking
25 what is the rationale that you would use to answer

Justice Ginsburg's hypothetical in the -- in the opinion for the Court that is ruling in your favor?

MR. DUPREE: The answer I would give is that in Justice Ginsburg's hypothetical the foreign parent could be subject to specific jurisdiction if it purposefully availed itself of the forum and that very well could be an inquiry that turns on the subsidiary's activity.

JUSTICE KENNEDY: And my question is whether or not by creating Mercedes U.S., Daimler didn't purposely avail itself of the forum?

MR. DUPREE: I don't think it did, Justice Kennedy.

JUSTICE KENNEDY: Because?

MR. DUPREE: Because I don't think there is any evidence in this record that suggests that by creating a subsidiary that does business generally, it was purposefully targeting California.

JUSTICE SOTOMAYOR: Mr. --

JUSTICE KAGAN: Mr. Dupree --

JUSTICE ALITO: If we agree with you -- if we agree with you that the test should be whether the subsidiary is an alter ego of the parent, would that depend on the -- the law of the particular State in which the suit is brought or would it be based on some

general understanding of alter ego liability?

MR. DUPREE: Justice Alito, I think the best test would be to look to State law for guidance, precisely because that is the law that commercial actors throughout our country typically would look to, to determine whether or not they might be in a veil-piercing situation.

JUSTICE ALITO: That would mean that due process would mean something different potentially in California and New York, for example. Wouldn't that be rather strange?

MR. DUPREE: Well, I'm not sure, Your Honor. Certainly this Court in other due process contexts has looked to the substance of State law to inform its judgements, for example in determining the scope of protected property interests. In punitive damages cases, it's looked to State law to determine the constitutional boundaries.

JUSTICE SOTOMAYOR: Where else have we done it in the personal jurisdiction context, define the limits of the due process, Federal due process in accordance with State law?

MR. DUPREE: Well --

JUSTICE SOTOMAYOR: Didn't we create tests in International Shoe, in Burger King separate from

State law?

MR. DUPREE: The test this Court created in International Shoe, I think, is probably best characterized as a Federal common law test. I think that this situation is not quite analogous, precisely for the reason I mentioned in my answer to Justice Alito, is that commercial actors and lawyers and parties throughout the country typically look to State law for guidance. And if this Court were to adopt a general Federal common law standard, under which I think we would still prevail, but --

JUSTICE SOTOMAYOR: So what do we do with all the amici briefs that points to countless articles that talk about the corporate veil-piercing as the most arbitrary of State laws out there?

MR. DUPREE: Well, I'm not sure --

JUSTICE SOTOMAYOR: I don't know how -- how corporations get any sense of comfort from a law that's so irrationally applied, according to some.

MR. DUPREE: Well, I think some of the amici, candidly, may overstate the purported confusion. At the end of the day, veil-piercing law is certainly well settled and vetted in this country's legal traditions, and I think it is sufficiently capable of precise application in advance. Corporations deal with

that standard on a day-to-day basis. And so although I take Your Honor's point that at the margins there may be room for debate as to whether a veil should be pierced in a particular case, I think by and large it's a general standard, it's a familiar standard, and it's a workable standard and it's a standard that people look to on a day-to-day basis.

JUSTICE SCALIA: Counsel, I've been looking for the text of the California jurisdiction statute. Where is it? I mean, you know, that's what this case is all about, isn't it?

MR. DUPREE: I believe it's --

JUSTICE SCALIA: Is it in your brief? Is it in the Respondent's brief? Is it in the Government's brief? I can't find the darn thing.

MR. DUPREE: Well, we'll provide the cite to Your Honor. If they --

JUSTICE SCALIA: I don't want the cite. I want the text in front of me right here.

MR. DUPREE: I will --

JUSTICE SCALIA: That's what briefs are supposed to have --

MR. DUPREE: Right. I will --

JUSTICE SCALIA: -- all -- all of the significant statutes that -- that relate to the case.

MR. DUPREE: Right. I will provide the cite to Your Honor on rebuttal. It is the California Civil Code.

JUSTICE SCALIA: I don't have the California Civil Code. You're saying it's -- it's not in the briefing?

MR. DUPREE: It is in the briefing. We did not reproduce it as a separate addendum at the beginning, but I believe it is quoted in the briefing and I will provide Your Honor with a precise page cite on rebuttal.

JUSTICE GINSBURG: But it does -- it does provide for the exercise of jurisdiction to the limits of due process.

MR. DUPREE: That's exactly right, Justice Ginsburg. It simply says that California may exercise long arm jurisdiction consistent and to the limit permitted by Federal due process. That's all the statute says, Justice Scalia.

I'll reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

As several questions from the Court suggest, the Due Process Clause itself does not supply fixed rules for the attribution of forum contacts from one corporation to another. Rather, such rules are the province of the positive law that creates the corporation and other substantive law such as agency that defines the relationship of that juridical person to other persons. And those rules are the ones that the corporations themselves rely upon and that others who deal with the corporations rely upon.

JUSTICE SOTOMAYOR: Could you tell me why we just don't rely on the tests we apply in the tax cases? It's a Federal test and it says if you're functionally and economically tied together and you control the other entity, the parent controls the subsidiary, your earnings are subject to the Due Process Clause and can be taxed by an individual State. It seems like a fairly simple test.

And if you break down the complicated California test, really, that was the essence it was getting to. So why do we go to the vagrancies of State law and why don't we just do the true and tried?

