No. 08-1107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The California Retailers Association has represented major retailers doing business throughout the state of California since 1933.[1] The Association's membership consists primarily of supermarkets, drugstores, department stores and general merchandise retailers,

[1] The parties have consented to the filing of this *amicus* brief. Nixon Peabody LLP, a counsel for The Hertz Corporation in *Friend v. Hertz Corporation*, authored this brief in part. *See* Sup. Ct. R. 37.6.

many of whom are incorporated and headquartered outside of California, and do business in multiple states in addition to California. The Association's members operate over 9,000 retail stores, which generate combined annual sales within the state of California exceeding $100 billion.

SUMMARY OF ARGUMENT

In supporting Hertz's Petition for Writ of Certiorari, the California Retailers Association and its members (collectively "CRA") seek to ensure that nationwide corporations are treated fairly and consistently in diversity jurisdiction cases.

The diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), confirms that a corporation can have only one principal place of business for purposes of diversity jurisdiction. *See also Metropolitan Life Ins. Co. v. Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). Nevertheless, as described in Hertz's Petition for Writ of Certiorari, at 8-14, the various circuits have adopted different (and conflicting) tests for determining a corporation's principal place of business. These various tests can, and do, lead to divergent outcomes depending merely on the fortuity of where a diversity action is originally filed. For example, a nationwide corporation headquartered in Illinois with significant operations in California will have its principal place of business in Illinois when the Seventh Circuit decides the matter pursuant to the "nerve center" test used in that Circuit. *See id.* The same corporation will have its principal place of business in California when the Ninth Circuit decides the matter pursuant to the "place of operations" test used by that Circuit. *See Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495 (9th Cir. 2001).

Retailers with nationwide operations generally do more business in California than in any other state because there are more people, and more consumers, in California. Consequently, under Ninth Circuit law, most nationwide retailers risk being declared California citizens despite the location of their nationwide headquarters and despite their extensive operations outside of California. There is no basis in the diversity jurisdiction statute to deny nationwide corporations doing business in California the benefits of a federal forum simply because they do more business there than any other single state.

In addition, the Ninth Circuit's "place of operations" or "substantial predominance" test for determining a corporation's principal place of business leads to uncertain results. This uncertainty harms the parties and the courts, especially with respect to diversity class actions filed in or removed to federal court pursuant to the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1332(d) (2007). The CAFA has greatly expanded the number of diversity class actions heard in federal court. If a federal court's jurisdiction is uncertain, then the time and expense associated with class discovery, case management, class certification, and settlement under the CAFA might all be for naught. A district court or a court of appeals (due to an absent class member's objections to the settlement) may determine at the end of the process that the district court never had jurisdiction in the first place.

Finally, nationwide corporations have legitimate concerns about local prejudice that the diversity statute is intended to prevent. For example, local governments have passed laws limiting "formula retail" stores which are traditionally associated with nationwide corporations. At least one such law has

been struck down under the dormant commerce clause as improperly targeting out-of-state corporations. Yet, the Ninth Circuit in this case concluded that "with its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts." *Friend v. Hertz Corp.*, 297 Fed. App'x, 690, 691 (9th Cir. 2008). This is an improper standard. The federal courts should not assume that a corporation that has "extensive contacts" with a state has no need for the protection of the federal courts.

The CRA supports Hertz's Petition for Writ of Certiorari, requests that the Court reject the Ninth Circuit's test for determining corporate citizenship, and urges the Court to grant the petition to establish a uniform rule or standard for determining a corporation's principal place of business.

ARGUMENT

I. The Inter-Circuit Conflict In Determining A Corporation's Principal Place of Business Frustrates the Purpose of the Diversity Statute

All the circuits agree that a corporation can have but one principal place of business. *E.g., Metropolitan Life*, 929 F.2d at 1223. The diversity statute confirms this: "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (emphasis added). Unfortunately, the various circuit courts apply different tests in determining a nationwide corporation's principal place of business, resulting in the distinct possibility that a corporation's citizenship will vary by circuit.

