No. 08-1107

In the Supreme Court of the United States

THE HERTZ CORPORATION, *PETITIONER*,

v.

MELINDA FRIEND, ET AL., *RESPONDENTS*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER IN SUPPORT OF RESPONDENTS

William C. McNeill, III
Claudia Center*
Rachael Langston
The Legal Aid Society –
Employment Law Center
600 Harrison Street,
Suite 120
San Francisco, CA 94107
415-864-8848
* Counsel of Record

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE HISTORY

ADDITIONAL AUTHORITIES

Blank Page

INTEREST OF THE *AMICUS CURIAE*

The Legal Aid Society – Employment Law Center ("LAS–ELC") is a nonprofit organization representing low-wage workers in California. *Amicus* LAS–ELC has a strong interest in the effective implementation of California's independent laws protecting its employees. A full recitation of the interest of the LAS–ELC appears in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, California counsel seek to represent California plaintiffs under California law against a corporation that earns much more money and conducts far more business in California than in any other State.

In construing the scope of diversity jurisdiction under 28 U.S.C. § 1332(c)(1) – and of the Constitutional provision which both authorizes and limits such jurisdiction – this Court must give due consideration to the interests of the State of California and its citizens.

When corporations target California for its resources and markets, performing substantially

---

[1] The parties have consented to the filing of this *amicus* brief. No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amicus*. Sup. Ct. R. 37.6.

more activity in our State than in any other, they should not be permitted to avoid the jurisdiction of our judiciary simply by citing to out-of-state headquarters.

Indeed, adopting the headquarters test propounded by Petitioner Hertz Corporation (hereinafter "Hertz") would encourage corporations predominantly active in California to manipulate jurisdiction by situating their headquarters across our borders. Imposing federal jurisdiction under such circumstances is far removed from the intent of the founders in drafting Article III, § 2, and is inconsistent with the language and purposes of the 1958 amendment to the Code.

Only a test founded on business realities begins to approach a reconciliation of the fundamental and competing interests at stake herein.

ARGUMENT

I. THIS COURT SHOULD CONSTRUE THE PROVISIONS AT ISSUE HERE WITH CONSIDERATION TO THE INTERESTS OF THE STATE OF CALIFORNIA AND ITS CITIZENS.

Over the past 150 years, California – the third largest State by land area, and currently the most populous State in the union – has built a booming economy featuring innovation and opportunity. Long a magnet for job seekers, entrepreneurs, and

corporate investment, California has simultaneously welcomed and supported enterprise while protecting the interests of its workers through an extensive network of statutory regulation. California's progressive workers' rights laws are frequently cited as models for enacting protections in other States and in Congress.[2]

Moreover, in service of its 37 million residents living throughout an area 250 miles by 750 miles, California has established a judiciary featuring 58 trial courts – one in each of its counties – with facilities in more than 450 locations.[3] The California

---

[2] *See, e.g.*, Patricia A. Shiu and Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 143, 151 (2009) (noting that California's disability discrimination law has served as a model for federal changes, and its paid family leave law is serving as a model for other states); Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 14-15 (2006) (California's paid family leave law "could provide a model for the rest of the country"); Duane Morris LLP, *Recent California Employment Cases: Instructive for Employers in All States*, 2005 WLNR 14088574 (Mondaq Bus. Briefing, Sept. 7, 2005) ("The California judiciary has often set the stage for judicial precedents that are later adopted by other states."); *see also Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 288-89 (1987) (upholding California's pregnancy disability leave law against facial challenge on federal statutory grounds: "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.").

[3] California Judicial Branch, Judicial Council of California, Administrative Office of the Courts, "Fact Sheet: California Judicial Branch" (2009),

court system is the nation's largest, and includes more than 2,000 judicial officers and 21,000 court employees.[4] The California Legislature determines the number of judges in each court, and vacancies are filled by the California governor. Judges are periodically subject to removal or continued service by the vote of the people of the State.[5]

By contrast, the federal judiciary offers 29 courts in 24 California locations; most California counties do not have a single federal courthouse.[6] There are only 158 federal judges and 55 federal magistrates serving California.[7] In another context, and in the report endorsing the Code provision at issue here, the Senate Judiciary Committee noted: "Very often cases removed to the Federal Courts require the workman to travel long distances and to bring his witnesses at great expense. This places an

---

http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial_Branch.pdf; California Judicial Branch, California Courts, "California Superior Courts," http://www.courtinfo.ca.gov/courts/trial/ (last visited Oct. 2, 2009); Wikipedia, California, http://en.wikipedia.org/wiki/California (listing area and population) (last visited Oct. 2, 2009).