MR. KNEEDLER: But in the instance you're talking about in taxation -- and this is related to a question the Chief Justice asked -- the due process clause does not itself prohibit a State or the Federal government from attributing substantive liability, for example, from a -- from a subsidiary to a parent, or, in the case of taxation, of choosing to look at the entire enterprise of which the parent corporation is the head.

But those are the results of deliberate choices by the lawmaking organs of the State, which they -- legislature, or when Congress does it, the Federal government. They do not --

JUSTICE SOTOMAYOR: California --

MR. KNEEDLER: -- reflect a general determination that in all circumstances, the acts of the nation or the acts of a subsidiary should be attributed to the parent. In fact, the general rule is quite to the contrary.

JUSTICE ALITO: Well, in the situation of individuals, does the -- does the due process rule regarding taxation of individuals by a State align with the -- the ability of somebody to sue that person in the State? Somebody -- for example, if someone is a partner in a law firm that has offices all over the country, they may be paying income taxes in many jurisdictions.

Are they subject to general jurisdiction? If there's a -- if you have somebody who works in D.C. and never goes to California but has to pay some income tax in California, are they subject to suit in California for any --

MR. KNEEDLER: No.

JUSTICE ALITO: -- claim that arises against them anywhere?

MR. KNEEDLER: No. No, they are not. And -- and for the taxation, there has to -- for taxation to begin with, there has to be some nexus between the individual and the -- and the State.

The rules that I think Justice Sotomayor was talking about in the Federal Tax Code has similar provisions, really have to do with the measure of taxation. And in most of those situations, certainly, in taxation among the States, there is an apportionment formula. Yes, the -- the overall income may be lumped together for purposes of -- of the initial step, but then there's an apportionment formula that says that -- in the Mobil case that's cited in the briefs, for example, that -- that Vermont can only tax so much of it, that portion that is fairly attributable to Vermont.

So in that sense, it's analogous to a specific jurisdiction. You're looking at -- you're

coming up with some formula to tie the taxation to the State that is imposing -- imposing the tax.

JUSTICE KAGAN: Mr. Kneedler, what do you think about this, that -- you know, as I've been looking through these cases, it seems to me that all these attribution issues and the conflict about attribution arises because courts generally have an improperly broad understanding of general jurisdiction and don't quite understand the distinction between general and specific jurisdiction.

If the courts -- if the Court here had understood that general jurisdiction applies when a company is essentially at home in a place, would any of these questions have arisen?

MR. KNEEDLER: Probably not. The court of appeals -- I think it's page 23 of its opinion -- says that the reason that it looked to the -- the question of whether the in-State activities of MBUSA were important to Daimler was that the importance is a measure of the presence, meaning essentially doing business within -- within California.

And as we point out in our brief, the Ninth Circuit's approach to this traces back to early New York cases that -- that address the question of doing business at a time when the business --

JUSTICE GINSBURG: But that was -- that was conceded. But that was -- there is a very substantial argument that there was no general jurisdiction over the subsidiary, but that was not contested below.

MR. KNEEDLER: Yes.

JUSTICE GINSBURG: And a party can always consent to jurisdiction.

MR. KNEEDLER: Yes. Now -- but I think in a broader matter -- and also, I take the point that Justice Kagan made earlier that even -- even if MBUSA was subject to general jurisdiction or if we -- if that's accepted for these purposes, that doesn't mean that Daimler -- you wouldn't attribute MBUSA's jurisdictional status to Daimler. You might attribute its contacts, if the appropriate rules for attribution of contacts work in that.

JUSTICE KENNEDY: Just as a way of getting you to state your general theory of the case, let me ask you: Do you have a recommendation as to whether or not we should remand this case? If we accept your theory of the case, which I'll let you explain, does that require a remand?

MR. KNEEDLER: It -- it does not. And in our view --

JUSTICE KENNEDY: And that is because?

MR. KNEEDLER: Yes. In -- in our view, it's proper for the -- for the Court to look to background principles of corporate law at least as a starting point or as a presumptive matter. And in this country, corporate separateness, under which a parent is not liable for the acts of a subsidiary, is the general rule.

There are established exceptions to that, traditional exceptions: The alter ego exception, and the situation where a principal is responsible for the acts of an agent.

Attribution on those bases, because they're traditional, would not offend traditional notions of -- of fair play and substantial justice under the due process clause. Here, Respondent does not argue -- Respondents do not argue for an -- that alter ego would satisfy.

And as for agency, there's no argument here that traditional agency requirements are satisfied.

JUSTICE KENNEDY: Under tradition, if you have the universe of agent and principal, an independent contractor, is the subsidiary of the latter or is it something -- is it some third -- some third animal?

MR. KNEEDLER: I think -- I think in this case -- again, we don't have any reference to -- at

all --

JUSTICE KENNEDY: Generally, if you have a -- a corporate parent and a subsidiary, do we usually think of a subsidiary as an agent?

MR. KNEEDLER: No, you do not.

JUSTICE KENNEDY: Do we think of it as -- what do we think about it as? An independent contractor, or just something else?

MR. KNEEDLER: It's an independent entity. It may be doing work for the parent, or it may not. In this case, at page 179A of the Joint Appendix, the agreement between Daimler and -- and MBUSA specifically provides that MBUSA is neither a special nor a general agent. It says that MBUSA cannot act on behalf of or bind Daimler, and it's not a fiduciary.

