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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

6 ORAL ARGUMENT OF THOMAS H. DUPREE, JR.,
7 ON BEHALF OF THE PETITIONER

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

10 The Ninth Circuit held that Daimler, a
11 foreign corporation, is subject to general jurisdiction
12 in California and thus may be sued in California on any
13 claim arising anywhere in the world. The Ninth Circuit
14 reached this conclusion by attributing to Daimler the
15 California contacts of a Daimler subsidiary, Mercedes
16 Benz USA, a separate corporation that respects all
17 corporate formalities and that is not Daimler's alter
18 ego.

19 The Ninth Circuit's approach violates due
20 process.

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

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

1 JUSTICE SCALIA: Now, are there -- were
2 there California cases that disregarded the -- the
3 corporate forum?

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

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

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

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

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

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

1 MR. DUPREE: Well, Mr. Chief Justice, there
2 may be a constitutional limit; certainly, to the extent
3 that, say, California adopted a rule that said, for
4 purposes of some sort of liability, we are going to
5 disregard the corporate forum, I think that could pose
6 due process concerns to the extent that it is purporting
7 to override, say, the corporate law of Delaware.

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

13 MR. DUPREE: I -- I still think there would
14 be, Mr. Chief Justice. In other words, I take Your
15 Honor's point about fair notice, if California said,
16 going forward, this is the rule we're going to apply.

17 But at the same time, I'm not quite sure
18 what in the Constitution would empower, say, California
19 to essentially override, say, Delaware's corporate law
20 and say, for our State purposes, we're essentially going
21 to rewrite the corporate DNA of a corporation that's
22 chartered in Delaware in order to --

23 JUSTICE SOTOMAYOR: We permitted that in
24 Container Corp.

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

1 JUSTICE SOTOMAYOR: We permitted that in
2 Container Corp. We permitted California law to tax the
3 parent California corporation for the earnings of all
4 its foreign subsidiaries. And we said the due process
5 clause wasn't offended by that.

6 MR. DUPREE: Well, Justice Sotomayor,
7 typically, this Court has applied a less rigorous due
8 process standard in the tax cases than it has in the
9 personal jurisdiction cases.

10 If one were to look at, say, Goodyear or
11 McIntyre, of any of this Court's more recent
12 jurisdictional decisions, it typically takes a much more
13 rigorous view of the due process clause's limits on a
14 sovereign's ability to adjudicate matters that arise
15 outside the forum than it has in the tax context.

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

20 MR. DUPREE: Well, Justice Ginsburg, I
21 respectfully disagree that we conceded the point below.
22 I'm not sure, frankly, that we could concede something
23 like that on behalf of a different corporation that's
24 not a party to this lawsuit.

25 But it is true that we focused on the

1 attribution question in the Ninth Circuit. And at the
2 end of the day, I don't think that that point affects
3 the outcome in this case because --

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

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

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

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

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

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

1 JUSTICE KAGAN: And, Mr. Dupree, even if you
2 waived that point, if I understand it correctly, you did
3 not waive the point that, even with all attribution in
4 the world, there still is no general jurisdiction over
5 Daimler. In other words, you could attribute all
6 MBUSA's contacts, and you still would not have general
7 jurisdiction over Daimler; is that right?

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

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

17 MR. DUPREE: Justice Kagan, that certainly
18 would be an acceptable route for this Court to resolve
19 the case. And Your Honor has it exactly right, in that,
20 even if one were to attribute the constitutional
21 contacts of MBUSA to Daimler, you would still be left
22 with a joint enterprise that, plainly, is not at home in
23 the State of California.

24 It would still be a German corporation,
25 headquartered in Stuttgart, that draws only

1 approximately 2 percent of its overall vehicle revenue
2 from California sales, so, yes --

3 JUSTICE SOTOMAYOR: Is that a reasonable --

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

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

12 JUSTICE SCALIA: "By and large"? Who -- who
13 are the small?

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

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

23 It's perhaps true -- I think it's true that
24 a State doesn't have to allow companies to have
25 wholly-owned corporations. Under the Constitution of

1 the United States, nothing says they do. Or a State
2 could say, wholly-owned corporations? Well, there's no
3 limited liability. Or they could say, in certain kinds
4 of accidents, there's no limited -- et cetera. You see,
5 they have lots of choice.

6 So what really seems to have been going on
7 here is the Ninth Circuit, from your perspective, just
8 really misstated California law by out to lunch. When
9 they say when we want it to be as broad as the
10 Constitution, they don't mean, because we could get rid
11 of limited liability, that that's what we do.

12 So -- so how can we deal with a circuit
13 court that seems to seriously misstate the law of a
14 State?

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

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

20 (Laughter.)

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

23 (Laughter.)