[4] "Fact Sheet: California Judicial Branch," *supra* note 3, at 2, 3 (state appellate courts have 105 justices, state trial courts have 1,628 judges and 393 commissioners and referees); California Judicial Branch, Judicial Council of California, "About the California Judicial Branch," http://www.courtinfo.ca.gov/about/aboutjb.htm (last visited Oct. 2, 2009).

[5] "Fact Sheet: California Judicial Branch," *supra* note 3, at 3.

[6] U.S. Courts, Court Locator (interactive website), at http://www.uscourts.gov/courtlinks/ (last visited Oct. 2, 2009).

[7] Daily Journal Corporation, The Daily Journal California Court Directory (Apr. 2009), 5-11.

undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." S. Rep. No. 1830, 85th Cong., 2d Sess., Report to Accompany H.R. 11102, at 9 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106. In this way diversity jurisdiction imposes a demonstrable bias against local litigants.

As an arm of the State government, the California judiciary has a special expertise and strong interest in construing the State's employment laws, and in administering the disputes that arise under these laws. *Accord* S. Rep. No. 109-14, P.L. 109-2, The Class Action Fairness Act of 2005, at 39, *reprinted in* 2005 U.S.C.C.A.N. 3, 38 ("[C]lass actions with a truly local focus should not be moved to federal court under this legislation because state courts have a strong interest in adjudicating such disputes."); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1836 (2008) (describing the "logic of federalism" as the principle that "[t] he federal courts should serve as the authoritative voice of federal law and national interests, and state courts should serve as the authoritative voices of state law and local interests.").

When corporations such as Petitioner Hertz target California to access its extensive resources, markets, and workforce and perform substantially more activity in our State than in any other, they must not be permitted to avoid the jurisdiction of the

California judiciary simply by citing to out-of-state headquarters.

A. The Court Should Assess Corporate Citizenship Within the Context of Shared State and Federal Power.

The scope of the Constitutional and statutory bases for diversity jurisdiction asserted by Petitioner Hertz must be assessed with due consideration to the interests of the State of California and its citizens. As Justice Louis Brandeis noted in 1923, "questions of jurisdiction are really questions of power between States and Nation." Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 713 (1993) (quoting a conversation between Brandeis and then-Professor Felix Frankfurter).

In seeking to defend and expand federal diversity jurisdiction in Congress and the federal courts, corporate entities have long cited to the purported bias of state courts against out-of-state defendants. The accuracy of this basis for diversity jurisdiction has been questioned.[8]

---

[8] *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928) ("[S]uch information as we are able to gather from the reporters [regarding out-of-state defendants in state courts] entirely fails to show the existence of prejudice on the part of the state judges"); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 23 (1948) (noting that the work of Friendly and Frankfurter "casts grave doubts on the accuracy" of the local bias theory for diversity jurisdiction); EDWARD A. PURCELL, JR., LITIGATION AND

Of course, the actual motivations of corporate defendants are not secret. Corporations and their counsel have long viewed the federal courts to be a more favorable forum for their interests with respect to court location, summary judgment, class certification, the jury pool, the unanimous jury, perceived competence,[9] and the cultural and economic background of judges.[10] For analogous

---

INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992), at 8 ("the identification of local 'prejudice' is a complex and problematic matter"); *id.* at 129 ("the dangers corporations faced from local prejudice may, in fact, have been considerably less than has often been claimed"); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1292 (2006) ("As was the case with local bias in the Progressive Era, [contemporary] empirical evidence attesting to or debunking the existence of local bias is scant."); *see also* William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*," 1993 WIS. L. REV. 1, 6 (1993) ("There are perfectly sound tactical reasons for a lawyer in a given case to welcome the presence of diversity jurisdiction, but they have almost nothing to do with the reason that kind of jurisdiction was created.").

[9] *Cf. Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 408 (7th Cir. 1989) ("[T] here is no reason to presume state courts are not competent to adjudicate [Title VII] issues. Such a notion overlooks the obvious; most states have enacted employment discrimination laws, which are routinely litigated in state courts, and state court judges are accordingly quite familiar with discrimination issues."), *aff'd*, 494 U.S. 820, 826 (1990) ("We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims."); *see also* Marcus, *supra* note 8, at 1256 ("Of course, the very grant of diversity jurisdiction is itself a federalism-tinged insult, since it implies that organs of state government cannot properly ensure a just proceeding.").