JUSTICE GINSBURG: Well, you don't -- you wouldn't have any doubt, would you, in the hypothetical that I pose. A Mercedes Benz car causes an accident -- there's an accident in California. It's alleged that the accident was the defective manufacturing of that car. California people are injured. There would be jurisdiction in a California court.

MR. KNEEDLER: I -- I would think so, particularly given the -- given the agreement in this case which obligates Daimler to market throughout the 50

1 States, and the volume of sales that are directed to the
2 United States, some major portion of which is expected
3 to be and intended to be in California. I don't think
4 there would be any question that California would have
5 specific jurisdiction.
6 JUSTICE KAGAN: But, of course, that just
7 points out the difference between specific and general
8 jurisdiction, that Daimler might be -- might be found --
9 found it -- there's jurisdiction over Daimler in a case
10 which involves the blowing up of a car in California,
11 but not over something that's not related to any of its
12 contacts in California.
13 MR. KNEEDLER: Right. That is -- that is
14 the -- the major -- that is the major difference.
15 JUSTICE ALITO: What would have to be --
16 MR. KNEEDLER: If I could make a point.
17 JUSTICE ALITO: What would have to be
18 true for MBUSA to be Daimler's agent with respect to
19 general jurisdiction? How would the facts of this case
20 have to be changed in order to bring this within an
21 agency principle?
22 MR. KNEEDLER: I think -- I think MBUSA
23 would have to be acting on behalf of Daimler. One step
24 in that direction would be if Daimler consigned the cars
25 to -- to MBUSA and that -- and MBUSA held itself out as

1 the sales agent. Here, the cars were sold to MBUSA in
2 Germany and -- and sent to the United States.
3 But if there was an agency relationship,
4 that doesn't necessarily mean that Daimler would be at
5 home in -- in California or whatever --
6 JUSTICE SOTOMAYOR: I mean, in most agency
7 relationships, titles stay with the principal. So I
8 don't know -- or -- or when it doesn't, it transfers to
9 the agent, but for the benefit of the principal. So I
10 don't know what the sale in Germany has to do.
11 MR. KNEEDLER: Well, I -- under this
12 agreement, MBUSA is -- acts independently. It does not
13 act day to day directly.
14 JUSTICE SOTOMAYOR: It seems an odd thing to
15 say given the page and a half that the lower court went
16 through on the various ways in which Germany controls
17 this subsidiary. It appoints all its officers. It
18 approves all its operating procedures. It approves all
19 of the people it hires and fires. It seems like there
20 isn't much left for what --
21 CHIEF JUSTICE ROBERTS: I don't think there
22 was a question, but you can respond.
23 (Laughter.)
24 MR. KNEEDLER: Those are contractual
25 undertakings. They are not the manifestations of

agency. Agency would require that -- that Daimler control the day-to-day operations of this subsidiary. And at page 116A of the petition appendix, the district court says there's no evidence of that whatsoever.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Russell?

ORAL ARGUMENT OF KEVIN RUSSELL

ON BEHALF OF THE RESPONDENTS

MR. RUSSELL: Mr. Chief Justice, and may it please the Court:

I'd like to begin with the question of what's in this case and what isn't, because the fact pattern in this case gives rise to multiple complicated questions, only two of which have been adequately preserved in this case. And one of the questions that's not in the case, Justice Kagan, is whether or not, if MBUSA's contacts are attributable, they are sufficient to establish general jurisdiction.

This case has been in litigation on the personal jurisdiction issue for eight years. Throughout that period, we have argued that if MBUSA's contacts were attributed to Daimler, they were sufficient in kind and quantity to support general jurisdiction over Daimler itself.

JUSTICE GINSBURG: So if a Mercedes Benz

vehicle overturned in Poland and injured the Polish driver and passenger, suit for the design defect could be brought in California?

MR. RUSSELL: That's right. And if you think that the answer to that is wrong, it's because of the argument that Daimler did not preserve.

JUSTICE KAGAN: Yes, but, Mr. Russell, it's usually -- it doesn't lead to good results when you assume something that is obviously in error. You know, it leads you to go onto a road that you wouldn't otherwise have gone onto and get to a destination that might be improper itself.

So it's bad practice, and I understand your, you know, idea about they didn't argue this, they didn't argue that. But to assume something that's obviously a fallacy as your basis for a decision is not likely to lead you to a good outcome.

MR. RUSSELL: Well, that might be a reason then for this Court to dismiss this case as improvidently granted. A cert petition, a grant of cert shouldn't be a Get-Out-of-Jail-Free card.

JUSTICE BREYER: Really, suppose I think that this was crying out for an en banc. After you got your decision, we decided Goodyear, didn't we? And yet, even though there is no effort to reconcile the case

with Goodyear, as there couldn't be -- we haven't decided it -- by the time we decided it, it still could have been taken en banc.

MR. RUSSELL: That's right.

JUSTICE BREYER: I guess we have no power at all to force the circuit, although that's what they are there for, to consider such a matter en banc.

MR. RUSSELL: That's because Petitioners didn't raise that question en banc. They filed an en banc petition after Goodyear came down -- -

JUSTICE BREYER: And they didn't raise these --

MR. RUSSELL: And they did not raise these questions.

JUSTICE KAGAN: But, Mr. Russell, they did talk about Daimler wasn't subject to general jurisdiction. They didn't contest MBUSA's being subject to general jurisdiction, but they said Daimler isn't subject to general jurisdiction.

