No. 08-1107

APR 6 - 2009

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 *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE AND AMERICAN TRUCKING ASSOCIATIONS IN SUPPORT OF PETITIONER

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

ROBERT S. DIGGES, JR.
AMERICAN TRUCKING
ASSOCIATIONS, INC.
950 N. Glebe Road, Suite 110
Arlington, VA 22203
(703) 838-1889

JONATHAN S. FRANKLIN*
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

ROBIN CONRAD
AMAR SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues and nearly 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all corporate income taxes paid to the federal government. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research and development spending—more than a third of the total private R&D spending in the U.S.

American Trucking Associations, Inc. ("ATA") is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,500 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States,

including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before this Court and other courts.

Amici and their members have strong interests in this case. All *amici* have members who are, or who lead, corporations with nationwide activities. The statute at issue applies only to corporations, and determines the fundamental issue of diversity jurisdiction according to a corporation's "principal place of business." Yet although the statute directs that there be at most only one principal place of business for a given corporation, the different tests in the circuits result in many companies having more than one, depending on where a lawsuit is filed. The Ninth Circuit's ill-defined and open-ended test also results in many nationwide companies being deemed California corporations merely because of the size of California's population as compared to other states. *Amici* therefore urge the Court to grant certiorari to bring uniformity to a statute that requires it.

SUMMARY OF THE ARGUMENT

There is an intractable split among the circuits regarding the test for determining a corporation's "principal place of business" under 28 U.S.C. § 1332(c)(1). The Seventh Circuit exclusively applies the straightforward "nerve center" test, which looks to the place (usually the corporate headquarters) from which the corporation's activities are directed. The other circuits, by contrast, apply an array of subjective tests that consider, in different ways and to different degrees, the locations of the corporation's operations. As a result of the varied tests, nationwide corporations are determined to have

more than one "principal" place of business, in contravention of the governing statute.

The Ninth Circuit's test, moreover, is unworkable, unpredictable and erroneous. That test has proven incapable of yielding consistent results. And the test often (as in this case) deems a nationwide corporation a citizen of California merely because its California operations—reflecting California's large population—are substantially larger than than those in other states while still comprising only a small minority of its overall activities. *Amici* believe that the Seventh Circuit's "nerve center" test is the correct one, because it effectuates the statutory purposes, including those of the recent Class Action Fairness Act ("CAFA"), and also yields consistent, predictable, and readily determinable results. But whichever test the Court ultimately decides upon, the Court should grant certiorari to bring uniformity to what must be a uniform determination.

Finally, this case is an ideal vehicle for resolving the split in the circuits. The circuits' differing tests have grown firmly entrenched, without any guidance from this Court. And the differences in those tests were dispositive in this case. Because the avenues for appeal of jurisdictional determinations are limited, it may be years, if not decades, before another similar case makes its way to this Court. The Court should act on this opportunity to announce a uniform rule for an important and fundamental jurisdictional issue that potentially affects thousands of cases filed against or by corporations every year.

REASONS FOR GRANTING THE WRIT

I. THE INTRACTABLE SPLITS AMONG THE CIRCUITS PERPETUATE INTOLERABLE UNCERTAINTY WHERE THE STATUTE DEMANDS UNIFORMITY.

In 1958, Congress amended Section 1332 to provide that a corporation is a citizen of both its place of incorporation *and* its principal place of business. *See* Pub. L. No. 85-554, 72 Stat. 415 (1958) (codified at 28 U.S.C. § 1332(c)(1)). Under Section 1332(c)(1), a corporation can have, at most, only one "principal" place of business.[2] The disparate and erratic tests employed by the circuit courts, however, result in more than one principal place of business for a given corporation. After more than 50 years of percolation, the differences in the circuits are firmly entrenched, and the time has come for this Court to bring certainty to the law.

