No. 15-1443

In the Supreme Court of the United States

THE BANK OF NEW YORK MELLON,

Petitioner,

v.

AMERICAN FIDELITY ASSURANCE CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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We showed in the petition that the Tenth Circuit misunderstood this Court's decision in *Daimler*; that this misreading of *Daimler* conflicts with the approach taken by other courts of appeals; that the Tenth Circuit's error underlay the holding below; and that resolution of the question presented is a matter of considerable importance. American Fidelity's opposition brief makes no substantial response to—or agrees with— these points.

A. The Tenth Circuit misunderstood *Daimler*.

1. To begin with, American Fidelity expressly *agrees* that the Tenth Circuit premised its holding in this case on the view that *Daimler* did *not* "limit[] general jurisdiction to only a corporation's state of incorporation or principal place of business, except in exceptional circumstances." Opp. 17; see Pet. App. 14a ("*Daimler* * * * did not limit general jurisdiction in this manner"). American Fidelity defends that understanding of *Daimler* as "apt[]" (Opp. 17)), repeatedly asserting that the Court in *Daimler* simply offered a corporate defendant's place of incorporation or principal place of business as "non-exclusive examples" of locations where the corporation is subject to general jurisdiction. *Id*. at 16; see *id*. at 11 (state of incorporation and principal place of business "are merely presumptive examples of where a corporation is deemed to be 'at home'"). And American Fidelity recognizes that this reading of *Daimler* was central to the holding below: the Tenth Circuit's decision was grounded on the belief that pre-*Daimler* Tenth Circuit law—which all agree did not limit general jurisdiction to the defendant's place of incorporation or

principal place of business (except in extraordinary circumstances)—"'employed the same standard that the Supreme Court reaffirmed and applied in *Daimler*.'" *Id.* at 10 (quoting Pet. App. 17a).

As we explained in the petition (at 10-13), however, this understanding of *Daimler* is wrong. *Daimler* establishes a clear rule: except in narrowly defined "exceptional" circumstances, a corporation is subject to general jurisdiction *only* in its "place of incorporation and principal place of business." 134 S. Ct. at 760. See *id.* at 761 n.19 (recognizing there may be an "exceptional case" where general jurisdiction is found away from a corporation's "formal place of incorporation or principal place of business" and offering as an example a case involving truly "exceptional facts" (*id.* at 756 n.8) where the alternative location was "'a surrogate for the place of incorporation or head office'" (*id.* at 756 (citation omitted)). Accordingly, as we also showed, other courts of appeals have properly recognized that "*Daimler* established that, except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business—the 'paradigm' cases." *Brown* v. *Lockheed Martin Corp,* 814 F.3d 619, 627 (2d Cir. 2016). See Pet. 13 (citing cases). American Fidelity makes no serious attempt to defend its contrary reading of *Daimler* as allowing for a much more expansive application of general jurisdiction.

2. By the same token, American Fidelity is incorrect in defending the Tenth Circuit's view that "*Daimler* reaffirmed the *Goodyear* standard" and "essentially restates *Goodyear*." Opp. 17. We showed in the petition that, during the period following *Goodyear* but prior to *Daimler*, courts almost uniformly

regarded "continuous and systematic contacts" as the governing standard for general jurisdiction (see Pet. 7-9 (citing cases)); *Goodyear* itself applied that standard (see *id.* at 9-10); it was generally understood at the time that, "[i]f the *Goodyear* opinion stands for anything * * * it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction" (4 Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 1067.5 (3d ed. Supp. 2013)); and courts of appeals, district courts, and commentators have almost uniformly agreed that *Daimler* changed the governing standard and greatly limited the availability of general jurisdiction. See Pet. 13-16. As we also showed, the Tenth Circuit's holding in this case stands as a notable departure from this substantial body of authority. *Id.* at 16-17. Here, too, American Fidelity offers no serious response.[1]