So, you know, they didn't make the precise argument that they should have made, but they basically put the question at issue: Is Daimler subject to general jurisdiction? Answer: No. Daimler is a German corporation. If it were subject to general jurisdiction in California, so too it would be subject to general

jurisdiction in every State in the United States, and all of that has got to be wrong.

MR. RUSSELL: Well, with respect, Justice Kagan, it's not as easy as you seem to think it is. Let me give you an example. In Perkins, this Court cited a prior case as a quintessential paradigmatic example of general jurisdiction, called Barrow Steamship Company v. Kane, and in that case, it approved -- this Court approved the exercise of general jurisdiction in New York over a British steamship company for a tort that occurred in Ireland based on the fact that it had an office run, actually, by another company, a mercantile company called Henderson.

JUSTICE GINSBURG: What was the year of that decision?

MR. RUSSELL: That was 1898. But this Court --

JUSTICE GINSBURG: Yes, but the thinking about jurisdiction has changed enormously since then.

MR. RUSSELL: But my point is that this Court in Perkins, which is quite a long time after International Shoe, cited to Barrows as an example of a paradigmatic example.

JUSTICE GINSBURG: If there was ever an example of a corporation being at home in a particular

1 place, it's Perkins against Benguet. It was a
2 Philippine company that was shut down entirely. It was
3 World War II. To the extent the company was operating
4 at all, it was in Ohio. It was not able to operate in
5 what otherwise would have been its home base. So
6 everything that the corporation was doing occurred in
7 Ohio.
8 MR. RUSSELL: Justice Ginsburg, just to be
9 clear, I'm not saying that this case is like Perkins.
10 I'm saying that in Perkins, a post- International Shoe
11 case, this Court embraced the result in Barrows, which
12 is a case quite like this one.
13 And more --
14 JUSTICE SCALIA: Mr. Russell, I'm still hung
15 up on -- on why we have to confront a Federal
16 constitutional question. It doesn't seem to me that a
17 State statute which says we want to exercise
18 jurisdiction to the extent the Constitution permits -- I
19 don't think that invites a Court to restructure standard
20 State law and to say we're not going to observe the
21 corporate distinction.
22 I guess you'd have to say we can hold the
23 individual shareholders of a corporation liable, because
24 that might not violate the Constitution.
25 I don't think that when California adopts

this statute it means to change its standard law regarding corporations, regarding individuals, and so forth. Why should we assume that?

MR. RUSSELL: Because Petitioner, again, didn't make that argument, either.

JUSTICE BREYER: Now we're -- look at the odd thing. It might not violate the Constitution. I mean, it's the same question, but it is bothering me, too. It might not violate the Constitution of the United States for a State to say we don't have limited liability in respect to the subsidiary corporation or the general corporation.

It's very unlikely to do that. It's going to be a big problem to get investment in that State, but it might not violate -- it might not violate the Constitution as here, to say, you know, we are in California not going to have subsidiaries when a plaintiff comes in and sues on the basis of something that happened outside the country; but we will have it when, in fact, he sues on something that happened in California. Now, a State could do that, I guess, but it's pretty odd.

And if you look what the -- what the Ninth Circuit said in its opinion, it never referred to California law directly. It's all Ninth Circuit cases

or Second Circuit cases. The only thing it says about California is probably something that was quoted in that circuit case, something like that.

So, what am I supposed to do, because State law is up to the State? How do I handle that?

MR. RUSSELL: This case has been litigated on the interpretation of the California statute that says that California intended, notwithstanding what rules it applies for liability, to exercise personal jurisdiction to the furthest extent permitted by the Constitution. And here it's not that difficult a question. Here the question is, if Petitioner would have been subject to general jurisdiction in California had it conducted the same operations through a subdivision in the case, does the Due Process Clause give it a constitutional right to avoid that jurisdiction simply by conducting those same operations through a wholly-owned subsidiary.

JUSTICE BREYER: So you think, in other words, that California has abolished -- I mean, California says there is no corporate insulation? A corporation, when it tries to work through a subsidiary, that subsidiary has unlimited liability from lawsuits in California. Is that what you think California law is?

MR. RUSSELL: California wants to go as far

as the Constitution would permit.

JUSTICE BREYER: The answer then to my question is yes. You think right today, in California, the law is there is no -- there is unlimited liability for a corporation that is a subsidiary of another?

MR. RUSSELL: Not that there is unlimited liability, but that the exercise --

JUSTICE BREYER: Well, you can bring a lawsuit, unlimited liability.

JUSTICE ALITO: Well, Mr. --

MR. RUSSELL: Because the statute at issue doesn't speak to liability. It speaks to personal jurisdiction.

JUSTICE ALITO: Mr. Russell, is it clear that the California law regarding corporate liability would apply to all of your claims?

MR. RUSSELL: No.

JUSTICE ALITO: You have Federal claims, you have Argentine claims; isn't that correct?

MR. RUSSELL: That's correct.

JUSTICE ALITO: But California law controls personal jurisdiction. It doesn't, does it, necessarily control corporate liability, let's say, with respect to the Argentine claims?

MR. RUSSELL: No, it certainly wouldn't.

The choice of law principles would almost certainly point to Argentine law.

JUSTICE GINSBURG: Well, but why should we -- now that the Federal claims are out -- I mean, when you started the suit you had a claim under the Alien Tort Statute, you had a claim under the Torture Victims Protection Act, but now those Federal claims are out and we are left with a claim under California law and Argentinian law.