As the First Circuit has recognized, the circuits apply at least "three tests for determining a corporation's principal place of business." *Diaz-Rodriguez* v. *Pep Boys Corp.*, 410 F.3d 56, 60 (1st Cir. 2005). *See* Cameron Fredman, *Developments In The Law: The Class Action Fairness Act of 2005*, 39 Loy. L.A.L. Rev. 1025, 1038 (2006) ("Federal circuits have split on the applicable test to determine principal place of business"); Lindsey D. Saunders, *Determining a Corporation's Principal Place of Business: A Uni-*

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[2] Sometimes a corporation may have no principal place of business, as when it is inactive or its headquarters are outside the United States. *See, e.g.*, *Swiger* v. *Allegheny Energy*, 540 F.3d 179, 188 (3rd Cir. 2008); *Torres* v. *So. Peru Copper Corp.*, 113 F.3d 540, 543-44 (5th Cir. 1997); *Midlantic Nat'l Bank* v. *Hansen*, 48 F.3d 693, 696 (3rd Cir. 1995).

form Approach to Diversity Jurisdiction, 90 Minn. L. Rev. 1475, 1478 (2006) ("the federal courts apply variations and combinations of three different tests to determine a corporation's principal place of business"). And while the tests do not necessarily yield inconsistent results in every case, "their differing emphases mean that, in some cases, *they will point to different locations as the principal place of business*." *Diaz-Rodriguez*, 410 F.3d at 60 (citation omitted; emphasis added). This disuniformity is intolerable. When courts deem a corporation to have more than one principal place of business, Section 1332(c)(1) is contravened. *See Saunders*, *supra*, at 1487 ("Until all circuit courts apply one test * * * Congress's intent will not be served.").

The differing tests are well-established and will persist absent this Court's intervention. The Seventh Circuit uses the "nerve center" test in all circumstances to determine a corporation's principal place of business. *Metro. Life Ins. Co.* v. *Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) ("a corporation has a single principal place of business where its executive headquarters are located"); *Wis. Knife Works* v. *Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) ("[W]e look for the corporation's brain, and ordinarily find it where the corporation has its headquarters.").

This test can be traced back to one of the first reported decisions on the 1958 amendment. *See Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959). There, the court held that an argument that a corporation's manufacturing operations determined its principal place of business was "misplaced and quite unrealistic." *Id.* Where a corporation has "far-flung" activities in different

states, the court held, "its principal place of business is the *nerve center* from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective." *Id.* (emphasis added).

The Third Circuit, however, has rejected the nerve center test entirely and employs the "center of corporate activities" test, which considers only the location of day-to-day corporate activities. *See CGB Occupational Therapy* v. *RHA Health*, 357 F.3d 375, 381 n.5 (3d Cir. 2004); *Kelly* v. *U.S. Steel Corp.*, 284 F.2d 850, 853-54 (3d Cir. 1960). In *Kelly*, 284 F.2d at 854, the court squarely rejected the plaintiff's "nerve center" argument that a corporation was a citizen of New York, its corporate headquarters, finding that the duty of conducting the "business by way of activities" had been delegated to Pennsylvania.

The First, Second and Fourth circuits, by contrast, apply either the "nerve center" or "place of operations" test on a discretionary, case-by-case basis. *See Diaz-Rodriguez*, 410 F.3d at 61; *R.G. Barry Corp.* v. *Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Long* v. *Silver*, 248 F.3d 309, 314-15 (4th Cir. 2001); *see also Masterson-Cook* v. *Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989). Where a corporation's activities are decentralized and spread across numerous states, these courts usually apply the nerve center test, but they use the place of operations test when activities are "centralized." Yet there are no clear standards for determining which test applies. *See, e.g.*, *Barry*, 612 F.2d at 655 (although nerve center was elsewhere, corporation was New York citizen because "New

York is the community in which [it] engages in its most extensive contact with the public.").

The Fifth, Sixth, Eighth, Tenth, and Eleventh circuits employ a "total activities" test that attempts to combine the "nerve center" and "place of operations" tests. *See J.A. Olson Co.* v. *City of Winona*, 818 F.2d 401, 409, 411 (5th Cir. 1987); *Gafford* v. *Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993); *Capitol Indem. Corp.* v. *Russellville Steel Co.*, 367 F.3d 831, 835-36 (8th Cir. 2004) ("open-ended" hybrid of the "nerve center" and "place of operations" test); *Gadlin* v. *Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000); *MacGinnitie* v. *Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005). This test employs "a somewhat subjective" analysis to choose between the results of the two tests. *MacGinntie*, 420 F.3d at 1239. When considering a corporation whose operations are far-flung, "the sole nerve center of that corporation is more significant," but the principal place of business is ultimately subject to an analysis of the "nature" of the corporation's activities as a whole. *Olson*, 818 F.2d at 411. Under this vague test, courts are to "take into consideration all relevant factors and [weigh] them in light of the facts of each case." *Gafford,* 997 F.2d at 163.