[10] "Although they advanced a variety of arguments for retaining [diversity] jurisdiction, their defense seemed

reasons, lawyers representing workers and consumers, particularly in class actions, often prefer state courts. These considerations have deep historical roots,[11] and remain significant today. "[M]any lawyers continue to believe that, all else held equal, substantive outcomes differ depending on which sovereign decides the dispute[.]" Marcus, *supra* note 8, at 1280.[12]

---

animated ultimately by neither jurisprudential principles nor ideas of systemic efficiency but by the desire of litigators to protect an exceptionally useful tactical tool and by the preference of elite lawyers and their corporate clients for federal forums." Purcell, Jr., *The Class Action Fairness Act in Perspective*, *supra* p. 4, at 1838.

[11] *See* Frank, *supra* note 8, at 28 (concluding that the creation of diversity jurisdiction was in part the product of the desire of commercial interests to litigate their controversies "before judges who would be firmly tied to their own interests"); PURCELL, JR., LITIGATION AND INEQUALITY, *supra* note 8, at 4-5, 8 (citing the "problems that relatively ordinary individuals faced when they were forced to dispute claims against national corporations that were capable of invoking the jurisdiction of the federal courts," noting that "national corporations and their attorneys consistently defended the legal rules that allowed them access to the national courts," and finding that "corporations gained powerful legal and extralegal advantages by using the federal courts"); *id.* at 22 ("studies have shown that corporate defendants repeatedly fared better in the federal than in the state courts"); *id.* at 54 (noting that lawyers who represented poorer individuals as plaintiffs were often familiar with state court and not federal court).

[12] *See also* Marcus, *supra* note 8, at 1304-05 ("[C] ontemporary practitioners believe that federal judges have less patience for state law class actions than their state counterparts.") (citing surveys of defense and plaintiffs' lawyers); Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 13 (2005); Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., *Attorney Reports on the Impact*

Such tactical concerns are an accepted part of our legal and political systems. However, they cannot eliminate the requirement of assessing – within our Constitutional framework of federalism and the separation of state and federal powers – whether a corporation claiming diversity jurisdiction is truly a "Citizen" of a "different State [ ]," and/or whether its "principal place of business" is found in a State other than where it does the greatest portion of its business.[13] Such an assessment cannot delegate forum selection to corporate defendants,[14] but must

---

of Amchem *and* Ortiz *on Choice of Federal or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys* 8 (2004).

[13] As one commentator has argued: "If federal judges truly differ in some systematic way from their state counterparts, these collective motivations create federalism implications for diversity jurisdiction. Particularly when federal judges systematically favor defendants in categories of disputes for which state law provides the rule of decision, the federal exercise of jurisdiction may mean that state law will receive less enforcement than if cases stay in state court. Diversity jurisdiction then affects the power of states to regulate the types of conduct that become the subject of these disputes. The assertion of federal jurisdiction thereby alters the federalism balance...." Marcus, *supra* note 8, at 1251, 1257.

[14] The existence of federal jurisdiction must be independently determined and cannot be delegated to or based upon the preferences of the parties. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (citations omitted).

include a real-world review of a corporation's actual activities within the State.

B. Business Realities Support a Finding that Hertz is a Citizen of California.

In this matter, business realities – including rental locations, leased real estate, employees, revenues, rental activity, and vehicle transactions – indicate that Petitioner Hertz is a citizen of the State of California under Article III, § 2, and has its "principal place of business" here for purposes of 28 U.S.C. § 1332(c)(1). It conducts far more business – and employs far more workers – in California than in any other State.

This is not merely a function of California's population. It is estimated that California's population is 12 percent of the United States population.[15] By its own admission, Petitioner Hertz conducts much more than 12 percent of its corporate activities in California.[16] Moreover, the unique features of California – its size and wealth – govern in favor of, not against, finding that many multi-

---

[15] California's population is 36,756,666, compared to the United States population of 304,059,724. U.S. Census Bureau, State and County QuickFacts, California, at http://quickfacts.census.gov/qfd/states/06000.html (last visited Oct. 2, 2009).

[16] Seventeen percent of Hertz rental locations exist in California, including the largest location it operates (the location at LAX). More than 20 percent of Hertz employees work in California. More than 18 percent of Hertz's rental revenues and vehicle transactions come from California operations. Brief for Petitioner, *supra* p. 9, at App. 8a, 26a-29a.

state corporations are California citizens.