Why should a Federal forum exercise supplemental jurisdiction over those claims once the Federal claims are out of the picture?

MR. RUSSELL: Well, certainly we agree that if this case were remanded to the district court it would have discretion to refuse to exercise supplemental jurisdiction.

JUSTICE GINSBURG: Wouldn't it be arbitrary for it to exercise personal jurisdiction when there is no Federal claim and the case involves foreign plaintiffs injured abroad, allegedly due to the activities of a subsidiary operating abroad?

MR. RUSSELL: Ultimately, we don't think so. I think you would have to take into account this case has been in litigation for eight years already. I think that's a substantial reason for the Court to want to

allow the case to continue.

I recognize that we would have a very hard time appealing from a decision that refused to exercise supplemental jurisdiction. But again, on the question that the Court actually granted cert on and which was actually preserved here, I do think that the Court could simply hold that, look, attribution of contacts between a wholly-owned subsidiary and its parents is not so unreasonable as to violate the Constitution.

At the end of the day, the due process question is whether the defendant had sufficiently availed itself of the benefits of doing business in the State to warrant an exercise of jurisdiction. It can do that either directly, through its --

JUSTICE GINSBURG: Yes, but that test that you just -- the sufficiently purposeful availing, those are all specific jurisdiction questions.

MR. RUSSELL: With respect --

JUSTICE GINSBURG: And not general jurisdiction questions.

MR. RUSSELL: With respect, I don't think that's correct. Justice Kennedy's opinion for the plurality in Castro, for example, identified the underlying premise of both general and specific jurisdiction and availing oneself of the benefits of

being in the State.

JUSTICE GINSBURG: And Goodyear distinguished the two by saying general jurisdiction means it's equivalent to residence for an individual. It's where you are at home.

And general jurisdiction was much broader in the days before long arm statutes. But now that we have specific jurisdiction so you can sue where the event occurred, just as specific jurisdiction has expanded, so general jurisdiction has shrunk.

MR. RUSSELL: I understand that there are very serious and important questions with respect to what it means to be at home in a State. And that if Petitioner had raised those arguments below, it might actually have prevailed. But this Court ought not to forgive that waiver in a case like this and it ought not to decide that question when not only is the argument forfeit, but it's barely been briefed in this case.

JUSTICE KENNEDY: Well, I understood the concession as being, that if Mercedes were the only corporation involved in this dispute, there would be specific -- sufficient contacts. That doesn't tell me anything about Daimler.

MR. RUSSELL: That is --

JUSTICE KENNEDY: I'm -- I'm not so sure

that this concession is that troublesome for Daimler.

MR. RUSSELL: No. There has been one concession, which is that MBUSA's contacts are sufficient to subject MBUSA itself to general jurisdiction. And there's been one forfeiture --

JUSTICE KENNEDY: So how does that answer the question about Daimler?

MR. RUSSELL: Well, because there's been one forfeiture as well. And that is, we've argued for 8 --

JUSTICE KENNEDY: There has been one --

MR. RUSSELL: Forfeiture, as well. We have argued for 8 years that if you attribute the contacts in MBUSA to Daimler, those contacts are sufficient to establish general jurisdiction over Daimler. They're sufficient to satisfy the minimum contacts.

JUSTICE GINSBURG: Well, any claim arising anyplace in the world.

MR. RUSSELL: That's right. That's been our argument. They could have said no, that's not right; they could have said MBUSA doesn't do enough business in California. They could have said that general -- that doing business theory of general jurisdiction is no good. They could have said you can only be subject to general jurisdiction --

JUSTICE KENNEDY: But I think their

concession is quite consistent with the proposition that the distinction between parent and subsidiary is meaningful for jurisdictional purposes. And that you're not just automatically an -- you yourself do not defend the Ninth Circuit's position that if Daimler gives enough functions to Mercedes that it has to give, that then Daimler is -- is liable. You don't -- your footnote, I think page 35 of your brief, you -- you don't take the Ninth Circuit's reasoning to its full extent.

MR. RUSSELL: That's right. We do think that this is an easier case because we have a wholly-owned subsidiary that operates in very much the same way as a subdivision would.

Notice that in the Federal --

JUSTICE SCALIA: Mr. Russell, does it not follow from -- from your argument that a Federal court should entertain a suit against the shareholders of a foreign corporation when that foreign corporation has sufficient contacts in California?

MR. RUSSELL: No, I don't think it does.

JUSTICE SCALIA: Why --

MR. RUSSELL: But the question ultimately is whether it's fair to say that the defendant has sufficiently benefitted from --

JUSTICE SCALIA: Why is it any less fair?

MR. RUSSELL: Because unlike a shareholder, a parent company enjoys not only the economic benefits of the subsidiary's activities --

JUSTICE SCALIA: Don't the shareholders?

MR. RUSSELL: They enjoy a partial. But in addition they have -- the parent has the right and here the substantial right to control the day to day --

JUSTICE SCALIA: Don't the shareholders?

MR. RUSSELL: No, they don't. All the shareholders have the right to do is appoint the -- the people to the board. Here, Daimler exercised a degree of control that is much more significant than that.

JUSTICE SCALIA: Well, I can't see a distinction. And I think if you stretch the California statute as far as you're stretching it, you -- you have to assume that California would exercise jurisdiction in that case --

MR. RUSSELL: Well, I don't think --

JUSTICE SCALIA: -- if you're the Ninth Circuit.