Departing from all other circuits, the Ninth Circuit uses both the "place of operations" and "nerve center" tests, but applies them in a prescribed order of priority. *See Davis v. HSBC Bank*, __ F.3d __, No. 08-57062, 2009 WL 539934 (9th Cir. Feb. 26, 2009); *Tosco Corp.* v. *Cmtys. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001); *Indus. Tectonics, Inc.* v. *Aero Alloy*, 912 F.2d 1090, 1092-93 (9th Cir. 1990)). A court may only turn to the "nerve center" test if a defendant fails to meet its burden to prove that "no

state contains a substantial predominance of the corporation's business activities." *Tosco*, 236 F.3d at 500. "Substantial predominance" requires the amount of a corporation's business activity in that one state be "significantly larger" than operations in the state with the second-most operations. *Id.*

Because these tests diverge widely in outcome and predictability and require varying proofs, they guarantee that many nationwide corporations will eventually be deemed to have multiple "principal" places of business. Petitioner Hertz, for example, has its headquarters, or "nerve center," in New Jersey, and the Seventh Circuit will simply hold that Hertz is a citizen of New Jersey on this basis. The Third Circuit would ignore the nerve center if it is not Hertz's center of corporate activity, raising questions whether corporate activities are delegated somewhere outside of New Jersey. The First, Second, and Fourth circuits would make a case-by-case determination as to whether Hertz's principal place of business is in New Jersey or some other state in which it operates. The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits would look at the total activities and use the two tests together. Often these two tests would choose the "nerve center" because of Hertz's far-flung activities, but the analysis depends largely on a court's exercise of discretion. The Ninth Circuit, by contrast, made Hertz a citizen of California, and *never* factored in its New Jersey nerve center, because it found Hertz unable to disprove that its California operations substantially predominated over its Florida operations. *See* Pet. App. 2a.

As a result, Hertz has at least two different "principal" places of business under the circuits'

varying tests—New Jersey and California—and perhaps others. This outcome is prohibited by Section 1332(c)(1), in which Congress made a corporation a citizen of its principal place, not places, of business.

II. THE NINTH CIRCUIT'S TEST IS UNWORKABLE, UNPREDICTABLE AND ERRONEOUS.

A. The Ninth Circuit's Rule Is Incapable Of Consistent Results And Improperly Deems Nationwide Corporations Citizens Of California.

It is particularly crucial that the Ninth Circuit apply the correct test under Section 1332(c)(1), because California's population is substantially larger than that of any other state, which leads nationwide corporations to have commensurately larger operations there. The grant of diversity jurisdiction "has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners." *Pease* v. *Peck*, 59 U.S. (18 How.) 595, 599 (1855). Unfortunately, the Ninth Circuit has adopted an elastic and ill-defined test that improperly subjects national corporations with headquarters elsewhere to state courts as "local" California companies, even when their California operations just reflect a larger presence due to California's population size. And even worse, the test has proven incapable of producing consistent results. As a result of the Ninth Circuit's failure to provide clear direction, nationwide corporations cannot predict whether by doing business in California, they will be made California citizens and thus subject to California

state courts when sued by California plaintiffs. Certiorari is thus warranted for this reason as well.

As Judge Kleinfeld recently noted, the Ninth Circuit's vague test "generates excessive unpredictability and encourages expensive litigation to identify the 'principal place of business' for corporations that operate in multiple states." *Davis*, 2009 WL 539934, at *4 (Kleinfeld, J., concurring). In this case, for example, the Ninth Circuit found that Hertz is a citizen of California, rather than the state of its headquarters, New Jersey. Hertz was deemed a California company because its operations in California substantially exceeded those in the next largest state, even though the vast majority of its operations and revenues (around 80%) were attributable to other states. *See* Pet. 7. The court held that its precedent did not require consideration of California's population as a factor in determining Hertz's principal place of business. Pet. App. 3a. *See Ganezer* v. *DirectBuy, Inc.*, No. CV-08-8666-GAF, 2009 WL 363908, *4 (C.D. Cal. Feb. 11, 2009) (noting that Ninth Circuit "squarely rejected" consideration of California's population size in *Hertz*, and remanding case against corporation with 10% of franchises in California, but with headquarters and all 430 employees in Indiana).

