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 FOR RESPONDENT

TODD M. SCHNEIDER
JOSHUA G. KONECKY
W.H. "HANK" WILLSON, IV
MEGAN M. LEWIS
SCHNEIDER WALLACE COTTRELL BRAYTON KONECKY LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104
(415) 421-7100

NORMAN PINE
BEVERLY TILLETT PINE
PINE & PINE
14156 Magnolia Blvd.,
Suite 200
Sherman Oaks, CA 91423
(818) 379-9710

ROBERT J. STEIN III
Counsel of Record
WILLIAM M. HENSLEY
MARC D. ALEXANDER
AILEEN M. BANELLIS
VALERIE K. BRENNAN
ADORNO YOSS ALVARADO & SMITH
1 MacArthur Place
Suite 200
Santa Ana, CA 92707
(714) 852-6837

ARTHUR N. ABBEY
STEPHEN T. RODD
STEPHANIE AMIN-GIWNER
ORIN KURTZ
ABBEY SPANIER RODD & ABRAMS LLP
212 East 39th Street
New York, NY 10016
(212) 889-3700

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, the main focus must be on where the corporation's business operations are performed rather than solely on the location of the corporation's headquarters.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

LEGISLATIVE MATERIAL

OTHER AUTHORITIES

JURISDICTION

Mindful that this Court may have already addressed the following jurisdictional issue incident to its grant of certiorari, Respondents raise the arguments below in the event that this Court has reserved this issue for determination with the merits of this appeal. Respondents dispute Petitioner's assertion that appellate jurisdiction exists here pursuant to 28 U.S.C. § 1254. Generally, there is no appellate review of a district court order remanding a case for lack of subject matter jurisdiction. 28 U.S.C. § 1447(d); *Carlsbad Tech., Inc. v. HIF BIO, Inc.,* 129 S. Ct. 1862, 1866 (2009). This prohibition manifests a long-standing Congressional policy opposing "interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court." *See*, *e.g.*, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006).

The Class Action Fairness Act ("CAFA") created a limited exception, codified at 28 U.S.C. § 1453(c), which provides only a 70-day window in which an appeal must be brought to final judgment. 28 U.S.C. § 1453(c)(4) ("If a final judgment on appeal under paragraph (1) is not issued before the end of [70 days], the appeal shall be denied"). However, nothing in that section provides for additional review by this Court. There is no tension between applying § 1453(c)'s limited window of appellate review and holding that § 1447(d)'s prohibition of appellate review applies thereafter; the express language of § 1453(c) and the legislative history confirm that is

what Congress intended. *See* 28 U.S.C. § 1453(c)(1) (stating that § 1447 applies to CAFA remands, excepting the limited appeal provided elsewhere in § 1453). Here, appellate jurisdiction terminated, at the latest, 70 days after the appeal was docketed by the Ninth Circuit (*i.e.,* November 4, 2008).

STATEMENT OF THE CASE

This case is limited to claims arising under California law, on behalf of California workers only. By virtue of the definition of the class contained in Respondents' initial Complaint (and by the admission of Petitioner The Hertz Corporation ("Hertz")), Respondents Melinda Friend and John Nhieu ("Respondents") and the class of employees they seek to represent are citizens of California. *See* Pet. App. 18a. It is also undisputed that Hertz does more business in California than in any other state. *See* Pet. App. 28a.

The statute at issue, 28 U.S.C. § 1332(c)(1), provides that, for purposes of diversity jurisdiction, "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[.]" Congress added the "principal place of business" prong of this test in 1958. *See* Pub. L. No. 85-554, 72 Stat. 415 (1958) (codified as amended at 28 U.S.C. § 1332(c)(1)).