24 MR. DUPREE: The chain of reasoning, Your
25 Honor, is simply that California, like all States,

1 generally respects the corporate form, certainly with
2 regard to liability determinations.

3 In fact, this is a point that Professor
4 Brilmayer makes at length in her amicus brief, where she
5 says that it is anomalous for a State, on one hand, to
6 respect the corporate form as to liability
7 determinations, but then, when it comes to making these
8 sorts of personal jurisdictional determinations, it
9 applies a completely different standard.

10 So I think --

11 JUSTICE GINSBURG: But suppose -- but
12 suppose we had a case of an accident on a California
13 highway injuring California people and they sued,
14 charging that the Mercedes Benz was defectively
15 manufactured.

16 Would there be jurisdiction over both the
17 parent and the sub in that situation?

18 MR. DUPREE: If it were the case Your Honor
19 hypothesized, I think there may well be specific
20 jurisdiction available, depending on whether Daimler
21 purposefully availed itself of the California forum.

22 JUSTICE GINSBURG: And what does that mean?
23 I mean, it certainly wanted to have its cars sold in --
24 in California.

25 MR. DUPREE: Right. What this Court has

1 said in its opinions in Asahi and then, of course, in
2 McEntyre, is that you look whether the corporation
3 targeted the forum. And in Asahi, Justice O'Connor's
4 opinion identified several facts that could support such
5 a finding.

6 For example, whether the parent targeted
7 advertising at the forum, whether the parent designed a
8 product specifically for use in that forum. And, of
9 course, this Court has said, repeatedly, that questions
10 of specific jurisdiction are highly fact dependent.

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

16 JUSTICE SOTOMAYOR: Counsel --

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

21 MR. DUPREE: Well, certainly, courts have
22 exercised specific jurisdiction in that situation. But,
23 of course, as this Court's ruling in McEntyre
24 illustrates, that's not necessarily always the case, and
25 there may, of course, be situations where a product does

1 cause injury in the forum, yet the foreign parent is not
2 necessarily subject to specific jurisdiction in that
3 forum.

4 JUSTICE KENNEDY: Well, how -- how would you
5 answer Justice Ginsburg's question if you were writing
6 the opinion in your favor? Would you say that, in the
7 hypothetical, Daimler Chrysler put in motion a course of
8 events that caused an injury in California? Is that the
9 way our jurisprudence works?

10 MR. DUPREE: Well --

11 JUSTICE KENNEDY: If you're going to answer
12 the hypothetical in an opinion, how would you -- what
13 would you say?

14 MR. DUPREE: Well, I think I would go back
15 to what this Court has articulated, first of all, is the
16 standard for specific jurisdiction, which is purposeful
17 availment or purposeful direction. I think as far as
18 what constellation of facts --

19 JUSTICE KENNEDY: Well, Daimler has
20 purposely availed itself of California jurisdiction by
21 establishing the sub that -- that operates there by
22 establishing Mercedes U.S., that it operates there.

23 MR. DUPREE: Well, Mercedes --

24 JUSTICE KENNEDY: So -- so creating a
25 subsidiary is not availing itself of jurisdiction?

1 MR. DUPREE: Well, Justice Kennedy, I think,
2 in some cases, a subsidiary's work could give rise to
3 specific jurisdiction, but I think that's not
4 necessarily true across the United States in all cases.

5 JUSTICE KENNEDY: I agree. And I'm asking
6 what is the rationale that you would use to answer
7 Justice Ginsburg's hypothetical in the -- in the opinion
8 for the Court that is ruling in your favor?

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

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

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

20 JUSTICE KENNEDY: Because?

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

25 JUSTICE SOTOMAYOR: Mr. --

1 JUSTICE KAGAN: Mr. Dupree --

2 JUSTICE ALITO: If we agree with you -- if
3 we agree with you that the test should be whether the
4 subsidiary is an alter ego of the parent, would that
5 depend on the -- the law of the particular State in
6 which the suit is brought? Or would it be based on some
7 general understanding of alter ego liability?

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

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

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

25 JUSTICE SOTOMAYOR: Where else have we done

1 it in the personal jurisdiction context, define the
2 limits of the due process -- Federal due process, in
3 accordance with State law?

4 MR. DUPREE: Well --

5 JUSTICE SOTOMAYOR: Didn't we create tests
6 in International Shoe, in Burger King, separate from
7 State law?

8 MR. DUPREE: The test this Court created in
9 International Shoe, I think, is probably best
10 characterized as a Federal common law test. I think
11 that this situation is not quite analogous, precisely
12 for the reason I mentioned in my answer to
13 Justice Alito, is that commercial actors and lawyers and
14 parties throughout the country typically look to State
15 law for guidance.