Only four months later, however, the Ninth Circuit held in *Davis*, *supra*, that nationwide electronics retailer Best Buy was a citizen of Minnesota, its nerve center, rather than California. The district court had found substantial predominance because California had 15% more Best Buy stores, 40% more employees, and 46% more sales than Texas, the second highest state. *Davis*, 2009 WL 539934, at *2. But the Ninth Circuit found

that "[a]t most, the statistics demonstrate that Best Buy Stores' California retail activities roughly reflect California's larger population." *Id.* at *2. The court's malleable test thus made it possible to decide the two cases differently, despite the companies' similar percentages of operations in California, and with contrary applications of population size as a factor.[3]

The variances in these results arise from the peculiar burden the Ninth Circuit places on a corporation to prove that its activities in California do not "substantially predominate" over those in the next largest state. This requires "a comparison of that corporation's business activity in the state at issue to its business activity in other individual states." *Tosco*, 236 F.3d at 500. Various indeterminate factors are consulted 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." *Id.*

This method is acutely susceptible to distortion by the effects of California's enormous population, which dwarfs that of any other state.[4] As Judge Kleinfeld explained, "a comparison between the two highest states cannot tell us whether the highest

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[3] It should be noted that one judge (Judge Ikuta) sat on both the *Hertz* and *Davis* panels.

[4] In 2008, California's population was estimated at 36,756,666, or 12.09% of the total U.S. population. *See* U.S. Census Bureau, Annual Estimates of the Resident Population for the United States (www.census.gov/popest/states/tables/NST-EST2008-01.xls). The next largest state, Texas, had an estimated population of 24,326,974, or 8.17% of the total. *Id.* Thus, California's population is more than 50% higher than that of any other state.

state has a 'substantial predominance' because it tells us only how one state compares to another, not whether any state so predominates that it is reasonable to call a multi-state company a citizen of that one state." *Davis*, 2009 WL 539934, at *8 (Kleinfeld, J., concurring). The comparison between the two highest states "tells us nothing about whether the highest state predominates for the entire corporation (which is what matters)" and therefore cannot yield the principal place of business. *Id.* Thus, if a retailer has operations in all states proportional to population, and predominance between the two largest states is the relevant determination, "California would be the 'principal place of business' for virtually every corporation because of its larger population." *Id.* at *7

The erroneous effects of the Ninth Circuit's test are readily apparent. Starbucks Corporation—world famous as a Seattle, Washington-based corporation—was nevertheless found to be a citizen of California under the Ninth Circuit's test. *Mbalati* v. *Starbucks Corp.*, No. CV-07-3267-RFG (C.D. Cal. June 17, 2007). United Airlines has its world headquarters in Chicago and operates all over the nation, but a California district court found that it is a citizen of California. *Ghaderi* v. *United Airlines, Inc.*, 136 F. Supp. 2d 1041 (N.D. Cal. 2001); *Burgos* v. *United Airlines, Inc.*, No. C-00-04717-WHA, 2002 WL 102607, *6 (N.D. Cal. 2002). Wholesaler Costco has its well-known home office in Washington, but a California district court found that it is a citizen of California. *Castaneda* v. *Costco Wholesale Corp.*, No. CV-08-7599-PSG, 2009 WL 81395, *2 n.2 (C.D. Cal. Jan. 9, 2009). *See also Lao* v. *Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1064 (C.D. Cal. 2006)

(furniture company headquartered in Illinois deemed a California citizen after rejecting arguments based on per capita figures). On the other hand, Home Depot was found to be a citizen of Georgia, the location of its headquarters. *Arellano* v. *Home Depot U.S.A., Inc.*, 245 F. Supp. 2d 1102, 1107-1108 (S.D. Cal. 2003).

Despite holding that a nationwide retailer "will not be a citizen of California merely because its operations in California cater to California's larger population," *Davis*, 2009 WL 539934 at *3, the recent *Davis* decision failed to deliver a directive to lower courts that will ensure consistent decisions. The court does "not require that courts apply a per capita approach to determining a corporation's principal place of business *in every case*." *Id.* (emphasis added). And "[t]he substantial predominance test does *not* require that a majority of corporate operations occur in a single state." *Id.* at *2 (emphasis added). While California's large population figures into the analysis, there is no explanation of the proof required, and the court declined to adopt any "hard and fast rule or percentage by which the operations in one state must exceed those in other states." *Id.* Consequently, nationwide corporations continue to face uncertainty as to their citizenship if they conduct operations in California commensurate with California's large population and giant economy.