In its opinion below, the United States District Court for the Northern District of California summarized the Ninth Circuit's test for determining a corporation's principal place of business for purposes of diversity jurisdiction as follows:

> Where the majority of a corporation's business activity does not take place in one state, the state in which the corporation's business activity is "significantly larger than any other state in which the corporation conducts business" is the corporation's principal place of business. *See Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 500-02 (9th Cir. 2001). In determining whether a corporation's business activity "substantially predominates in a given state," a district court must make a "comparison of that corporation's business activity in the state at issue to its business activity in other individual states." *See id.* at 500. In making such comparison, the court "employs a number of factors," including "the location of employees, tangible property, production activities, sources of income, and where sales take place." *See id.*; *id*. at 497, 500-02 (holding that where corporation did not employ plurality of employees in California, but did have plurality of manufacturing and retailing locations in California, and generated plurality of sales in California, California was principal place of business). *If, however,* "*no state contains a substantial predominance* of a corporation's business activities," the corporation's principal place

> of business *is its* "*nerve center,*" which is "the state where the majority of its executive and administrative functions are performed." *See id*. at 500 (applying "place of operations test"; noting corporation failed to offer sufficient evidence of business activity in other state that could "reasonably compare" to amount of operations in California).

Pet. App. 6a-7a (emphasis added).

Throughout this brief, Respondents refer to this formulation of the Ninth Circuit's test (or analogous tests from other circuits) as the "business realities" test. Under this test, a court must first determine whether there is a substantial predominance of a corporation's business activities in any one state, by comparing factors including the location of employees, tangible property, production activities, sources of income, and where sales take place. If the court finds a substantial predominance, then that state is the principal place of business. If not, the court relies upon the state in which the corporation's nerve center is located.

As will be discussed in more detail below, the Ninth Circuit, and every other circuit court except the Seventh, determine a corporation's "principal place of business" by employing tests that weigh a variety of factors which in combination establish the principal location of the corporation's business activities. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1033 (9th Cir. 2009) (Kleinfeld, J., concurring) (describing the various tests employed by the circuit

courts). The Seventh Circuit is the only court that determines a corporation's principal place of business by focusing solely on the location of "corporate headquarters."

In its Notice of Removal and as the district court found, Hertz admitted that it derives more revenue, employs more workers, and rents more cars in California than in any other state. *See* Pet. App. 8a. In fact, Hertz does approximately 20% of its business in California and performs nearly twice as much business in California as it does in the State in which it has its second-largest amount of business activity (Florida). *See id*. Because Hertz does such a substantial portion of its business in California, Respondents moved to remand the case back to California state court. Pet. App. 4a-5a. The district court granted Plaintiffs' Motion to Remand on January 15, 2008.[1] Pet. App. 4a, 11a.

Hertz petitioned for permission to appeal the district court's ruling. The Ninth Circuit denied Hertz's Petition on April 17, 2008. Pet. App. 12a. Hertz then moved for reconsideration or rehearing. Pet. App. 13a. The Ninth Circuit granted the motion for reconsideration, but ultimately affirmed the

[1] The district court did not "den[y] Petitioner's request to 'take judicial notice of the fact that California's population is larger than that of Florida[.]' " Pet. Brief 8. Rather, the district court did not find this fact relevant given the requirements of the Ninth Circuit's test for "principal place of business" for purposes of diversity jurisdiction. *See* Pet. App. 10a.

district court's order remanding the case to California state court, and found that California was Hertz's "principal place of business." Pet. App. 1a-3a, 13a. This Court then granted Hertz's petition for certiorari.

SUMMARY OF THE ARGUMENT

This case presents the question whether the phrase "principal place of business" in the diversity statute, 28 U.S.C. § 1332(c), was intended to denote nothing more than the address of the corporation's "headquarters." The answer is "no."

In fact, in adopting the phrase in question, Congress's intent was to minimize legal fictions by making corporations citizens of the State where, in comparison to all other States, their business operations substantially predominate. This conclusion is supported by the plain meaning of the statutory language, the legislative history of the statute, and the purposes that Congress sought to promote in amending the diversity test.

1. The plain meaning of a statute's language is the starting point of statutory construction and, if unambiguous, the ending point. Hertz insists that the "ordinary meaning" of the statutory language proves that it was intended to create a simple, bright line test. Pet. Brief 10. However, of the eleven circuit courts which have examined the statute, only the Seventh Circuit has viewed the ordinary meaning the

same way as Hertz does. That alone suggests that Hertz's "ordinary meaning" is suspect.