As explained in detail in Hertz's Petition, the tests utilized for determining a corporation's principal place of business differ in significant respects depending on the Circuit. At one end of the spectrum is the Seventh Circuit, which applies "the nerve center" test. Thus, "a corporation has a single principal place of business where its executive headquarters are located." *Metropolitan Life*, 929 F.2d at 1223 (Easterbrook, J.).

At the other end of the spectrum is the Ninth Circuit, which initially applies a "substantial predominance" or "place of operations" test. Thus, if "the corporation's activity in one state [is] 'substantially larger' than the corporation's activity in any other state," the corporation has its principal place of business in that state. *Davis v. HSBC Bank Nev.* (*Davis II*), __ F.3d __; 2009 WL 539934, *1-2 (9th Cir. 2009). Only if no state "substantially predominates" does the Ninth Circuit look to a corporation's nerve center. *Id.*

Most other circuits (but not all) apply some form of the "total activities" test. *E.g., MacGinnitie v. Hobbs Group*, 420 F.3d 1234, 1239 (11th Cir. 2005); *Teal Energy v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004); *Capital Indemnity Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004); *Amoco Rocmount Co. v. Armstrong*, 7 F.3d 909, 914-15 (10th Cir. 1993); *Gafford v. General Elec. Co.*, 997 F.2d 150, 162-63 (6th Cir. 1993). This test purports to provide a framework for determining whether to use the "nerve center" test or a "place of operations" (or "place of activities") test in determining a corporation's principal place of business.

With respect to the Ninth Circuit's "substantial predominance" test, the Circuit has stated that a "substantial predominance" of a corporation's opera-

tions can be considerably less than a majority. *E.g.*, *Davis II*, 2009 WL 539934 at *2. The corporation's presence need only be "substantially larger" in one state than any other single state. *Id.*

California is home to approximately 37 million people, or about 12% of the United States' population. It has substantially more people than Texas (52% more), the next largest state with a population of approximately 24 million. California's gross domestic product is more than 1.8 trillion dollars, or approximately 13% of the United States' gross domestic product. California's economy is substantially greater than that of Texas (58%), the next largest state.[2] California's land mass is larger than any state but Alaska and Texas. Under the Ninth Circuit test, and given its annual contributions to the federal treasury, California would likely be considered the "principal place of business" of the United States, even though the federal government plainly sits in the District of Columbia.

Given the above statistics, it is not at all surprising that nationwide retailers are likely to have greater sales, more locations, and more employees in California than in any other state. And because nationwide corporations may be sued in multiple circuits, the circuits' various tests create a considerable risk that each such corporation will be found to have more than one state as its principal place of business.

For example, according to the U.S. Department of Labor, about 1.6 million people are employed at department stores in the United States. Approximately

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[2] This data is for 2007 (the most recent available). Bureau of Economic Analysis, U.S. Department of Commerce, http://www.bea.gov/regional/gsp/.

14% of these employees (or 224,591) work in California, and the remaining 86% work elsewhere. Texas, the next largest state, holds 6.8% of the nation's department store employees (or 109,281). Accordingly, department stores employ 105% more employees in California than in Texas. The same trend – though to different degrees – applies to other types of retailers, as set forth in Appendix A.

Thus, under the Ninth Circuit's analysis, large retailers – in the aggregate – face a significant risk of being declared California citizens simply because their presence in California is greater than their presence in any other *single* state. The other circuits, in contrast, will almost certainly find that the principal place of business of these large retailers is elsewhere.

For example, Best Buy, which is headquartered in Minnesota, has operations in nearly all 50 states. Eleven percent of its stores, 13% of its sales, and 13% of its employees are in California. Texas is the second largest state, with 10% of Best Buy's stores and 9% of its sales and employees. Thus, Best Buy has 16% more stores, 45% more sales, and 45% more employees in California than in Texas. Based on these facts, a district court (prior to being overruled by the Ninth Circuit), applying Ninth Circuit law concluded that Best Buy has its principal place of business in California. *Davis v. HSBC Bank Nev.* (*Davis I*), 2008 WL 4829880, *3 (C.D. Cal. 2008). The Eighth Circuit would likely disagree, and find instead that Best Buy is a citizen of Minnesota. As explained by Judge Kleinfeld, concurring in *Davis II*: "[w]ere we to accept the district court's conclusion that Best Buy is a California citizen because it does more business there than in Texas, the Eighth Circuit and the district courts in Minnesota, where all of Best Buy's na-

tional management and administration take place, would rightly scoff." 2009 WL 539934 at *12. While the Ninth Circuit overruled the district court in *Davis II*, based on the specific facts, it did not change its test. Thus, the conflict, and problem, remains.