The vagueness of the Ninth Circuit's rule thus "generates expensive, unpredictable, and pointless litigation about corporate citizenship, likely to lead to intercircuit conflicts about where national business are citizens." *Id.* at *12 (Kleinfeld, concurring). To disprove allegations of "substantial

predominance," the court requires a quantitative and comparative analysis of the defendants' business activities across various states under each of six factors. *See Tosco*, 236 F.3d at 501-02; *Indus. Tectonics*, 912 F.2d at 1194. But, there is no "map or formula" to identify with any certainty when a corporation's activities are "significantly larger" than those in other states. *Ghaderi*, 136 F. Supp. 2d at 1047. Rather, courts exercise "situation specific judgment" after "taking into account each of the many pertinent circumstances as they present themselves uniquely in each litigated setting." *Id.* The Ninth Circuit also adds the ponderous requirement that courts "take into consideration both the nature of the corporation's business activities and the purposes of the corporate citizenship statute," but without explaining how to apply those factors. *Davis*, 2009 WL 539934 at *2. "Litigation is more than burdensome enough without adding a trial to decide where to have the trial." *Id.* at *10 (Kleinfeld, J., concurring). Yet the Ninth Circuit, like other circuits employing similarly indeterminate factors, guarantees burdensome litigation merely to determine jurisdiction.

These indeterminate guidelines also require corporations to hit a moving target to meet their burden of proof. Judge Kleinfeld noted in *Davis* that if a mere (as opposed to substantial) "predominance" test sufficed, "a corporation's principal place of business might change from year to year, or month to month, based on the routine vicissitudes of commerce." *Id.* But even under a "substantial predominance" test, corporations' citizenship could often change. Particularly in times of economic shift and downsizing, operations may change rapidly,

shifting the principal place of business as detected by an operations test on a monthly or yearly basis in response to market forces or regulation. By contrast, as noted below, the "nerve center" test maintains stability and predictability while still recognizing the state that defines a corporation's public identity.

The panel majority in *Davis* noted that "[w]ere we writing on a clean slate, we would find much in favor of the rule suggested by [Judge Kleinfeld's] concurrence. But we see ourselves as bound by the holding in *Tosco*." *Id.* at *1 n.3. By contrast, this Court is writing on an entirely clean slate, having never addressed the meaning of Section 1332(c)(1) in the half-century since its amendment. The Court should not pass up this opportunity to bring uniformity and certainty to this important area of the law.

B. The Court Should Adopt The "Nerve Center" Test.

Regardless of what test is eventually adopted, the Court should grant certiorari to restore uniformity to a statute that depends on it. But the statutory purpose, as well as the interests of uniformity and predictability, are best served by the "nerve center" test employed by the Seventh Circuit.

The Seventh Circuit rightly prizes the nerve center test for its simplicity and predictability. "[P]arties ought to know definitely what court they belong in, and not face the prospect that their litigation may be set at naught because they made a wrong guess about jurisdiction." *Dimmitt & Owens Fin., Inc.* v. *United States*, 787 F.2d 1186, 1191 (7th Cir. 1986). "Some courts use a vaguer standard * * * we prefer the simpler test. Jurisdiction ought to be readily determinable." *Wis. Knife Works*, 781 F.2d at

1282. The ready determination of diversity jurisdiction in the Seventh Circuit favorably impacts litigation practice, by establishing clarity and efficiency. Unlike the other circuits' tests, few factual disputes arise under the nerve center test, and they are generally easy to resolve.[5]

The other circuits' tests, by contrast, attribute significance to the ever-changing operations of corporations by making those operations determinative of the principal place of business in many cases. Given that Section 1332(c)(1) permits only *one* principal place of business, the hazards of this approach are evident. Unlike the deliberate choice of a corporate headquarters, the operations of a corporation must constantly change and respond to the vagaries of markets and demographics, and may move in and out of states on a year-by-year, or even month-by-month, basis.