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[1] American Fidelity points to a single district court decision, *Gilmore* v. *Palestinian Self-Government Authority*, 8 F. Supp. 3d 9 (D.D.C. 2014), for the proposition that *Daimler* and *Goodyear* applied the same standard because both made use of the "at home" formulation. Opp. 21. In fact, because the defendants in that case, the Palestinian Self-Government Authority and the Palestine Liberation Organization, were not corporate entities directly subject to the *Daimler* rule, the court had no occasion to address the differences between *Daimler* and *Goodyear* that are dispositive here. In any event, as other courts (including a subsequent decision of the District of Columbia district court) have explained, "[i]t was only after the Supreme Court issued its decision in *Daimler* that the scope of *Goodyear*'s 'at home' test was appreciated." *Estate of Klieman* v. *Palestinian Auth.*, 2015 WL 967624, at *4 (D.D.C. 2015). See *Fed. Home Loan Bank* v. *Ally Fin., Inc.*, 2014 WL 4964506, at *2 (D. Mass. 2014) ("The *Daimler* decision requires a tighter assessment of the standard than perhaps was clear from *Goodyear*.").

B. The Tenth Circuit's decision conflicts with that of other courts of appeals.

Against this background, American Fidelity also necessarily is wrong when it denies that the holding below is in conflict with the decisions of other courts of appeals. Opp. 18-24. The Tenth Circuit held that the general jurisdiction standard "was the same before and after *Daimler* was decided" and that "*Daimler*, like *Goodyear*, did not limit general jurisdiction" "to a corporation's state of incorporation or principal place of business, except in extraordinary circumstances." Pet. App. 6a, 14a-15a. As we showed in the petition (at 14-16), the Second Circuit has come to precisely the opposite conclusion on both of these points. It has held expressly that, "[a]side from 'an exceptional case,'" "a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business." *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014). See *Brown,* 814 F.3d at 627.[2] And it has recognized that *Daimler* altered "prior controlling precedent of this Circuit" (*Gucci*, 768 F.3d at 136) and "considerably altered the analytic landscape for general jurisdiction." *Brown*, 814 F.3d at 629. Numerous district courts, in the Second Circuit and elsewhere, have reached the same conclusion. See Pet. 15-16.

In fact, American Fidelity itself appears to recognize the Tenth Circuit's departure from the approach taken by other courts, noting vaguely that

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[2] As the Second Circuit noted, other courts of appeals have articulated an identical reading of *Daimler*. See *Brown*, 814 F.3d at 627 (citing cases).

"there is seemingly some level of conflict between the Tenth Circuit's decision and the Second Circuit's decision in *Gucci*" (Opp. 13) and acknowledging that "the Tenth Circuit's decision * * * is at odds with a few district courts in New York." Opp. 24; see *id.* at 18-19. Its attempts to minimize the significance of this conflict do not withstand scrutiny.

First, American Fidelity dismisses the Second Circuit's *Gucci* decision because that was "not a case involving waiver under [Fed. R. Civ. P.] 12(h) and (g) as is the instant matter." Opp. 18. But that distinction is immaterial. For one thing, American Fidelity simply disregards the reality that the Second Circuit in both *Gucci* and *Brown*, as well as numerous other courts, have stated and applied an understanding of *Daimler* that differs from the Tenth Circuit's approach. That, in itself, shows that the courts of appeals are in conflict.

And American Fidelity's waiver argument also is wrong on its own terms. Although the entity resisting general jurisdiction in *Gucci* was not a party to the principal litigation and therefore was not subject to Rules 12(g) and (h) (which provide that a party waives available defenses by failing to raise those defenses in a motion to dismiss), the Second Circuit in *Gucci* applied an identical waiver standard. Thus, it held that the entity resisting general jurisdiction in that case had not waived its lack-of-jurisdiction defense because "'a party cannot be deemed to have waived objections or defenses which were not known or available at the time they could first have been made" (768 F.3d at 135)—and the defense asserted in *Gucci* was made available for the first time by *Daimler*'s change in the governing standard. *Id.* at 135-

136. That is exactly the argument made by BNYM, and rejected by the Tenth Circuit, in this case.

Second, American Fidelity contends that *Gucci* and other Second Circuit decisions are inapposite because they "relate principally to a fact pattern where the party protesting personal jurisdiction had an office and related business operations in the forum district." Opp. 3; see *id.* at 19-20. But this observation, too, is beside the point. The Second Circuit clearly held, in both *Gucci* and *Brown*, that *Daimler* changed the governing standard to one where general jurisdiction over a corporate defendant exists only in the defendant's place of incorporation or principal place of business, absent extraordinary circumstances.[3] The Tenth Circuit disagrees, expressly rejecting that reading of *Daimler* and holding that *Daimler* did not change the law. This Court should resolve that conflict.