In sum, the inter-circuit conflict for determining a corporation's principal place of business creates a considerable risk that many nationwide corporations will be found to have more than one principal place of business depending on the circuit in which they are sued. This result conflicts with the plain language of the diversity statute.

II. The Ninth Circuit's "Substantial Predominance" Test Renders a District Court's Subject Matter Jurisdiction Over Diversity Class Actions Uncertain

Even absent the conflict among the Circuit Courts of Appeal, the Court should grant Hertz's Petition for Writ of Certiorari. The Ninth Circuit's "substantial predominance" test for determining a corporation's principal place of business is too uncertain to provide meaningful guidance for litigants and the lower courts.

A. Uncertainty Demonstrated In The Instant Case

Prior to the district court's remand order in *Friend v. Hertz Corporation*, two separate district court judges in the Ninth Circuit, considering virtually the same basic facts, concluded that Hertz's principal place of business was *not* in California.[3] If two dis-

[3] *See Lopez v. Hertz Local Edition, Inc.*, Case No. CV-06-7364 SJO (JTLx) (C.D. Cal.); December 15, 2006 Order To Show Cause; Hertz Amended Notice Of Removal (filed Jan. 3, 2007);

trict court judges, reviewing the same set of facts and applying the same test, can reach a conclusion exactly the opposite of a third district court judge, the legal test plainly is inadequate and fails to provide the parties with any reasonable certainty as to whether federal diversity jurisdiction does or does not exist in a particular case.

B. Uncertainty Demonstrated Between This Case and *Davis*

A comparison of the Ninth Circuit's decision in this case and its decision in *Davis II* also illustrates the uncertainty created by the Ninth Circuit test. In this case, the Ninth Circuit applied the substantial predominance test and concluded that Hertz was a citizen of California because 17% of its rental facilities, 18% of its sales, and 20% of its employees were located there. In *Davis II*, the Ninth Circuit concluded that Best Buy was not a citizen of California when 11% of its stores, 13% of its sales, and 13% of its employees were located there. 2009 WL 539934 at *1. The Ninth Circuit has provided no guideposts or standards that explain why a mere five to seven percent difference in the two nationwide retailers' California operations renders Hertz a citizen of California and Best Buy not.

Similarly, the Ninth Circuit's practice of determining a corporation's principal place of business by examining the corporation's business operations in

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April 11, 2007 Chambers Order; *Charlot v. The Hertz Corp.*, Case No. CV 07-1496-JFW (FFMx) (C.D.Cal.); March 26, 2007 Order To Show Cause; Declaration of Krista Memmelaar In Response To Show Cause Order (filed Apr. 4, 2007); April 6, 2007 Order Discharging The Order To Show Cause. These pleadings are available on the PACER system of the United States District Court for the Central District of California.

the two states with the largest shares of those operations potentially leads to corporations changing their principal place of business from year to year based on relatively minor market adjustments. For example, the Ninth Circuit concluded that Best Buy was *not* a citizen of California in part because it only did 45% more sales in California than in Texas – the next largest state (13% in California; 9% in Texas). Hertz, however, was deemed a citizen of California in part because it generated 60% more revenue in California than in Florida – the next largest state (18.6% in California; 11.6% in Florida).

However, only a *one percentage point shift* in sales or revenue within each of the two largest markets materially alters the "percentage more" calculation relied upon so heavily by the Ninth Circuit. Hertz, for example, would go from having 60% more revenue in California than in Florida to having only 39% more revenue (17.6% in California; 12.6% in Florida) – less than the 45% sales figure relied upon by the Ninth Circuit in determining that Best Buy was not a California citizen. Thus, under the Ninth Circuit's test, Hertz might be a citizen of California one year, then a citizen of New Jersey the next, if its Florida tourism business increases while California's drops. The same dangers hold true for any nationwide retailer located in California. Under the Ninth Circuit test, a modest consumer expansion in one state and an equally modest business contraction in another could lead to a change in a nationwide retailer's principal place of business.