16 And if this Court were to adopt a general
17 Federal common law standard, under which I think we
18 would still prevail, but --

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

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

24 JUSTICE SOTOMAYOR: I don't know how -- how
25 corporations get any sense of comfort from a law that's

1 so irrationally applied, according to some.

2 MR. DUPREE: Well, I think some of the
3 amici, candidly, may overstate the purported confusion.
4 At the end of the day, veil-piercing law is certainly
5 well settled and vetted in this country's legal
6 traditions, and I think it is sufficiently capable of
7 precise application in advance. Corporations deal with
8 that standard on a day-to-day basis.

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

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

20 MR. DUPREE: I believe it's --

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

24 MR. DUPREE: Well, we'll provide the cite to
25 Your Honor. It's a --

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

3 MR. DUPREE: I will --

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

6 MR. DUPREE: Right. I will --

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

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

12 JUSTICE SCALIA: I don't have the California
13 Civil Code -- you're saying it's -- it's not in the
14 briefing?

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

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

23 MR. DUPREE: That's exactly right, Justice
24 Ginsburg. It simply says that California may exercise
25 long-arm jurisdiction, consistent and to the limit

1 permitted by Federal due process.

2 That's all the statute says, Justice Scalia.

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 FOR THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONER

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

12 As several questions from the Court suggest,
13 the Due Process Clause itself does not supply fixed
14 rules for the attribution of forum contacts from one
15 corporation to another. Rather, such rules are the
16 province of the positive law that creates the
17 corporation and other substantive law, such as agency,
18 that defines the relationship of that juridical person
19 to other persons.

20 And those rules are the ones that the
21 corporations themselves rely upon and that others who
22 deal with the corporations rely upon.

23 JUSTICE SOTOMAYOR: Could you tell me why we
24 just don't rely on the tests we apply in the tax cases?
25 It's a Federal test, and it says, if you're functionally

1 and economically tied together and you control the other
2 entity -- the parent controls the subsidiary, your
3 earnings are subject to the Due Process Clause and can
4 be taxed by an individual State. It seems like a fairly
5 simple test.

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

10 MR. KNEEDLER: But in the instance you're
11 talking about, in taxation -- and this is related to a
12 question the Chief Justice asked -- the Due Process
13 Clause does not, itself, prohibit a State or the Federal
14 government from attributing substantive liability, for
15 example, from a -- from a subsidiary to a parent or, in
16 the case of taxation, of choosing to look at the entire
17 enterprise of which the parent corporation is the head.

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

22 JUSTICE SOTOMAYOR: California --

23 MR. KNEEDLER: -- reflect a general
24 determination that in all circumstances, the acts of the
25 nation or the acts of a subsidiary should be attributed

1 to the parent. In fact, the general rule is quite to
2 the contrary.

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

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

15 MR. KNEEDLER: No.

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

18 MR. KNEEDLER: No. No, they are not.

19 And -- and for the taxation, there has to -- for
20 taxation to begin with, there has to be some nexus
21 between the individual and the -- and the State.

22 The rules that I think Justice Sotomayor was
23 talking about in the Federal Tax Code has similar
24 provisions, really have to do with the measure of
25 taxation. And in most of those situations, certainly,

1 in taxation among the States, there is an apportionment
2 formula.

3 Yes, the -- the overall income may be lumped
4 together for purposes of -- of the initial step, but
5 then there's an apportionment formula that says that --
6 in the Mobil case that's cited in the briefs, for
7 example, that -- that Vermont can only tax so much of
8 it, that portion that is fairly attributable to Vermont.

9 So in that sense, it's analogous to a
10 specific jurisdiction. You're looking at -- you're
11 coming up with some formula to tie the taxation to the
12 State that is imposing -- imposing the tax.

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

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

25 MR. KNEEDLER: Probably not. The court of

1 appeals -- I think it's page 23 of its opinion -- says
2 that the reason that it looked to the -- the question of
3 whether the in-State activities of MBUSA were important
4 to Daimler was that the importance is a measure of the
5 presence, meaning essentially doing business within --
6 within California.

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

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

15 MR. KNEEDLER: Yes.

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

18 MR. KNEEDLER: Yes. Now -- but I think, in
19 a broader matter -- and also, I think the point that
20 Justice Kagan made earlier that even -- even if MBUSA
21 was subject to general jurisdiction or if we -- if
22 that's accepted for these purposes, that doesn't mean
23 that Daimler -- you wouldn't attribute MBUSA's
24 jurisdictional status to Daimler.

25 You might attribute its contacts, if the

1 appropriate rules for attribution of contacts work in
2 that.

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

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

11 JUSTICE KENNEDY: And that is because?

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

19 There are established exceptions to that --
20 traditional exceptions, the alter ego exception and the
21 situation where a principal is responsible for the acts
22 of an agent.