More importantly, this Court's construction of the identical statutory language reveals the error in Hertz's contention. In *Commissioner of Internal Revenue v. Soliman,* 506 U.S. 168 (1993), *superseded by statute as stated in Beale v. C.I.R.,* T.C. Memo. 2000-158 ("*Soliman*"), this Court was required to interpret the phrase "principal place of business" within the context of resolving a tax exemption issue.

That analysis focused on the key point that the "*commonsense* meaning of 'principal' suggests that *a comparison of locations* must be undertaken." 506 U.S. at 174 (emphasis added). Because the phrase "principal place of business" *compels a comparison* between two or more places, it simply *cannot* be a mere proxy for the corporate headquarter's address. Indeed, one of Hertz's major arguments actually supports this point. Hertz insists that the benefit of its proffered "headquarters" proxy test is that it "requires a court to determine *only one fact*: the location [of the corporation's headquarters]." Pet. Brief 28 (emphasis added). But determination of a single fact is the opposite of the type of comparative analysis which this Court declared was the commonsense meaning of "principal place of business" as used in other statutes.

Statutory construction principles recognize that when it can be demonstrated that Congress knew how to say something simply and directly, a strong

inference arises when Congress chooses other language. As set forth below, there are numerous federal statutes which prove that Congress knew how to use the terms "headquarters" or "principal executive office" when it desired to do so. Tellingly, it did not use such language here.

2. Likewise, the legislative history of the 1958 amendment to 28 U.S.C. § 1332(c) rebuts Hertz's position. In adopting the phrase "principal place of business," Congress's intention was to attack easy (and unfair) access to federal courts enjoyed by foreign corporations when such access was not justified by the purpose underlying the diversity statutes *i.e.*, protection of true "foreign" entities from local bias. In adding a provision that made a corporation a citizen not only of its State of incorporation, but also of the State where it had its "principal place of business," the 1958 amendment was designed to reduce access to federal courts and to prevent jurisdictional gamesmanship by corporations.

In seeking to prevent local corporations from being able to evade their home State courts, Congress selected a phrase from the Bankruptcy Act ("principal place of business") which had a long history of judicial construction. As explained in S. Rep. No. 85-1830, there is:

> "ample precedent in the decisions of our courts and in federal statutes such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is *thus* provided *sufficient*

> *criteria to guide* courts in future litigation under this bill."

S. Rep. No. 85-1830, 85th Cong. (1958), *reprinted in* 2 U.S.C.C.A.N. 3099, 3102 ("S. Rep. No. 85-1830") (emphasis added).

Consideration of that "ample precedent" confirms that the term "principal place of business" was not merely shorthand for a corporation's headquarters; rather, it was a term calling for an examination of the various aspects of the corporation's business operations to determine where the corporation actually conducts its business. In fact, shortly after the passage of the 1958 amendment, one court conducted a thorough review of the pre-1958 bankruptcy venue precedents. It concluded that most cases construing "principal place of business" under the Bankruptcy Act "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) ("*Gilardi*.")

If accepted, Hertz's "headquarters" test would run afoul of the intended purpose of the amendments to the statute. Congress recognized that relying simply on the State of incorporation created an inherent unfairness in allowing "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." S. Rep. No. 85-1830, at 3102. But

if corporations could ignore where they perform most of their business operations in favor of a test that simply looks at where their corporate headquarters is located, much of the same unfairness would arise.

3. Hertz stresses the alleged "simplicity" of administering its "headquarters" test over the plain language of the statute *and* Congress's intent. However, both Supreme Court precedent and Congressional actions rebut Hertz's assertion that "jurisdictional rules" must be simple. There are many examples of threshold jurisdictional issues which require fact-intensive analysis, often aided by discovery rights.