MR. RUSSELL: I don't think that's right. I mean, this Court has recognized that look, the Due Process Clause requires ultimately drawing some lines, but it can't be done in a mechanical way. Here,

Goodyear provides a safe harbor to companies that want to make sure that they're not subject to general jurisdiction in California. They can do so by selling their cars to an independent distributor, the way Petitioner used to do and the way that Toyota still does. But with respect to --

JUSTICE GINSBURG: But if you go -- if you go back to the -- to the foundation case of International Shoe. That case recognized that you can be an agent for one purpose, but not for another. So the people -- the salesmen who were promoting the sales of shoes were the agents of International Shoe for the purpose of promoting the sale of shoes. They were not an all-purpose agent for the purpose of, say, dealing -- real estate dealings on behalf of the corporation.

So you could have an agency for one purpose, selling cars in California, but totally unrelated to torturing people in Argentina.

MR. RUSSELL: That's right. But the -- but that I think we need to separate the two ideas of what does it take to make Petitioner at home in California. Once it's established that it is at home in California, it is simply a traditional aspect of general jurisdiction that it will be subject to suit for things that happened abroad.

1 If this suit had been brought against Apple
2 Computer, which is headquartered in California, I don't
3 think we would be here today. The question here is
4 whether the -- the conduct in California is rendered
5 insufficient by virtue of the fact that it was
6 undertaken by a subsidiary.
7 JUSTICE BREYER: That is my problem, and I
8 don't know what to do. It's really -- Justice Scalia
9 has been mentioning this problem.
10 You're seeing it through the lens of
11 jurisdiction. I'm not. I'm seeing it through the lens
12 of corporate law. Five shareholders get together from
13 outside California and they set up a corporation in
14 California. Why? To insulate themselves from
15 liability, particularly lawsuits.
16 Now, instead of those five shareholders,
17 everything is the same, but now it's a German
18 corporation and suddenly, they can't insulate themselves
19 from the lawsuits in California. I think it unlikely
20 that California would have such a corporate law, whether
21 it goes by the name of jurisdiction or some other name.
22 But that's a State law question.
23 So what am I supposed to do? That's where
24 we started this argument. And that's what I --
25 MR. RUSSELL: Well, Justice Breyer, if you

1 think -- if you think that the -- the proper resolution
2 of a case like this turns on issues that were not
3 preserved below and have not been argued here, then you
4 can do one of two things.
5 JUSTICE BREYER: What?
6 MR. RUSSELL: You can dismiss the case as
7 improvidently granted or you can decide the case on the
8 assumptions upon which it's been litigated and make
9 clear that you're doing that.
10 JUSTICE BREYER: Well, another thing we
11 could do is we could say we've decided now two cases
12 that seem to bear on this, and one is Goodyear and the
13 other is Kiobel; and we could say we'll send it back for
14 consideration of this case in light of those.
15 MR. RUSSELL: We would have no problem with
16 that if you made clear that it was open to us under
17 remand to argue that they didn't preserve these
18 arguments. That would be a fine result for us.
19 CHIEF JUSTICE ROBERTS: You just --
20 JUSTICE SCALIA: I'm sorry.
21 CHIEF JUSTICE ROBERTS: You mentioned
22 Kiobel. Do you still think you have a viable claim
23 under Kiobel, or haven't you conceded that?
24 MR. RUSSELL: We are not prepared to concede
25 that at this point, although we recognize we have an

uphill struggle to fit ourselves within the exception that's been left. Principally, our argument would be based on the fact that at the time of suit, this was a dual American/German company with dual headquarters in -- in the United States, which is different than Shell. But we're not prepared to concede it, but we're not asking this Court to resolve it.

JUSTICE SCALIA: If this is as -- as Justice Breyer and I seem to think, a question of State law, don't you think it's extraordinary that the Ninth Circuit could make such a significant holding on -- on California law without -- there is a certification procedure in California, isn't there?

MR. RUSSELL: There is, although --

JUSTICE SCALIA: So why -- why wouldn't they have asked the California Supreme Court whether -- whether this jurisdiction statute was meant to alter corporate law or, you know, tort law, or, you know -- just imagine any change in law that would bear upon jurisdiction, and all those changes must be assumed to have happened.

Couldn't -- couldn't they ask that? Is that what this California jurisdictional statute means?

MR. RUSSELL: Sure. They could have asked that. Usually they only ask those questions --

JUSTICE SCALIA: Is it too late to ask it now?

MR. RUSSELL: It wouldn't be if you sent it back. I mean, usually courts of appeals don't ask those questions unless somebody asks them to. And here Petitioner never asked them to. It assumed, as did we, that the statute meant that they wanted the most permissive attribution rule that's permitted by the Due Process Clause; and I don't think it's unreasonable -- that's an unreasonable interpretation of the statute.