23 Attribution on those bases, because they're
24 traditional, would not offend traditional notions of --
25 of fair play and substantial justice under the Due

1 Process Clause. Here, Respondent does not argue --
2 Respondents do not argue for an -- that alter ego would
3 satisfy.

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

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

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

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

16 MR. KNEEDLER: No, you -- you do not.

17 JUSTICE KENNEDY: Do we think of it as --
18 what do we think about it as? An independent
19 contractor? Or just something else?

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

1 behalf of or bind Daimler, and it's not a fiduciary.

2 What --

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

10 MR. KNEEDLER: I -- I would think so,
11 particularly given the -- given the agreement in this
12 case which obligates Daimler to market throughout the 50
13 States, and the volume of sales that are directed to the
14 United States, some major portion of which is expected
15 to be and intended to be in California. I don't think
16 there would be any question that California would have
17 specific jurisdiction.

18 JUSTICE KAGAN: But, of course, that just
19 points out the difference between specific and general
20 jurisdiction, that Daimler might be -- might be found --
21 found it -- there's jurisdiction over Daimler in a case
22 which involves the blowing up of a car in California,
23 but not over something that's not related to any of its
24 contacts in California.

25 MR. KNEEDLER: Right. That is -- that is

1 the -- the major -- that is the major difference.

2 JUSTICE ALITO: What would have to be --

3 MR. KNEEDLER: If I could make a point --

4 JUSTICE ALITO: What would have to be

5 true for MBUSA to be Daimler's agent with respect to
6 general jurisdiction? How would the facts of this case
7 have to be changed in order to bring this within an
8 agency principal?

9 MR. KNEEDLER: I think -- I think MBUSA
10 would have to be acting on behalf of Daimler. One step
11 in that direction would be if Daimler consigned the cars
12 to -- to MBUSA and that -- and MBUSA held itself out as
13 the sales agent. Here, the cars were sold to MBUSA in
14 Germany and -- and sent to the United States.

15 But if there was an agency relationship,
16 that doesn't necessarily mean that Daimler would be at
17 home in -- in California or whatever --

18 JUSTICE SOTOMAYOR: I mean, in most agency
19 relationships, titles stay with the principal. So I
20 don't know -- or -- or when it doesn't, it transfers to
21 the agent, but for the benefit of the principal. So I
22 don't know what the sale in Germany has to do.

23 MR. KNEEDLER: Well, I -- under this
24 agreement, MBUSA is -- acts independently. It does not
25 act day to day directly.

1 JUSTICE SOTOMAYOR: Well, it seems an odd
2 thing to say given the page and a half that the lower
3 court went through on the various ways in which Germany
4 controls this subsidiary. It appoints all its officers.
5 It approves all its operating procedures. It approves
6 all of the people it hires and fires.

7 It seems like there isn't much left for
8 what --

9 MR. KNEEDLER: If I may --

10 CHIEF JUSTICE ROBERTS: I don't think there
11 was a question, but you can respond.

12 (Laughter.)

13 MR. KNEEDLER: Those are contractual
14 undertakings. They are not the manifestations of
15 agency. Agency would require that -- that Daimler
16 control the day-to-day operations of this subsidiary.
17 And at page 116A of the petition appendix, the district
18 court says there's no evidence of that whatsoever.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Russell.

21 ORAL ARGUMENT OF KEVIN RUSSELL

22 ON BEHALF OF THE RESPONDENTS

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

25 I'd like to begin with the question of

1 what's in this case and what isn't because the fact
2 pattern in this case gives rise to multiple complicated
3 questions, only two of which have been adequately
4 preserved in this case. And one of the questions that's
5 not in the case, Justice Kagan, is whether or not, if
6 MBUSA's contacts are attributable, they are sufficient
7 to establish general jurisdiction.

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

14 JUSTICE GINSBURG: So if a Mercedes Benz
15 vehicle overturned in Poland and injured the Polish
16 driver and passenger, suit for the design defect could
17 be brought in California?

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

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

1 might be improper itself.

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

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

11 JUSTICE BREYER: Really, suppose I think
12 that this was crying out for an en banc. After you got
13 your decision, we decided Goodyear, didn't we? And yet,
14 even though there is no effort to reconcile the case
15 with Goodyear, as there couldn't be -- we haven't
16 decided it -- by the time we decided it, it still could
17 have been taken en banc.

18 MR. RUSSELL: That's right.

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

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

25 JUSTICE BREYER: And they didn't raise

1 these --

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

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

9 So, you know, they didn't make the precise
10 argument that they should have made, but they basically
11 put the question at issue, is Daimler subject to general
12 jurisdiction? Answer, no. Daimler is a German
13 corporation. If it were subject to -- subject to
14 general jurisdiction in California, so, too, it would be
15 subject to general jurisdiction in every State in the
16 United States, and all of that has got to be wrong.