As the district court properly concluded, Hertz "is not the type of litigant that diversity jurisdiction was designed to protect." Brief for Petitioner-Appellant at App. 9a (District Court order filed Jan. 15, 2008) (citing and quoting from *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 502 (9th Cir. 2001)); *see also id.* at App. 3a (Ninth Circuit order filed Oct. 30, 2008) ("With its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts.").

II. THE RULE PROPOSED BY THE PETITIONER IS CONTRARY TO THE LANGUAGE AND PURPOSES OF THE 1958 AMENDMENTS.

In enacting the 1958 amendments to the Code, Congress followed and repeatedly cited the recommendations of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States. Pursuant to a study of the scope of federal jurisdiction and venue, the Committee had proposed legislation to relieve the increasingly heavy caseloads assigned to federal court judges. *See* Jack H. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 222-23 (1959) (reviewing history of amendment); Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong. (1957), *Foreword* ("The underlying purpose of the above legislation is to ease the current workload of

our Federal courts and reduce the tremendous backlog of cases which are presently pending on the court calendars.").

Following the Judicial Conference Committee's advice, Congress agreed to limit federal jurisdiction in several respects, including by curbing the extension of diversity jurisdiction to "local corporations which, because of a legal fiction, are considered citizens of another State." S. Rep. No. 1830 at 4, 1958 U.S.C.C.A.N. at 3102. Congress extended corporate citizenship to the entity's "principal place of business," and directed that this term be determined according to the precedents defining it for purposes of the Bankruptcy Act. S. Rep. No. 1830 at 5, 1958 U.S.C.C.A.N. at 3102 ("The proposal to rest the test of jurisdiction upon the 'principal place of business' of a corporation has ample precedent in the decisions of our courts and in Federal statute such as the provisions of the Bankruptcy Act.") (citation omitted).

"Most of the cases construing this phrase, 'principal place of business' under the Bankruptcy Act and Sections 1332 and 1441 are in accord that this finding always has been determined by an analysis of the totality of corporate activity rather than the mere determination of the location of executive offices." *Gilardi v. Atchison, Topeka & Santa Fe Rwy. Co.*, 189 F. Supp. 82, 86-87 (N.D. Ill. 1960) (reviewing pre-1958 case law to determine whether diversity jurisdiction existed); *accord* Friedenthal, *supra* p.10, at 223 ("The cases under the Bankruptcy Act provide no rigid legal formula

for the determination of the principal place of business. Rather they consider the issue to be a question of fact to be decided in light of all relevant evidence.").[17]

Congress's use of terms which have been previously construed indicates an intent to ratify such interpretations.[18] This result is consistent with

---

[17] *See, e.g., Continental Coal Corp. v. Roszelle Bros.*, 242 F. 243, 246-47 (6th Cir. 1917) (reviewing factors including property and employees and finding that extensive mining operations in Kentucky and not corporate office in Tennessee determined "principal place of business"); *Lawrence v. Atl. Paper & Pulp Corp.*, 298 F. 246, 248-49 (5th Cir. 1924) (finding that principal place of business was state where manufacturing operations and property were located, not state where corporate meetings held); *Dryden v. Ranger Ref. & Pipe Line Co.*, 280 F. 257, 258, 263 (5th Cir. 1922) (finding that principal place of business located where corporation carried on business and interacted with customers, and not where internal management conducted); *In re Evans*, 12 F. Supp. 953, 954-56 (W.D. N.Y. 1935) (determining principal place of business by looking at locations of business transactions and creditors); *In re Monarch Oil Corp.*, 272 F. 524, 526 (S.D. Ohio 1920) (finding principal place of business located where corporation owned and operated oil wells, and not site of corporate offices).

[18] *See Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 134 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law....").

the legislative history, which was carefully reviewed by Judge Harold R. Tyler in 1963:

> Repeated use of the phrase "doing business" (and similar phrases), both in the report of the Senate Judiciary Committee, as well as during the debates on the floor of the House of Representatives, suggests that the legislators were intent upon tying, so far as reasonably possible, corporate citizenship to the realities of corporate business activity.
>
> Finally, it may be pointed out that the Senate Judiciary Committee adopted the view that "the underlying purpose of diversity of citizenship legislation ... is to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries...."
>
> If the Committee regarded this as the principle under-lying diversity jurisdiction, then, *pro tanto*, it must have envisioned a test based chiefly on operations, since it is by visible presence, including the employment of local people, that a corporation will become popularly recognized as "domestic" rather than "foreign."