For instance, the process of determining the citizenship of natural persons for purposes of diversity jurisdiction is at least as fact-intensive as Hertz claims the "place of operations" test is, but this Court has approved that process for at least a century. Similarly, determining whether a district court has *in personam* jurisdiction over a foreign corporation or whether a plaintiff has standing is an uncertain and fact-intensive process for which there is no bright line test, and which might require extensive discovery. Finally, CAFA itself confirms that accuracy trumps simplicity in making jurisdictional determinations. It does so both by creating a factually complex evaluation for determining jurisdiction and by *intentionally* leaving untouched § 1332(c)'s test for corporate citizenship.

Moreover, even if, *arguendo*, such "ease" or "simplicity" were a valid goal for this Court to weigh, Hertz's proposed "headquarters" test would not meet this goal because it is not nearly as simple and easily administered as Hertz suggests. A series of factual questions would arise, and the determination would be complicated by the fact that corporations (including Hertz itself) often have *multiple* designated "headquarters."

4. Hertz's proposed test for determining the location of corporate headquarters is subject to abuse and would lead to unfair and nonsensical results. Because Hertz recognizes how easily its proposed bright line "headquarters" test can be abused, it proposes a "narrow exception" for corporations who perform 100% of their business activities in one State, but locate their headquarters in a different State. But Hertz's proposal does nothing to prevent abuse because it could be easily circumvented. A corporation seeking to escape the exception merely need open a skeletal sales office (or other location performing "non-headquarters" business activity) in a different State. Moreover, its proposed "exception" finds no support in either the statute's language or its legislative history.

Hertz argues that if its proffered "headquarters test" is rejected, any business operations test must be based on a per capita analysis rather than using actual gross numbers. But, the per capita approach does not accurately identify the "principal place of a

business" of a company. As demonstrated in the hypothetical below, even if Hertz conducted 98% of its business in California and only 2% of its business in Wyoming, Wyoming would be considered Hertz's "principal place of business" under the per capita approach. Such an illogical result cannot be accepted.

Moreover, a per capita test approach would unjustifiably prevent large States from enforcing their own laws through their own courts. Diversity jurisdiction was not designed to allow a major California employer such as Hertz to profit from California's large economy and then, for purposes of removal, avoid the jurisdiction of California's courts.

ARGUMENT

I. BASIC CANONS OF STATUTORY CONSTRUCTION SUPPORT APPLICATION OF THE BUSINESS REALITIES TEST.

A. The purpose and language of the 1958 amendment is contrary to Hertz's headquarters test.

Statutory construction aims to ascertain legislative intent. Thus, any ambiguities in the instant statutory language should be resolved in the way that best furthers Congress's intention and purpose. *See Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). Accordingly, the starting point of any analysis here must be to consider the evil that Congress was attempting to rectify.

As detailed in Section II *infra*, that evil was that corporations that did most of their business in a given State were able to escape accountability in state courts – and burden federal courts – by the mere expediency of choosing to be incorporated elsewhere. Such corporations, with a heavy "local presence" in a given state, did not fit the paradigm for which diversity jurisdiction was created, *i.e.,* the need "to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts[.]" *Danjaq, S.A. v. Pathe Communications Corp*., 979 F.2d 772, 774 (9th Cir. 1992) (quoting S. Rep. No. 1830, at 3102). Furthermore, treating such "local" corporations as if they were "foreign" gave them an unfair benefit denied to all other citizens and corporations doing business in the State, and added numerous local controversies to the federal docket.

Against this backdrop, this Court must ascertain why Congress chose the phrase "principal place of business" as the determinative factor of a corporation's citizenship for diversity purposes. As noted in Section III.C *infra*, corporations can (and do) relocate their headquarters with relative ease, enabling them to divorce the state of their (diversity) "citizenship" from the state in which they actually conduct the bulk of their business activities – a situation analogous to the dichotomy between place of actual business versus state of incorporation. Thus, a test

based on the location of a corporation's headquarters would lend itself to the same type of manipulation.

Here, both the plain meaning of the phrase "principal place of business" and the purpose of the statutory amendment dictate the same conclusion – that Congress did not mean, and could not have meant, to adopt a test which focused merely on the location of a corporation's headquarters, rather than on where a corporation actually conducts most of its business.

1. By its own terms, "principal place" requires a comparison between two or more places. Thus, it cannot simply mean the address of the corporate headquarters.