17 MR. RUSSELL: Well, with respect, Justice
18 Kagan, it's not as easy as you seem to think it is. Let
19 me give you an example. In Perkins, this Court cited a
20 prior case as a quintessential paradigmatic example of
21 general jurisdiction, called Barrow Steamship Company v.
22 Kane.

23 And in that case, it approved -- this Court
24 approved the exercise of general jurisdiction in New
25 York over a British steamship company for a tort that

1 occurred in Ireland, based on the fact that it had an
2 office run, actually, by another company -- a mercantile
3 company called Henderson --

4 JUSTICE GINSBURG: What was -- what was the
5 year of that decision?

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

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

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

14 JUSTICE GINSBURG: If there was ever an
15 example of a corporation being at home in a particular
16 place, it's Perkins against Benguet. It was a
17 Philippine company that was shut down entirely. It was
18 World War II. To the extent the company was operating
19 at all, it was in Ohio.

20 It was not able to operate in what otherwise
21 would have been its home base, so everything that the
22 corporation was doing occurred in Ohio.

23 MR. RUSSELL: Justice Ginsburg, just to be
24 clear, I'm not saying that this case is like Perkins.
25 I'm saying that, in Perkins, a post-International Shoe

1 case, this Court embraced the result in Barrows, which
2 is a case quite like this one.

3 And more --

4 JUSTICE SCALIA: Mr. Russell, I'm still hung
5 up on -- on why we have to confront a Federal
6 constitutional question. It doesn't seem to me that a
7 State statute which says we want to exercise
8 jurisdiction to the extent the Constitution permits -- I
9 don't think that invites a Court to restructure standard
10 State law and to say, we're -- we're not going to
11 observe the corporate distinction.

12 I guess you'd have to say we can hold the
13 individual shareholders of a corporation liable because
14 that might not violate the Constitution. I don't think
15 that when -- when California adopts this statute it
16 means to change its -- its standard law regarding
17 corporations, regarding individuals, and so forth.
18 Why -- why should we assume that?

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

21 JUSTICE BREYER: But, now, we're -- look at
22 the odd thing. It might not violate the Constitution.
23 I mean, it's the same question, but it is bothering me,
24 too. It might not violate the Constitution of the
25 United States, for a State to say, we don't have limited

1 liability in respect to the subsidiary corporation or
2 the general corporation.

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

13 And if you look what the -- what the Ninth
14 Circuit said in its opinion, it never referred to
15 California law directly. It's all Ninth Circuit cases
16 or Second Circuit cases. The only thing it says about
17 California is probably something that was quoted in that
18 circuit case, something like that.

19 So what am I supposed to do? Because State
20 law is up to the State. How do I handle that?

21 MR. RUSSELL: This case has been litigated
22 on the interpretation of the California statute that
23 says that California intended, notwithstanding what
24 rules it applies for liability, to exercise personal
25 jurisdiction to the furthest extent permitted by the

1 Constitution.

2 And here, it's not that difficult a
3 question. Here, the question is, if Petitioner would
4 have been subject to general jurisdiction in California,
5 had it conducted the same operations through a
6 subdivision in the case, does the Due Process Clause
7 give it a constitutional right to avoid that
8 jurisdiction simply by conducting those same operations
9 through a wholly-owned subsidiary --

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

16 MR. RUSSELL: California wants to go as far
17 as the Constitution would permit. We're not asking --

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

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

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

1 JUSTICE ALITO: Well, Mr. --

2 MR. RUSSELL: Because the statute at issue
3 doesn't speak to liability, it speaks to personal
4 jurisdiction.

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

8 MR. RUSSELL: No.

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

11 MR. RUSSELL: That's correct.

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

16 MR. RUSSELL: No, it certainly wouldn't.
17 The choice of law principles would almost certainly
18 point to Argentine law.

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

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

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

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

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

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

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

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

9 MR. RUSSELL: With respect --

10 JUSTICE GINSBURG: And not general
11 jurisdiction questions.

12 MR. RUSSELL: With respect, I -- I don't
13 think that's correct. Justice Kennedy's opinion for the
14 plurality in *Castro*, for example, identified the
15 underlying premise of both general and specific
16 jurisdiction and availing oneself of the benefits of
17 being in the State. And --

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

22 The -- and general jurisdiction was much
23 broader in the days before long-arm statutes. But now
24 that we have specific jurisdiction, so you can sue where
25 the event occurred, just as specific jurisdiction has

1 expanded, so general jurisdiction has shrunk.