Inland Rubber Corp. v. Triple A Tire Serv. Inc., 220 F. Supp. 490, 495 (S.D.N.Y. 1963).

Such direction governs over a single phrase from witness Judge Albert B. Maris, testifying before

a 1957 House subcommittee on two prior iterations of the 1958 legislation.[19] *See Kelly v. Robinson*, 479 U.S. 36, 51 (1986) ("We acknowledge that a few comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.") (citing *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) and 2A N. Singer, *Sutherland on*

---

[19] Petitioner Hertz cites frequently to the 1957 transcript of a hearing before a subcommittee of the House Judiciary Committee regarding two previous iterations of the 1958 legislation, particularly for the testimony of Judge Albert B. Maris. Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong. (1957). As noted in the transcript's foreword, "This document was compiled for the purpose of inviting further suggestions and comments ..." *Id.*, Judge Maris filled in for Chief Judge John J. Parker, who chaired the Judicial Conference Committee during its study of venue and jurisdiction. *Id.* at 9. He noted that he could not "adequately paraphrase Judge Parker if [he] wanted to." *Id.* at 27. Judge Maris then explained the background behind adopting the "principal place of business," noting: "That is the exact language of the Bankruptcy Act. There are a large number of cases in the books which construe just what that means, what is the principal place, and what is not the principal place of business of a corporation." *Id.* at 36. When asked about a corporation with activities in multiple states, Judge Maris noted that "[a]ll of those problems have arisen in bankruptcy cases" and added "I wouldn't want to be bound by this statement because I haven't them before me." *Id.* at 37. In determining the principal place of business, Judge Maris testified, "it would take a hearing in some cases to get to the facts as to the corporation." *Id.* at 38-39.

Statutory Construction § 48.10, pp. 319 and 321, n.11 (4th ed. 1984)).

Consistently, in construing the phrase "principal place of business" within the context of tax law, this Court has noted: "[W] e cannot develop an objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case." *Commissioner of Internal Revenue v. Solomon*, 506 U.S. 168, 174-75 (1993), *superseded by statute*, Taxpayer Relief Act of 1997, Pub. L. 105-34, sec. 932(a), 111 Stat. 788, 881, *as recognized in Beale v. Commissioner*, T.C. Memo 2000-158 at 13 n.9 (2000). [20]

Notwithstanding this body of relevant case law, Petitioner Hertz proposes a bright-line rule assigning citizenship to the State in which a corporate entity has chosen to locate its headquarters. As set forth in Respondents' brief, such a rule would encourage corporations to manipulate jurisdiction by moving their headquarters across State borders. Resp. Brief at 38 to 43 (reviewing empirical evidence that corporations relocate their headquarters with frequency). In the case of California, corporations would evade state

---

[20] Multiple factors govern many initial determinations by district court judges. *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) ("Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command."); Resp. Brief at 44 to 52.

court jurisdiction by moving their headquarters across our borders to Nevada or Arizona, or to distant states remote from the locus of corporate operations.

Such an outcome is contrary to the language and intent of the 1958 amendments. Congress sought to eliminate diversity jurisdiction where corporations are deemed a citizen of another State due only to legal fiction. *See* S. Rep. No. 1830 at 4, U.S.C.C.A.N. at 3102 ("It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen."); *accord Gilardi*, 189 F. Supp. at 88 ("To equate principal place of business to executive offices would ... run the risk of creating a substitute fiction for the fiction of charter citizenship."). The Petitioner's proposal will only create and encourage a substitute fiction.

Moreover, since 1958, federal court congestion – the very problem Congress sought to address with its amendment to § 1332(c)(1) – has not only continued but has sharply worsened.[21] In

---

[21] Jessica Dye, "Judges Press Senate for More Federal Posts" (Law360, Sept. 30, 2009) ("Federal judges urged members of the U.S. Senate Judiciary Committee on Wednesday to take swift action to address skyrocketing caseloads and overextended judges in district and circuit courts across the country by authorizing the first significant federal judicial expansion since 1990. ... Judge Lawrence J. O'Neill of the U.S. District Court for the Eastern District of California said his district was by far under some of the heaviest pressure. ... Its most recent backlog report showed 591 civil cases pending

contravention of this central purpose, Petitioner's proposal would grant diversity jurisdiction to virtually all disputes with those corporations that locate their corporate offices in States remote from their actual operations.