In advancing its argument that the phrase "principal place of business" is really synonymous with "headquarters," Hertz insists that its interpretation flows from the "ordinary meaning" of the phrase. Pet. Brief 10. Just the opposite is true as is demonstrated by this Court's analysis in *Soliman,* 506 U.S. 168.

Soliman required construction of the phrase "principal place of business" as used in a statute governing whether a taxpayer's home office was deductible. In that context, the majority, in an opinion authored by Justice Kennedy, noted that the "*commonsense* meaning of 'principal' suggests that *a comparison of locations* must be undertaken. . . .

Courts cannot assess whether any one business location is the 'most important, consequential, or influential' one without comparing it to all the other places where business is transacted." 506 U.S. at 174 (emphasis added); *accord, id*. at 179 (Blackmun, J., concurring) (emphasis added) ("As Justice Kennedy points out, this phrase [principal place of business] invites and *compels a comparison*"). This makes perfect sense given that the word "principal" is a relative term. This commonsense meaning defeats Hertz's argument. If in using the phrase "principal place of business" Congress meant nothing more than the corporation's "headquarters," where is the "comparison of locations" that the commonsense meaning of this language demands?[2]

In this sense, one of Hertz's major arguments actually supports Respondents' position. Hertz argues that the benefit of its proffered "headquarters" test is that it "requires a court to determine only one fact: the location [of the corporation's headquarters.]" Pet. Brief 28. But determination of *a single fact* is not the

[2] *Soliman* rejected an objective formula, determining that "the ultimate determination of the principal place of business [is] dependent upon the particular facts of each case." It identified two primary factors to consider in making this determination – "the relative importance of the activities performed at each business location and time spent at each place." *Id.* at 174-75. The point where goods and services are delivered is to be given great weight in this decision-making process, rather than myopically focusing on the location of the managerial focal point. *Id.*

type of comparative analysis that this Court declared was the commonsense meaning of "principal place of business."

2. Had Congress simply intended to mean "headquarters" or "principal executive office," it could have easily used that language.

An axiom of statutory construction recognizes that when it can be demonstrated that Congress knew how to say something simply and directly, a strong inference arises when Congress chooses to use other language. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) (*superseded by statute as stated in U.S. S.E.C. v. Fehn*, 97 F.3d 1276 (9th Cir. 1996)), this Court pointedly observed that "Congress knew how to impose aiding and abetting liability when it chose to do so" and, therefore, the fact that it did not use the words "aid" and "abet" in the statute at issue showed that it did not intend to impose aiding and abetting liability.[3]

---

[3] *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (given that Congress knows how to refer to "ownership" in other than the formal sense, its failure to do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality" was significant); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) ("Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy"); *Whitfield v. United States*, 543

(Continued on following page)

The foregoing principle vitiates Hertz's plain meaning argument. Many federal statutes demonstrate that Congress knew how to purposely use the terms "headquarters" or "principal executive office" when it desired to do so.[4] *Soliman* makes this very point. In rejecting the home office as the "principal place of business," this Court stated:

U.S. 209, 216 (2005) (Congress has imposed an explicit overt act requirement in 22 conspiracy statutes, yet has not done so in the provision governing conspiracy to commit money laundering).

[4] *See*, *e.g.*, 36 U.S.C. § 110308 (proper service of process, which includes service on *corporate headquarters* relating to patriotic and national organizations); 49 U.S.C. § 503(b) (location for service of process on motor carriers of migrant workers includes Office of Transportation Authority in jurisdiction of a carrier's *headquarters* when a carrier does not have a designated service agent); 49 U.S.C. § 10706(a)(2)(B) (rail carrier seeking rate agreements must include in its verified statement to the Board the mailing address and telephone number of the carrier's *headquarter's* office); 15 U.S.C. § 78m(d) (location to send certain insurance security issuers' reports is the insurance company's *principal executive office*); 26 U.S.C. § 6323(f)(2) (for purposes of determining the residence of a corporation or partnership, situs of personal property subject to lien shall be deemed the place at which the *principal executive office* of the business is located); 49 U.S.C. § 20104(c) (certain types of specific civil actions may be brought in the judicial district in which employer has its *principal executive office*); 49 U.S.C. § 20113(c) (venue of civil action for enforcement by Secretary of Transportation includes the judicial district where defendant has its *principal executive office*); 49 U.S.C. § 21302(b) (location in which Attorney General shall bring civil action to collect civil penalty in railroad carrier violation includes the judicial district where the defendant has its *principal executive office*).