C. Uncertainty With Respect to the CAFA Jurisdiction

This uncertainty could lead to a substantial waste of court and litigation resources, especially with re-

spect to claims brought in or removed to federal court under the CAFA.

Congress passed the CAFA in 2005 in response to the perceived abuse of the class action litigation device in state courts. Pub.L. 109-2 § 2, 119 Stat. 4, (a)(4) (2005). Among its findings, Congress specifically stated that: "State and local courts are . . . sometimes acting in ways that demonstrate a bias against out-of-State defendants. . . ." Pub.L. 109-2, §, 119 Stat. 4, (a)(4)(B) (2005). Congress' express intent was to expand federal court jurisdiction over class actions between parties of different states based upon a concept of "minimal diversity." Thus, the CAFA generally grants the federal district courts original jurisdiction over class actions in which any defendant is a citizen of a state different from any (putative) class member. 28 U.S.C. § 1332(d)(2).

Predictably, the CAFA has resulted in an increase in class actions filed in or removed to federal courts. Prior to enactment of the CAFA, approximately 29 diversity class actions were brought in or removed to federal court each month. After the CAFA's enactment, the number doubled to approximately 58 – or almost 700 a year. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act Of 2005 on Federal Courts: Fourth Interim Report*, Federal Judicial Center, at 6, April 2008, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf. The Ninth Circuit, in particular, has faced an increase in diversity class actions well above the federal court average. Within the Ninth Circuit, there has been a 100% increase in diversity class action cases removed to federal court, and an almost 400% increase in diversity class actions

originally brought in federal court. Lee & Willging at 22, Figure 4.

Like most other civil cases, the vast majority of class actions result in settlements. Oftentimes, a settlement is reached only after the parties and the court have expended enormous time and energy in conducting discovery, managing the litigation, and determining the propriety of class certification. Unlike other cases, however, strangers to a class action with an interest in its outcome (*e.g.*, absent class members) can object to any settlement. One study found that the number of objectors varied, with a median of three objectors per class action settlement. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs & Objectors in Class Action Litigation: Theoretical & Empirical Issues*, 57 Vand. L. Rev. 1529, 1546 (2004).[4]

In many cases, the Ninth Circuit's "substantial predominance" test will result in considerable uncertainty as to whether a diversity class action properly belongs in federal court. A district court (or a court of appeals) can consider subject matter jurisdiction over a case at any time, whether the issue is raised *sua sponte*, by one of the parties, or by an objector. And objectors may have every incentive to raise (or threaten to raise) the jurisdictional issue in an effort to obtain a settlement more favorable to the objectors, or, perhaps, remove the case from the auspices of a particular federal court all together.

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[4] Another study states that someone objects to a class action settlement in slightly more than one half of cases. Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide For Judges,* Federal Judicial Center, at 20 (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$File/ClassGde.pdf.

In short, the uncertainty of the Ninth Circuit's test can easily lead to late-in-the-game attempts at forum shopping and to enormous wastes of judicial resources in the litigation of the CAFA-based class actions (and other complex actions) that are belatedly deemed to have been improvidently filed or removed. To avoid such unnecessarily harmful consequences, the Court should grant review of Hertz's petition and provide litigants and the lower courts with a standard that better assures reasonable certainty as to a district court's jurisdiction over an action.

III. The Federal Diversity Statute and the CAFA Should Be Interpreted to Protect Nationwide Corporations from Local Prejudice

The purpose of diversity jurisdiction is to provide a "federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant." *J.A. Olson Co. v. Winona*, 818 F.2d 401, 404 (5th Cir. 1987). The Ninth Circuit, however, assumes that a nationwide corporation with significant business operations in California "is not the type of litigant that diversity jurisdiction was designed to protect." *Tosco*, 236 F.3d at 502. In this case, the Ninth Circuit specifically stated: "With its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts." 297 Fed. App'x at 691.