Consistent with federalism and federal docket control, citizenship should not be divorced from the locus of the corporation's substantial and predominant relationships with a State's citizens. It is these real-world sales, purchases, leases, employment contracts, real estate transactions, and additional interactions that mark state interest and are the underlying facts of litigated disputes.[22] By rewarding the institution of distant headquarters, Petitioner's proposal will only exacerbate federal court congestion and emphasize corporate over state interests.

III. ONLY A RULE FOUNDED ON BUSINESS REALITIES APPROACHES A RECONCILIATION OF THE FUNDAMENTAL AND COMPETING INTERESTS AT ISSUE.

In conducting its business, Petitioner Hertz

---

for more than three years in the Eastern California district, he said."), at http://legalindustry.law360.com/articles/123940.

[22] Again, California's size and wealth are factors that favor a finding of corporate citizenship. As a large state offering an extraordinary economy and labor force, and extensive urban and agricultural areas, California draws huge numbers of corporations, investors, and workers, and is naturally the site of extensive corporate interactions and the disputes that arise from such relationships.

has greatly benefited from its extensive and profitable contacts with the State of California. In particular, it employs substantially more workers and serves many more consumers in California than in any other State. It has engaged in these valuable relationships for decades while submitting to California's longstanding scheme of worker and consumer protections.

These contacts must matter in assessing Hertz's corporate citizenship. Otherwise the State's actual role in the operation of the Petitioner's business is erased via the sort of "legal fiction" decried by Congress in amending 28 U.S.C. § 1332(c)(1). Otherwise the word "Citizen" is a simply a word given over to corporate expediency with no consideration of state interests.

Moreover, a rule based on business realities furthers the desired goal of the 1958 amendment to reduce diversity jurisdiction. The State in which a corporation has more business dealings with customers, derives its largest portion of gross income, employs the most workers, and has its greatest contact with the public, is likely to be where the bulk of litigation arises.

The majority of Circuits requires a review of real-world, in-state relationships and exchanges in assessing corporate citizenship. As reviewed in the party briefs, the Ninth Circuit directs that courts, as an initial matter, apply the "place of operations" test. This test properly grants citizenship to any corporation with the "bulk of corporate activity" in a

particular State. Only if there is no such predominance in a single State can the location of corporate headquarters be considered. [23]

Additional Circuits – including the Fifth,[24] Sixth,[25] Eighth,[26] Tenth,[27] and Eleventh[28] Circuits –

---

[23] *Tosco Corp. v. Comtys. for a Better Environment*, 236 F.3d 495, 500 (9th Cir. 2001) (holding that where a substantial predominance of a corporation's business activity takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state, and noting that "[t] he Ninth Circuit employs a number of factors to determine if a given state contains a substantial predominance of corporate activity, including the location of employees, tangible property, production activities, sources of income, and where sales take place."); *see also Indus. Tectonics v. Aero Alloy*, 912 F.2d 1090, 1092 n.3, 1094 (9th Cir.1990) (noting the "general rule that the 'bulk of corporate activity,' as evidenced by operating, administrative, and management activities, determines a corporation's principal place of business," and concluding: "[T]he principal place of business should be the place where the corporation conducts the most activity that is visible and impacts the public, so that it is least likely to suffer from prejudice against outsiders.").

[24] *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 405-06, 411-12 (5th Cir. 1987) (reviewing pre-1958 bankruptcy cases, adopting total activities test, and noting: "We also see as significant the degree to which the corporation's activities bring it into contact with the community. In examining the corporation's local contacts, we look at the number of employees in the given locale and the extent to which the corporation participates in the community through purchase of products, supplies and services, sales of finished goods, and membership in local trade or other organizations.").

[25] *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162-63 (6th Cir. 1993) (adopting total activities test and noting: "But we think the place where the principal office is located is not necessarily the place where the principal business is carried on. Such may or may not be the case.") (citation omitted).

apply a "total activities" test, which assesses a broad range of tangible factors related to the actual scope and substance of corporate activities.[29]

---

[26] *Capitol Indem. Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 836 (8th Cir. 2004) (adopting total activities test).