The nerve center test best effectuates Congress's intent to deny diversity jurisdiction only to those corporations sued in their "home" states. The 1958 amendment was intended to eliminate from the protections of diversity jurisdiction "those corporations doing a local business with a foreign charter." S. Rep. 85-1830, at 3102. But Congress intended

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[5] The "nerve center" test ably overcomes the situation where a corporate headquarters may only be nominal and is not really the "directing intelligence" of a corporation. *See Wis. Knife Works*, 781 F.2d at 1282-83; *Ace Rent-A-Car* v. *Empire Fire & Marine Ins. Co.*, 580 F. Supp. 2d 678, 687-88 (N.D. Ill. 2008) (holding, despite company president's assertion that Illinois was the principal place of business because his office was there, that Indiana was nerve center from where payments, communications and other governance was made); *Bond* v. *Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 913 (S.D. Ind. 2008) (discerning nerve center from among three candidates).

that the amendment would "not eliminate [from diversity jurisdiction] those corporations which do business over a large number of States, such as the railroads, insurance companies and other corporations whose businesses are not localized in one particular State." *Id.*

While its goal was to reduce the number of diversity cases, Congress identified the particular "evil" it sought to cure: the limitation of corporate citizenship only to the state of incorporation, which "gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have." *Id.* at 3101-02. Thus, Congress targeted the removal of diversity jurisdiction only at those cases where a "local" corporation sought to bypass state courts in its "home State."

The "nerve center" test best serves these purposes, particularly where (as here) no one state accounts for a majority of a corporation's activities. Diversity jurisdiction shields corporations from hostility and prejudice against "foreigners" or "outsiders" in a state forum, and promotes interstate commerce by allowing corporations to do business outside their home states free from that perceived bias.[6] Where a corporation is in its "home state,"

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[6] *See Burford* v. *Sun Oil Co.*, 319 U.S. 315, 326 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made the basis of a federal claim."); *see also Davis*, 2009 WL 539934 at *9 (Kleinfeld, J., concurring) ("Jurors may have no prejudice at all against citizens and corporations of other states, but still have a financial incentive to import their money" especially

Congress deemed such protections unnecessary. But a corporation's home state should not be decided based on an accountant's post hoc statistical comparison; it should be the state the corporation calls home. For example, the home state of Starbucks—where it is least likely to experience outsider bias—is plainly Washington, even if Californians may consume proportionately more coffee than people in other states.

The two instances in which Congress has deprived corporations of diversity jurisdiction—the state of incorporation and the "principal place of business"—are both the products of choice, not imposition. The choice of a state of incorporation is typically an early and deliberate decision to avail the corporation of particular state laws. In fairness, the corporation could be said to agree to be amenable to the courts in the state where it incorporates.

The "principal place of business" should reflect the same underlying policies. A corporation makes a conscious decision about where to place its headquarters, or "nerve center." This is a signature decision that reflects a corporation's identity. The location of the "nerve center" may be a product of the corporation's founding and carry all the history and meaning associated with that birth. Or it might reflect a subsequent symbolic change in location. Regardless, it is the center of a corporation's out-

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"when the corporate pockets are deep and the loss will not affect local employment"). As scholars have noted, the Framers were also concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce. *See generally* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 22-28 (1948).

reach to the world, and the place where—regardless of how far-flung the corporation's activities—people know to find it. It is this place, and not the unpredictable and ever-changing outcome of a statistical analysis, where the corporation has its "home" and where it is least in need of the protections of diversity jurisdiction.

These concerns are not just theoretical. The indeterminate tests applied by other circuits encourage forum-shopping by home-state plaintiffs seeking to subject an outsider corporation to state court jurisdiction. *See* Saunders, *supra*, at 1475 ("Nonuniformity encourages forum shopping at the federal level, breeds uncertainty, and, in many cases, serves to thwart Congress's intent to limit federal jurisdiction."). That is because "[t]he savvy plaintiff's attorney will attempt to sue the corporation in the circuit where the test used will favor the plaintiff's position," which "provides no stability or predictability for those corporate parties whose business activities make them prone to suit in more than one circuit." *Id.* at 1488.

Moreover, as a result of CAFA, "[t]here are now more opportunities for plaintiffs, defendants, and their attorneys to shop around for the best forum, class of plaintiffs, or choice of parties to sue." *Id.* at 1475-76; *see* 28 U.S.C. § 1332(d). In CAFA, Congress determined that interstate class actions properly belong in federal court, and sought to make it harder for "plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. 109-14 (2005), at 5. In particular, CAFA aimed to avoid forum-shopping and judge-shopping. *See* 151 Cong. Rec. S999 (daily ed. Feb. 7, 2005) (purpose of CAFA was "to prevent judge shopping to States and even

counties where courts and judges have a prejudicial predisposition on cases.") (statement of Sen. Spector).