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[3] American Fidelity maintains that *Brown* "plainly recognized that this Court's announcement of a 'new' standard for the assertion of general jurisdiction began with *Goodyear*." Opp. 24. In fact, *Brown* recognized that *Goodyear* appeared to leave open the possibility that substantial contacts "could place a corporation 'at home' in many locations," while *Daimler* "considerably altered the analytic landscape and left little room for these arguments." 814 F.3d at 629. *Gucci*, too, made plain that *Daimler* was the controlling precedent. See 768 F.3d at 134 (no jurisdiction "in light of *Daimler*"); *id.* at 135 ("applying the Court's recent decision in *Daimler*, the district court may not properly exercise general jurisdiction"); *ibid.* ("[f]ollowing *Daimler*, there is no basis consistent with due process for the district court to have exercised general jurisdiction").

C. The Tenth Circuit's error regarding *Daimler* determined the outcome below.

In addition, American Fidelity maintains that BNYM in fact would have prevailed had it argued against the availability of general jurisdiction pre-*Daimler*, and that BNYM accordingly waived the argument by failing to advance it at that time. Opp. 1-2, 12, 21. On this view, American Fidelity appears to contend that it makes no difference whether *Daimler* changed the law because BNYM in any event could have successfully challenged, and therefore had to challenge, the existence of general jurisdiction pre-*Daimler*. *Id.* at 2. That argument is wrong, for a number of reasons.

First, as we showed in the petition (at 7-10) and demonstrate above, the post-*Goodyear*, pre-*Daimler* consensus was that continuous and systematic contacts with the forum were sufficient to establish general jurisdiction; as noted, the black-letter understanding was that, "[i]f the *Goodyear* opinion stands for anything * * * it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction." 4 FEDERAL PRACTICE & PROCEDURE, AT § 1067.5. And there can be no serious dispute that—under the facts stipulated by the parties (see Pet. 4 n.1; Opp. 5)—BNYM had such contacts with Oklahoma. American Fidelity should not be heard to make a contrary argument now: as we showed in the petition (at 9), American Fidelity specifically alleged in its complaint that BNYM "engaged in systematic and continuous contact with Oklahoma" sufficient to establish general jurisdiction (Ct. App. JA 10-11), and *agreed* before the district court that BNYM "would have been subject to general jurisdiction prior

to *Daimler*, in that it engaged in a substantial business in Oklahoma." R.60, at 4. American Fidelity does not deny these earlier submissions, and makes no attempt to show that claims of general jurisdiction over entities situated similarly to BNYM were rejected pre-*Daimler*, in the Tenth Circuit or anywhere else.[4]

Second, the Tenth Circuit appeared to offer a suggestion similar to American Fidelity's, indicating that pre-*Daimler* circuit authority did not support general jurisdiction "based only on continuous and systematic contacts with the forum"; the court below indicated, instead, that such jurisdiction was understood to exist only if the defendant's contacts were sufficient to render it "at home" in the forum. Pet. App. 15a. But this suggestion also is incorrect, and for similar reasons. As we showed in the petition (at 8 & n.3), post-*Goodyear*, pre-*Daimler* decisions in the Tenth Circuit applied the same "continuous and systematic contacts" standard as was applied in all other courts; although the Tenth Circuit occasionally (and sometimes parenthetically) used the phrase "at home" in the forum during that period, it never at-