In fact, nationwide corporations, even those with significant operations in California (or another state), are very much subject to prejudice as "out-of-staters." And they have a *particular* need for the protections afforded by the federal courts. Such corporations are more likely to be sued (due to their greater presence) than other out-of-state citizens, and are subject to a

considerable danger of local prejudice. As Judge Kleinfeld cogently stated in his concurring opinion in *Davis II*, even if jurors may not have a prejudice against citizens and corporations of other states, "[d]iversity protects against deep pocket justice as one form of prejudice." 2009 WL 539934 at *9.

Concern over local prejudice is particularly warranted in the retail context. Evidence of local prejudice against retailers headquartered in other states comes in a variety of forms, but most obviously in the guise of grass-roots and political efforts to prevent such retailers from entering local communities. "In California alone, nearly a dozen towns and counties have adopted anti-big-box ordinances." Tim Sullivan, High Country News, June 7, 2004, available at 2004 WLNR 15077826.

In addition to well-publicized political efforts demonstrating prejudice against "big box retailers," local governments also have passed laws aimed at national retail chains that typically operate smaller stores. For example, in 2004, San Francisco passed an ordinance limiting "formula retail" stores within the city. The ordinance expressly sets forth that one of San Francisco's concerns about formula retailers is that they are not "local." According to the ordinance, "[m]oney earned by independent businesses is more likely to circulate within the local neighborhood and City economy *than the money earned by formula retail businesses which often have corporate offices and vendors located outside of San Francisco*." S.F., Cal., Planning Code § 703.3(a)(5) (2004) (emphasis added).[5]

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[5] Laws intended to limit chain retail stores or restaurants have been passed by many local governments, particularly in California. *See e.g.*, Arcata, Cal., Ordinance 1333 (June 5,

Some formula retail ordinances have survived challenge under the dormant commerce clause because, although the legislators made discriminatory statements about out-of-state retailers when passing the law, their motives were irrelevant to the court's analysis. *Coronadans Organized for Retail Enhancement v. Coronado*, 2003 WL 21363665, *6 (Cal. App. 2003) (unpublished). Other such ordinances have been struck down because "the ordinance's effective elimination of all new interstate chain retailers has the 'practical effect of . . . discriminating against' interstate commerce." *Island Silver & Spice Inc. v. Islamorado*, 542 F.3d 844, 846-47 (11th Cir. 2008) (quoting *Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)).

These laws (regardless of their constitutionality) show that the prejudice against nationwide corporations with out-of-state headquarters is very real. A nationwide corporation's "extensive California contacts and business activities" does not eliminate this prejudice, nor should it eliminate federal jurisdiction, as the Ninth Circuit suggests. If anything, such contacts potentially increase prejudice as local citizens may erroneously believe that corporations headquartered elsewhere take money and jobs from the local economy and "do not care" about the local population.

In determining a corporation's principal place of business, a proper consideration is which single state's population, government, and courts are *least likely* to be prejudiced against a nationwide corpora-

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2002); Calistoga, Cal., Ordinance 519 (Feb. 6, 1996); Coronado, Cal., Mun. Code § 86.55.360; Pacific Grove, Cal., Mun. Code §23.64.115; San Bautista, Cal., Ordinance 2007-04 (Feb. 20, 2007); Sausalito, Cal., Mun. Code § 10.44.240 (2003); and Solvang, Cal., City Code § 11-12-7(E) (1994).

tion due to that corporation's business activities and corporate presence. A proper consideration is most certainly not, as the Ninth Circuit suggests in this case and *Tosco*, whether a corporation's contacts and business activities are significant enough in a particular state to make local prejudice no more likely there than anywhere else.

CONCLUSION

The inter-circuit conflict concerning a nationwide corporation's principal place of business will lead to such corporations having more than one such place. The Ninth Circuit's test for determining a corporation's principal place of business creates great uncertainty. Nationwide corporations headquartered outside of California – even those with significant contacts within that state – are still subject to the prejudices that diversity jurisdiction is specifically intended to avoid. The California Retailers Association respectfully submits that this Court should grant Hertz's Petition for Writ of Certiorari and should establish a uniform standard for determining a corporation's principal place of business.

Respectfully submitted,

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