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

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

16 MR. RUSSELL: That is --

17 JUSTICE KENNEDY: I'm -- I'm not so sure
18 that this concession is that troublesome for Daimler.

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

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

25 MR. RUSSELL: Well, because there's been one

1 forfeiture as well. And that is, we've argued for 8 --

2 JUSTICE KENNEDY: There has been one?

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

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

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

17 JUSTICE KENNEDY: But I think their
18 concession is quite consistent with the proposition that
19 the distinction between parent and subsidiary is
20 meaningful for jurisdictional purposes. And that you're
21 not just automatically an -- you, yourself, do not
22 defend the Ninth Circuit's position that, if Daimler
23 gives enough functions to Mercedes that it has to give,
24 that then Daimler is -- is liable.

25 You don't -- your footnote, I think page 35

1 of your brief, you -- you don't take the Ninth Circuit's
2 reasoning to its full extent.

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

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

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

14 JUSTICE SCALIA: Why --

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

18 JUSTICE SCALIA: Why is it any less fair?

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

22 JUSTICE SCALIA: Don't the shareholders?

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

1 day --

2 JUSTICE SCALIA: Don't the shareholders?

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

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

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

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

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

19 Here, Goodyear provides a safe harbor to
20 companies that want to make sure that they're not
21 subject to general jurisdiction in California. They can
22 do so by selling their cars to an independent
23 distributor, the way Petitioner used to do and the way
24 that Toyota still does.

25 But with respect to --

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

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

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

20 If this suit had been brought against Apple
21 Computer, which is headquartered in California, I don't
22 think we would be here today. The question here is
23 whether the -- the conduct in California is rendered
24 insufficient by virtue of the fact that it was
25 undertaken by a subsidiary.

1 JUSTICE BREYER: That is my problem, and I
2 don't know what to do. It's really -- Justice Scalia
3 has been mentioning this problem. You're seeing it
4 through the lens of jurisdiction. I'm not. I'm seeing
5 it through the lens of corporate law. Five shareholders
6 get together from outside California, and they set up a
7 corporation in California. Why? To insulate themselves
8 from liability, particularly lawsuits.

9 Now, instead of those five shareholders,
10 everything is the same, but now, it's a German
11 corporation, and suddenly, they can't insulate
12 themselves from the lawsuits in California. I think it
13 unlikely that California would have such a corporate
14 law, whether it goes by the name of jurisdiction or some
15 other name, but that's a State law question.

16 So what am I supposed to do? That's where
17 we started this argument. And that's what I --

18 MR. RUSSELL: Well, Justice Breyer, if you
19 think -- if you think that the -- the proper resolution
20 of a case like this turns on issues that were not
21 preserved below and have not been argued here, then you
22 can do one of two things.

23 JUSTICE BREYER: What?

24 MR. RUSSELL: You can dismiss the case as
25 improvidently granted, or you can decide the case on the

1 assumptions upon which it's been litigated and make
2 clear that you're doing that.

3 JUSTICE BREYER: Well, another thing we
4 could do is we could say we've decided, now, two cases
5 that seem to bear on this, and one is Goodyear, and the
6 other is Kiobel; and we could say we'll send it back for
7 consideration of this case, in light of those.

8 MR. RUSSELL: We would have no problem with
9 that if you made clear that it was open to us under
10 remand to argue that they didn't preserve these
11 arguments. That would be a fine result for us.

12 CHIEF JUSTICE ROBERTS: Justice Breyer
13 mentioned --

14 JUSTICE SCALIA: I'm sorry. `

15 CHIEF JUSTICE ROBERTS: -- mentioned Kiobel.
16 Do you still think you have a viable claim under Kiobel,
17 or haven't you conceded that?

18 MR. RUSSELL: We are not prepared to concede
19 that at this point, although we recognize we have an
20 uphill struggle to fit ourselves within the exception
21 that's been left. Principally, our argument would be
22 based on the fact that, at the time of suit, this was a
23 dual American/German company with dual headquarters
24 in -- in the United States, which is different than
25 Shell.

1 But we -- we're not prepared to concede it,
2 but we're not asking this Court to resolve it.

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

9 MR. RUSSELL: There is, although --

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

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

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

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

23 MR. RUSSELL: Well, it wouldn't be, if you
24 sent it back. I mean, usually, courts of appeals don't
25 ask those questions unless somebody asks them to. And

1 here, Petitioner never asked them to. It assumed, as
2 did we, that the statute meant that they wanted the most
3 permissive attribution rule that's permitted by the Due
4 Process Clause. And I don't think it's unreasonable --
5 that's an unreasonable interpretation of the statute.

6 I recognize that it's a little bit
7 problematic, that these statutes don't give greater
8 definitive guidance. But Petitioner hasn't complained
9 about that either.