[4] American Fidelity maintains that the district court observed that BNYM made no showing that an objection to general jurisdiction would have been futile pre-*Daimler*. Opp. 7-8. But that court's principal rationale for holding BNYM's jurisdictional argument waived was its view that, because *Daimler* simply applied *Goodyear*'s approach, BNYM's argument "was available well before the *Daimler* decision." Pet. App. 36a. That court subsequently certified its order for interlocutory appeal because BNYM "has identified authority from other jurisdictions that may support its position that it has not waived the defense of personal jurisdiction because *Daimler* provided new grounds for the defense." Pet. App. 27a.

tributed any particular meaning or substance to the phrase. It therefore is not in fact the case that BNYM had a basis before *Daimler* to contest general jurisdiction in Oklahoma.[5]

Third, and most significantly for present purposes, American Fidelity's contention that BNYM could have contested general jurisdiction pre-*Daimler* offers no basis on which to deny review. The Tenth Circuit did not suggest either that BNYM actually could have prevailed had it contested general jurisdiction pre-*Daimler*, or that any change in the law effected by *Daimler* would have made no difference to the outcome of the case. Instead, the holding below was that "*Daimler* reaffirmed the *Goodyear* standard," that the "same defense was available to BNYM" under both *Daimler* and *Goodyear*, and that, consequently, post-*Goodyear*, pre-*Daimler* Tenth Circuit decisions "employed the same standard that the Supreme Court reaffirmed and applied in *Daimler*." Pet. App. 15a-17a; see *id.* at 6a ("the general jurisdiction standard BNYM asserts was the same before and after *Daimler* was decided, and it was therefore available to BNYM from the outset of the litigation"). The Tenth Circuit's holding, accordingly, was that BNYM waived its objection to general jurisdiction

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[5] The decision below noted that the Tenth Circuit several times rejected assertions of general jurisdiction post-*Goodyear*. Pet. App. 15a-16a & n.3. But as is apparent from the court's characterization of the decisions, none—unlike this case—involved a defendant that engaged in a continuous and systematic course of conduct in the forum. Because, as we have shown, *Goodyear* itself effectively applied (and was generally understood to have applied) a "continuous and systematic" standard, the Tenth Circuit could not have rejected jurisdiction in a case involving such contacts.

because *Daimler* did not change the governing standard. The question presented in the petition is whether that holding was correct.

D. The question presented is a recurring and important one that warrants review.

Finally, the question here is an important one that warrants this Court's attention. In arguing to the contrary, American Fidelity contends principally that the question is "peculiar to this case and perhaps a limited number of similar 'old,' pre-January 14, 2014 cases likewise involving a defendant's pre-*Daimler* waiver of the defense of lack of personal jurisdiction." Opp. 3; see *id.* at 10, 18-19. But that is not so. To be sure, this case arises in the context of waiver. But the Tenth Circuit and American Fidelity agreed that there would be no waiver if *Daimler* changed the governing standard, thus providing a defense to BNYM that previously had been unavailable. See Pet. App. 6a; Opp. 1. The outcome here turns, accordingly, on whether the Tenth Circuit was correct in holding that *Daimler* "did not limit general jurisdiction" to "a corporation's state of incorporation or principal place of business, except in exceptional circumstances" (Pet. App. 14a), so that the defense of lack of general jurisdiction "could [have been] asserted to the same extent under *Goodyear* as it could be asserted under *Daimler*." *Id.* at 17a. As a consequence, the determinative question here is what *Daimler* means—and that is a recurring question of considerable importance.

Moreover, as we showed in the petition (at 17-18), the uncertainty created by the Tenth Circuit's error, and by its departure from the approach taken

by other courts of appeals, will cause considerable harm. The Tenth Circuit's misstatement of *Daimler* makes impossible the "'predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). The inconsistency of the Tenth Circuit's holding with the standard applied by other courts will promote forum shopping. And the uncertain nature of the rule stated by the Tenth Circuit—which makes no attempt to explain how to determine whether a defendant *is* "at home" in the forum, except to say that it is *possible* to be at home somewhere other than the place of incorporation or principal place of business—precludes certainty and makes inconsistent outcomes inevitable. Although we made this point in the petition, American Fidelity offers no response.

Given the plain departure of the Tenth Circuit's decision from *Daimler*, summary reversal of the decision below might be appropriate. But in any event, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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