[27] *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993) (adopting total activity test, described as approach which "'considers a variety of factors, such as the location of the corporation's nerve center, administrative offices, production facilities, employees, etc., and it balances these factors in light of the facts of each case," and noting that "the determination of a corporation's principal place of business does not hinge on one particular facet of corporate operations, but on the total activity of the company considered as a whole.").

[28] *Vareka Invs., N.V. v. Am. Inv. Props., Inc.*, 724 F.2d 907, 910 (11th Cir. 1984) (adopting total activities test).

[29] A few Circuits use a similar assessment in some – but not all – situations. *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) (noting that "nerve center" test applies to "farflung corporations or corporations without physical operations, but holding that "the principal place of business of a corporation that has the bulk of its physical operations in one state is to be determined under the locus of operations test, even if the corporation's executive offices are in another state"); *R. G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651 (2d Cir. 1979) (describing "nerve center" test as applicable "[w]here corporate operations are spread across numerous states," but otherwise permitting "focus instead upon the state in which a corporation has its most extensive contacts with, or greatest impact on, the general public"); *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999) (noting that Circuit applies "nerve center" test "when a corporation engages primarily in the ownership and management of geographically diverse investment assets," but applies the "place of operations" test focusing on "the place where the bulk of corporate activity takes place" when the corporation has "multiple centers of manufacturing, purchasing, or sales") (citation omitted).

Importantly, the factors identified as relevant to citizenship under the "place of operations" test and the "total activities" test are identifiable and knowable – a district court may without difficulty request and examine evidence of sales, purchases, profits, real property, equipment, employees, public contacts, and the like. Such an assessment covers ground familiar to federal court judges. *See, e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317-20 (1945) (reviewing manufacturing, distribution, solicitations, rentals, and sales in determining personal jurisdiction over corporation).

Given the fundamental and competing interests at stake when imposing diversity jurisdiction, such in-state relationships and exchanges should be given substantial weight. Moreover, those authorities which permit for purposes of diversity jurisdiction a finding of citizenship based solely upon the location of a corporation's headquarters should be rejected.[30]

CONCLUSION

Where, as here, a corporation has

---

[30] *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) (adopting "nerve center" test, described as the rule that "a corporation has a single principal place of business where its executive headquarters are located"); *cf. Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 291 (3d Cir. 1998) (noting that the most important factor in finding the principal place of business is "the headquarters of day-to-day corporate activity and management"). *See also* citations in footnote 25 (permitting application of "nerve center" test in particular cases).

substantially more material presence in California than in any other State, its California citizenship should be presumed. Petitioner's writ should be denied, and the case remanded to California Superior Court.

Respectfully submitted,

October 6, 2009

William C. McNeill III
Claudia Center*
Rachael Langston
The Legal Aid Society – Employment Law Center
600 Harrison Street,
Suite 120
San Francisco, CA 94107

Counsel for Amici Curiae

*Counsel of Record

Blank Page

Founded in 1916, the **Legal Aid Society – Employment Law Center ("LAS–ELC")** is the oldest nonprofit legal organization in the Western United States. The LAS-ELC represents California workers in cases covering a broad range of employment issues including wage and hour claims and discrimination on the basis of race, gender, age, disability, pregnancy, national origin, sexual orientation and sexual identity.

In 1914, responding to the egregious working conditions of migrant agricultural workers, the California Legislature established a State Commission of Immigration and Housing charged with enforcing the Labor Camp Sanitation Act of 1913.

By 1915, the Commission planned the establishment of a Legal Aid Society in San Francisco. Patterned after free legal clinics that had been in operation in New York and Germany since 1876, the San Francisco effort was headed by the Vice President of the Commission and the Archbishop of the Diocese of San Francisco.

The Legal Aid Society of San Francisco opened its doors for business on May 1, 1916. Then, as now, the mission of the Society was to offer free legal services to individuals without resources. "The services of the Society are free to all persons, regardless of nationality, who are without means to employ attorneys to press their just claims or represent them in court." Annual Report (1916-1917). By its ten-year anniversary, the Society had handled more than 9,000 cases.

In 1970, the Society recommitted itself to

advocacy on behalf of the employment rights of individuals, finding that such advocacy is critical to the economic self-sufficiency of workers.

Today, nearly a century after its inception, and serving thousands of working people a year, the organization calls itself the Legal Aid Society - Employment Law Center. One of the country's foremost nonprofit legal entities, the LAS–ELC operates according to the principle that all people are entitled to work in an environment that is safe, respectful, free from discrimination, and in compliance with the law.