10 And so on the -- the premises on which this
11 case was litigated, I do think you can decide this case
12 by resolving two questions. First, on the assumption
13 that if MBUSA's contacts are attributable to Petitioner,
14 they are sufficient to make it at home, does the fact
15 that those contacts are through a wholly-owned
16 subsidiary, rather than a subdivision, make the exercise
17 of general jurisdiction improper --

18 JUSTICE ALITO: But if we assume, for the
19 sake of argument, that there isn't a preservation issue
20 regarding this in-home -- this at-home question, why
21 shouldn't the rule be that, unless a corporation is
22 incorporated in the jurisdiction or has its principal
23 place of business in the jurisdiction, the -- the acts
24 of the subsidiary are not attributable, unless it's an
25 alter ego.

1 It's a nice, clean rule. Many of the
2 prominent scholars in this area think that the American
3 doctrine of general jurisdiction doesn't serve any good
4 purpose. Now, that specific jurisdiction has been
5 expanded, it makes us an international outlier. Why
6 shouldn't we have a nice, clear rule like that, and
7 everybody will know exactly where things stand?

8 MR. RUSSELL: Just to be clear, there are
9 two parts to that rule. There is one that's the
10 assertion that ordinarily, you're only at home in the
11 place of principal business or principal -- principal
12 place of business or place of incorporation. And the
13 other is, oh, we'll only apply that rule with respect to
14 subsidiary contacts.

15 That additional thing, which is necessary
16 to -- to shoehorn it into this case, I think, is very
17 artificial. So if this Court is going to --

18 JUSTICE GINSBURG: What is -- what is the
19 additional thing?

20 MR. RUSSELL: That we will only apply that
21 rule if the contacts, if I understand Justice Alito's
22 proposal, we only apply that rule if this -- if the
23 contacts in the State are through a subsidiary. That's
24 a very artificial gerrymander, honestly, to fit the
25 facts of this case.

1 If this Court is going to say that the doing
2 business theory of general jurisdiction is no longer
3 good law, it should do so directly, it should do so when
4 the case has actually been briefed. It hasn't been
5 briefed here.

6 JUSTICE GINSBURG: You did say, in your
7 brief, that recognizing that other nations are highly
8 critical of our expansive -- at one-time expansive
9 notion of doing business as a basis for general
10 jurisdiction, you say that that shouldn't be taken into
11 account as a basis for constitutional decisionmaking.

12 And yet, what we are talking about is a
13 notion of whether it's fair and reasonable to require a
14 corporation to answer in a forum and is -- is what the
15 other countries think unenlightening on what's fair and
16 reasonable?

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

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

1 second, a German corporation, incorporated in Germany,
2 headquartered in Germany, 2.4 percent of its sales are
3 in California.

4 How do you argue that it's subject to
5 jurisdiction, general jurisdiction, not specific
6 jurisdiction, general jurisdiction, which means over
7 suits that have nothing to do with California or,
8 indeed, as here, over in the United States, have nothing
9 to do with anything that happened in the United States,
10 how do you make the argument that Daimler is subject to
11 general jurisdiction?

12 MR. RUSSELL: I would say a couple things.
13 I haven't briefed this, but this is what I would say in
14 a brief, if we had the opportunity to brief it. And
15 that is it has done billions of dollars in business in
16 California. It's --

17 JUSTICE KAGAN: It's 2.4 percent of its
18 sales. That would make it subject to general
19 jurisdiction every place.

20 MR. RUSSELL: But the problem -- but the
21 problem is a corporation shouldn't be jurisdictionally
22 better off simply because it's bigger than its
23 competitors who are smaller and, therefore, necessarily
24 do a bigger portion of their business in a smaller
25 number of places.

1 I think it's -- there is a very significant
2 fairness problem with the proportionality test suggested
3 by the government, again, never raised in this case.
4 Nobody ever argued that MBUSA didn't do enough business
5 in California, and in fact, it's done billions of
6 dollars of business there, and it's enjoyed the benefits
7 of being in the State, of doing business in the State,
8 to a far greater degree than many of its competitors,
9 say Tesla, which is subject to general jurisdiction for
10 suits for anything that it does anywhere in the world.

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

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

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

24 MR. RUSSELL: That may be the result --

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

1 Island.

2 (Laughter.)

3 MR. RUSSELL: That may be the case if -- the
4 Court has always recognized that doing business is
5 enough. Back to the Barrow case, when just having an
6 office, a sales office -- another case that this Court
7 cited in Perkins and cited in International Shoe as an
8 example of a paradigmatic case was a case called Hausa,
9 by then-Judge Cardozo. It was a suit by somebody from
10 New York, who sued in New York, sued a Pennsylvania
11 corporation, and the justification was it had a sales
12 office in New York.

13 Now, if this Court thinks that those cases
14 were wrong, if it thinks that we need to change our
15 conception of general jurisdiction, in light of the
16 evolved modern --

17 JUSTICE GINSBURG: Isn't that exactly what
18 Goodyear held?

19 MR. RUSSELL: No. Goodyear didn't purport
20 to change anything. I know you used a new phrase to
21 describe the prior precedent, but it wasn't purporting
22 to revise it, and I don't think that there was
23 substantial argument in that case on that score.