I recognize that it's a little bit problematic that these statutes don't give greater definitive guidance; the Petitioner hasn't complained about that either. And so on the premises on which this case was litigated, I do think you can decide this case by resolving two questions: First, on the assumption that if MBUSA's contacts are attributable to Petitioner, they are sufficient to make it at home, does the fact that those contacts are through a wholly-owned subsidiary rather than a subdivision make the exercise of general jurisdiction improper --

JUSTICE ALITO: If we assume for the sake of argument that there isn't a preservation issue regarding this in-home -- this at-home question, why shouldn't the rule be that unless a corporation is incorporated in the

1 jurisdiction or has its principal place of business in
2 the jurisdiction, the -- the acts of the subsidiary are
3 not attributable unless it's an alter ego.
4 It's a nice clean rule; many of the
5 prominent scholars in this area think that the American
6 doctrine of general jurisdiction doesn't serve any good
7 purpose. Now that specific jurisdiction has been
8 expanded, it makes us an international outlier. Why
9 shouldn't we have a nice clear rule like that, and
10 everybody will know exactly where things stand?
11 MR. RUSSELL: Just to be clear, there are
12 two parts to that rule. There is one that's the
13 assertion that ordinarily, you're only at home in the
14 place of principal business, or principal -- principal
15 place of business, or your place of incorporation. And
16 the other is, oh, we'll only apply that rule with
17 respect to subsidiary contacts.
18 That additional thing, which is necessary
19 to -- to shoehorn it into this case, I think, is very
20 artificial. So if this Court is going to --
21 JUSTICE GINSBURG: What is the additional
22 thing?
23 MR. RUSSELL: That we will only apply that
24 rule if the contacts, if I understand Justice Alito's
25 proposal, we only apply that rule if the contacts in the

State are through a subsidiary. That's a very artificial gerrymander, honestly, to fit the facts of this case. If this Court is going to say that the doing business theory of general jurisdiction is no longer good law, it should do so directly, it should do so when the case has actually been briefed. It hasn't been briefed here.

JUSTICE GINSBURG: You did say in your brief that recognizing that other nations are highly critical of our expansive, one-time expansive, notion of doing business as a basis for general jurisdiction, you say that that shouldn't be taken into account as a basis for constitutional decisionmaking. And yet what we are talking about is a notion of whether it's fair and reasonable to require a corporation to answer in a forum, and is what the other countries think unenlightening on what's fair and reasonable.

MR. RUSSELL: I don't know that you can't take it into account at all, but I will say that the constitutional test is whether it's consistent with traditional notions of fairness and justice, meaning traditional American notions of substantial fairness.

JUSTICE KAGAN: Mr. Russell, how would you make the argument, and again with Justice Alito, sort of putting these waiver questions aside for a second, a

1 German corporation incorporated in Germany,
2 headquartered in Germany, 2.4 percent of its sales are
3 in California. How do you argue that it's subject to
4 jurisdiction, general jurisdiction, not specific
5 jurisdiction, general jurisdiction, which means over
6 suits that have nothing to do with California or indeed,
7 as here, over in the United States, have anything to do
8 with anything that happened in the United States.
9 How do you make the argument that Daimler is
10 subject to general jurisdiction?
11 MR. RUSSELL: I would say a couple things.
12 I haven't briefed this, but this is what I would say in
13 a brief if we had the opportunity to brief it. And that
14 is it has done billions of dollars in business in
15 California. It's --
16 JUSTICE KAGAN: It's 2.4 percent of its
17 sales. That would make it subject to general
18 jurisdiction every place.
19 MR. RUSSELL: But the problem is a
20 corporation shouldn't be jurisdictionally better off
21 simply because it's bigger than its competitors who are
22 smaller and therefore necessarily do a bigger portion of
23 their business in a smaller number of places.
24 I think there is a very significant fairness
25 problem with the proportionality test suggested by the

government, again never raised in this case. Nobody ever argued that MBUSA didn't do enough business in California, and in fact it's done billions of dollars of business there and it's enjoyed the benefits of being in the State, of doing business in the State, to a far greater degree than many of its competitors, say Tesla, which is subject to general jurisdiction for suits for anything that it does anywhere in the world.

JUSTICE KAGAN: If it is subject to general jurisdiction in California, is it subject to general jurisdiction in all 49 other States?

MR. RUSSELL: I think there would still be a question of whether -- they would be able to raise the arguments that they haven't raised in other jurisdictions. It may be that the billions of dollars that they are doing business in California is enough, but the few millions of dollars they do in Iowa is not.

JUSTICE KAGAN: So everybody is subject to general jurisdiction in like California and New York and Florida because they are big markets, but no worries about, you know, Delaware?

MR. RUSSELL: That may be the result.

JUSTICE KAGAN: That's a bad example. Rhode Island.

MR. RUSSELL: That may be the case if -- -

1 the Court has always recognized that doing business is
2 enough. Back to the Barrow case, when just having an
3 office, a sales office. Another case that this Court
4 cited in Perkins and cited in International Shoe as an
5 example of a paradigmatic case was a case called Hausa
6 by then-Judge Cardozo. It was a suit by somebody from
7 New York, who sued in New York, sued a Pennsylvania
8 corporation, and the justification was it had a sales
9 office in New York.
10 Now, if this Court thinks that those cases
11 were wrong, if it thinks that we need to change our
12 conception of general jurisdiction in light of the
13 evolved modern --
14 JUSTICE GINSBURG: Isn't that exactly what
15 Goodyear held?
16 MR. RUSSELL: No. Goodyear didn't purport
17 to change anything. I know you used a new phrase to
18 describe the prior precedent, but it wasn't purporting
19 to revise it, and I don't think that there was
20 substantial argument in that case on that score.
21 JUSTICE GINSBURG: There would hardly be
22 room for a decision next to Goodyear that says, oh, for
23 general jurisdiction purposes it's enough that you have
24 some subsidiary operating in the State. The whole idea
25 of Goodyear was to say there is one place you can always

sue a corporation, one or two, place of incorporation, a principal place of business.