Although CAFA allows large interstate class actions to be brought in, or removed to, federal court upon a showing of only "minimum" (rather than complete) diversity, the statute also contains important exceptions for "home-state" and "local controversies," *see* 28 U.S.C. § 1332(d)(4)(A), (B), that make a corporation's citizenship crucial. For example, the "local controversy exception" requires a class action to stay in state court if at least two-thirds of the plaintiffs are from the state where the action was originally filed, and a defendant whose conduct forms a "significant" basis for claims and relief is a citizen of the state. *See* 28 U.S.C. § 1332(d)(4)(A). As noted in the legislative history, "this is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole." S. Rep. 109-14, at 39. It was intended to cover only "a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others." *Id.*

Making corporations citizens of states based merely on the presence of operations or activities—which are unlikely to form the bond that creates a "truly local controversy"—contorts CAFA's exception, and thrusts open the kind of "jurisdictional loophole" that Congress intended to prevent. CAFA thus increases the opportunities and incentives for plaintiffs in interstate class actions to file suit in a jurisdiction—particularly California—located in a circuit that is more likely to deny a federal forum to a nationwide corporation. *See* Saunders, *supra*, at 1491 ("[P]laintiffs who have a choice of defendants will engage in 'defendant-shopping.' They will sue

the corporation whose principal place of business under the relevant circuit test will be the state in which the plaintiffs are also citizens.").

Accordingly, the "nerve center" test is the most appropriate test for determining a corporation's principal place of business. But regardless of the proper test, the Court should grant certiorari to bring certainty and uniformity to the law.

III. THIS CASE PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO CLARIFY AN IMPORTANT THRESHOLD JURISDICTIONAL ISSUE.

As noted, there are many ways for plaintiffs to exploit the split among the circuits in the test for determining a corporation's principal place of business. By contrast, corporations' remedies to bring uniformity to the law lie only in this Court, and are few and far between. Because remand orders are almost never appealable, *see* 28 U.S.C. § 1447(d), an erroneous determination that a corporation is a citizen of the forum state will rarely be reviewed.[7]

Remand orders under CAFA are appealable in certain instances, but their appealability is subject to the unfettered discretion of the courts of appeals. *See* 28 U.S.C. § 1453. Thus, given that almost all circuits' tests have been firmly entrenched for years if not decades, this provision is unlikely to greatly increase the opportunities for this Court's review. Indeed, even in this case, the Ninth Circuit initially denied permission to appeal, but then reversed

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[7] If the plaintiff has affirmatively invoked diversity jurisdiction, a dismissal for lack of jurisdiction would be appealable. But in suits involving corporations, the defendant is ordinarily the party invoking the federal forum.

course only after Hertz moved for reconsideration. *See* Pet. App. 12a.

This case, moreover, is an ideal vehicle for resolving the issue because the difference between the Ninth Circuit's test and the "nerve center" test was the dispositive factor in denying diversity jurisdiction. Under the Seventh Circuit's test, Hertz would be a citizen of New Jersey and thus amenable to federal jurisdiction in California. This is not true in every case. For example, the differences in the circuits' tests did not ultimately affect the recent *Davis* decision, which would have been decided the same way under the Seventh Circuit's test. And although the Ninth Circuit chose to apply its rule in this case in an unpublished decision, the court has unequivocally set forth that rule in a series of published precedential opinions. *See Davis*, 2009 WL 539934; *Tosco*, 236 F.3d at 500; *Indus. Tectonics*, 912 F.2d at 1092-93.

The circuits have had disparate tests for decades, with no indication that they will resolve the disparity on their own. And the differences in the tests were dispositive here. There is therefore no need for any further "percolation" in the Ninth, or any other, circuit. It could be years before the Court is presented with another opportunity to resolve a threshold jurisdictional issue that affects thousands of cases every year. In the interim, corporations will remain subject to having two or more principal places of business, in direct contravention of Section 1332(c)(1). The time has come for this Court to definitively resolve the issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the judgment below.

Respectfully submitted,

MARIA GHAZAL
BUSINESS ROUNDTABLE
1717 Rhode Island Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

ROBERT S. DIGGES, JR.
AMERICAN TRUCKING
ASSOCIATIONS, INC.
950 N. Glebe Road, Suite 110
Arlington, VA 22203
(703) 838-1889

* Counsel of Record

JONATHAN S. FRANKLIN*
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

ROBIN CONRAD
AMAR SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amici Curiae