24 JUSTICE GINSBURG: Well, there would hardly
25 be room for a decision next to Goodyear that says, oh,

1 for general jurisdiction purposes, it's enough that you
2 have some subsidiary operating in the State. The whole
3 idea of Goodyear was to say, there is one place you can
4 always sue a corporation, one or two, place of
5 incorporation, a place -- principal place of business.

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

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

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

20 Again, this is an important question that
21 hasn't been briefed in this case, it wasn't preserved
22 below, and I think that you ought to decide the case on
23 the grounds, on the premises on which it has been
24 litigated for eight years. And if you can't do that,
25 you ought to dismiss the case as improvidently granted

1 or at least remand the case to allow a full airing of
2 these issues in an appropriate forum.

3 JUSTICE ALITO: If this 2.4 percent figure
4 is important, wouldn't we get into impossible
5 line-drawing problems? What if it was 1.4 percent?

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

9 JUSTICE SCALIA: You think it should be
10 billions of dollars, right? We're talking about
11 percentage, right?

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

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

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

21 And those -- the Court has always recognized
22 that those are not standards that are capable of
23 mechanical operation or brightline rules. If you think
24 that you need to develop some new standards, you ought
25 to do it in a case when it is squarely presented and

1 adequately briefed.

2 If there are no further questions?

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Dupree, you have four minutes remaining.

5 REBUTTAL ARGUMENT OF THOMAS H. DUPREE, JR.,

6 ON BEHALF OF THE PETITIONER

7 MR. DUPREE: Just a few brief points.

8 First, with regard to Justice Breyer's question about
9 remand, I think there is absolutely no reason for this
10 Court to remand this case to the Ninth Circuit. The
11 issues as to attribution were fully briefed below. They
12 are fully briefed here. I think that, were this Court
13 to either remand the case or dismiss the case, for one
14 thing, the circuit split would persist. The Ninth
15 Circuit's decision in the event of a remand would remain
16 on the books.

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

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

25 MR. DUPREE: Well, Justice Sotomayor --

1 JUSTICE SOTOMAYOR: The other side --
2 neither you or the other side have argued that there
3 isn't a reasonableness component. I know some of my
4 colleagues don't think there is. But both of you have
5 proceeded in your briefing as if there is. Do you care
6 how you win?

7 MR. DUPREE: Well, yes, Your Honor, I think
8 we do. I think we do. And let me say this: I think
9 that, with regard to Your Honor's points about issues
10 being waived or forfeited below, the only issue that
11 even arguably -- even arguably was forfeited below was
12 the discrete question as to whether Mercedes Benz itself
13 is subject to general jurisdiction in California.

14 The question that Justice Kagan and others
15 were inquiring about, namely, that even were one to
16 accept the attribution theory and evaluate Daimler as a
17 joint enterprise, would that render the combined
18 enterprise at home in California, we plainly did not
19 waive or forfeit that question.

20 In fact, we expressly addressed it in our
21 opening brief, and we have been fighting in this case,
22 from day one, to argue that, even if you were to
23 attribute the contacts, there is no basis for
24 jurisdiction over Daimler. That question is squarely
25 presented for this Court's review.

1 I also think that -- as Justice Ginsburg and
2 others have noted, there has been some confusion in the
3 lower courts over the distinction between specific
4 jurisdiction and general jurisdiction. This Court saw
5 it in Goodyear, for example, and I think that, were this
6 Court to resolve this case on the ground that Justice
7 Kagan suggested -- or Justice Alito suggested, namely,
8 that a corporation cannot be at home outside of the
9 areas where it maintains its principal place of business
10 or is incorporated, that it can't be subject to general
11 jurisdiction anywhere else.

12 That would be a clean rule. It would be a
13 workable rule. I think it's fully consistent with what
14 the Court said in Goodyear, and it would provide clarity
15 and guidance to the lower courts and eliminate the
16 circuit split that currently exists over agency
17 jurisdiction.

18 A couple other quick points, Justice Scalia,
19 I regret to report that neither the parties nor the
20 courts below reproduced the text of the California
21 statute. The Solicitor General, however, to his credit,
22 did on page 4 of his brief. It simply says that,
23 "California may exercise jurisdiction on any basis not
24 inconsistent with the Constitution of California or the
25 United States."

1 And the Ninth Circuit panel, on page 19A of
2 the Petitioner's appendix, said that, therefore, the
3 question is this case -- in this case is simply whether
4 the exercise of jurisdiction would exceed the
5 permissible bounds of due process.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Counsel.

19 The case is submitted.

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

22

23

24

25

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