MR. RUSSELL: Well, again if I can just respond to that idea. The one consequence of that, and getting back to what I would say to Justice Kagan, is people aren't subject to general jurisdiction only in one or two places. They are subject to general jurisdiction anywhere they set foot and are served with process. And I think it is quite unfair to say --

JUSTICE GINSBURG: But people can be only one place at a time.

MR. RUSSELL: But they go a lot of places over time. And as a consequence they are in fact in the course of living their lives or even doing business in an unincorporated forum subject to general jurisdiction in a lot of places.

Again, this is an important question that hasn't been briefed in this case, it wasn't preserved below, and I think that you ought to decide the case on the grounds, on the premises on which it has been litigated for eight years. And if you can't do that you ought to dismiss the case as improvidently granted or at least remand the case to allow a full airing of these issues in an appropriate forum.

JUSTICE ALITO: If this 2.4 percent figure

is important, wouldn't we get into impossible line-drawing problems? What if it was 1.4 percent?

MR. RUSSELL: Well, you do get into line-drawing problems in this area. This Court has recognized that even in specific jurisdiction cases.

JUSTICE SCALIA: You think it should be billions of dollars, right, that percentage, right?

MR. RUSSELL: I think billions of dollars is enough.

JUSTICE SCALIA: So we've got to pick a dollar amount rather than a percentage.

MR. RUSSELL: Well, you have to pick some metric. I mean, this Court's cases have always been general. They talked about minimum contacts. They talked about systematic and continuous business operations in the State.

And the Court has always recognized that those are not standards that are capable of mechanical operation or bright line the rules. If you think that you need to develop some new standards, you ought to do it in a case when it is squarely presented and adequately briefed.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dupree, you have four minutes remaining.

REBUTTAL ARGUMENT OF THOMAS H. DUPREE, JR.,
ON BEHALF OF THE PETITIONER

MR. DUPREE: Just a few brief points. First, with regard to Justice Breyer's question about remand, I think there is absolutely no reason for this Court to remand this case to the Ninth Circuit. The issues as to attribution were fully briefed below. They are fully briefed here. I think that were this Court to either remand the case or dismiss the case, for one thing, the circuit split would persist. The Ninth Circuit's decision in the event of a remand would remain on the books.

Even if this Court were to remand the decision of the Second Circuit which -- -

JUSTICE SOTOMAYOR: Do you really care how we do it? Given that so many issues have not been adequately briefed, conceded when they are obviously fallacious and unsupportable, why don't we just say simply exercise of jurisdiction is unreasonable in this case?

MR. DUPREE: Well, Justice Sotomayor --

JUSTICE SOTOMAYOR: The other side -- neither you or the other side have argued that there isn't a reasonableness component. I know some of my colleagues don't think there is. But both of you have

1 proceeded in your briefing as if there is. Do you care
2 how you win?
3 MR. DUPREE: Well, yes, Your Honor, I think
4 we do. I think we do. And let me say this. I think
5 that with, regard to Your Honor's points about issues
6 being waived or forfeited below, the only issue that
7 even arguably, even arguably was operated below was the
8 discrete question as to whether Mercedes Benz itself is
9 subject to general jurisdiction in California.
10 The question that Justice Kagan and others
11 were inquiring about, namely that even were one to
12 accept the attribution theory and evaluate Daimler as a
13 joint enterprise, would that render the combined
14 enterprise at home in California, we plainly did not
15 waive or forfeit that question. In fact we expressly
16 addressed it in our opening brief and we have been
17 fighting in this case from day one to argue that, even
18 if you were to attribute the contacts, there is no basis
19 for jurisdiction over Daimler. That question is
20 squarely presented for this Court's review.
21 I also think that, as Justice Ginsburg and
22 others have noted, there has been some confusion in the
23 lower courts over the distinction between specific
24 jurisdiction and general jurisdiction. This Court saw
25 it in Goodyear, for example, and I think that were this

1 Court to resolve this case on the ground that Justice
2 Kagan suggested or Justice Alito suggested, namely, that
3 a corporation cannot be at home outside of the areas
4 where it maintains its principal place of business or is
5 incorporated, that it can't be subject to general
6 jurisdiction anywhere else.
7 That would be a clean rule. It would be a
8 workable rule. I think it's fully consistent with what
9 the Court said in Goodyear, and it would provide clarity
10 and guidance to the lower courts and eliminate the
11 circuit split that currently exists over agency
12 jurisdiction.
13 A couple other quick points.
14 Justice Scalia, I regret to report that neither the
15 parties nor the courts below reproduced the text of the
16 California statute. The Solicitor General, however, to
17 his credit did on page 4 of his brief.
18 It simply says that California may exercise
19 jurisdiction on any basis not inconsistent with the
20 Constitution of California or the United States. And
21 the Ninth Circuit panel on page 19A of the Petitioner's
22 appendix said that, therefore, the question is this case
23 -- in this case is simply whether the exercise of
24 jurisdiction would exceed the permissible bounds of due
25 process.

The last point I want to make, and we've been discussing legal issues, is just to remind the Court of the facts of this case. This is a case involving Argentine plaintiffs suing a German corporation based on events that allegedly occurred in Argentina more than 30 years ago. This case has no connection to the United States, and it has no business in a California courtroom.

The Ninth Circuit's contrary conclusion is indefensible, and for that reason, we ask that the judgment be reversed.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Counsel.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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