> The statute does not refer to the '*principal office*' of the business. If it had used that phrase, the taxpayer's deduction claim would turn on other considerations. The statute refers instead to the '*principal place*' of business. It follows that the most important or significant place for the business must be determined.

506 U.S. at 174 (emphasis added). Likewise, in construing § 1332(c)(1), it matters that Congress used "principal place of business" rather than "headquarters" or "principal executive office," two terms with which it was quite familiar.

B. Hertz's arguments concerning the meaning of "principal place of business" are contrary to the plain meaning of that language.

Hertz insists that the statutory language requires a court to identify "the single 'place of business' within a State" constituting a corporation's "'principal' place of business." Pet. Brief 15. In purporting to construe the ordinary meaning of "principal place of business," Hertz advances two illogical arguments.

First, ignoring the critically-important word "principal," Hertz instead analyzes the phrase "place of business" in isolation and states that it "normally refers to '[a]n establishment where business is conducted,' such as an office, a retail store. . . ." Pet.

Brief 15-16 (citations omitted).[5] Hertz then asserts "[n]othing in the text of § 1332(c) suggests that 'place of business' in that provision carries anything other than its ordinary meaning." *Id*. This, of course, ignores that the word "principal" in the text of the statute does exactly that.[6]

Second, Hertz asserts that the word "where" (within the phrase "a citizen . . . of the State where [it] has its principal place of business") supports its claim that the phrase must refer to a single specific location within a State. Pet. Brief 15-16. But contrary to Hertz's construction, use of the word "where" is not limited to designating a "specific location within a State." Pet. Brief 15.

A simple hypothetical proves the point. Consider if Congress had, instead, provided that a corporation

---

[5] Hertz's chosen definition is highly self-serving. Another recognized definition states that "place" is "a very indefinite term. It is applied to *any* locality, limited by boundaries, however large or however small. It may be used to designate a country, *state*, county, town, or a very small portion of a town." *Black's Law Dictionary* 1307 (4th rev. ed. 1968) (citations omitted) (emphasis added).

[6] When Hertz does eventually address the full phrase, "principal place of business," it attaches great importance to a definition of that language found in the *American Heritage Dictionary of Business Terms* ("the location of a firm's head office.") Pet. Brief 22. However, what Hertz neglects to mention is that the *very next* definition of that phrase is "the location where the majority of activities relative to a business take place." *American Heritage Dictionary of Business Terms* (David L. Scott, ed. 2009), at 408.

would be a citizen of "the State where the corporation has the majority of its employees." Obviously, this statute would require the type of aggregating and State-by-State comparison which Hertz claims the use of the word "where" necessarily precludes.[7]

Furthermore, even if one assumed *arguendo* that "principal place of business" had to be restricted to a given place within a State, Hertz's argument would still fail because the "most important" place of a corporation's business is not invariably the corporate headquarters. For example, assume the Venetian Resort in Las Vegas was the sole hotel/casino property of its corporate owner and also assume that, for tax or other business purposes, the corporation's headquarters were located in Arizona. Few would seriously argue that the activities at the headquarters were "more important" than the activities at the hotel-casino-resort.

Hertz finds significance in the statute's use of singular syntax – "principal place of business" rather than "principal places of business," arguing this precludes examining (and aggregating) multiple "places of business." Pet. Brief 17. Hertz errs for at least two reasons.

---

[7] Under Hertz's logic, use of the word "where" would require the court to determine *the specific location within the State* which houses the majority of employees, rather than counting the total number of employees in the State. But, of course, this renders the statutory language an absurdity.

First, Hertz ignores that, in the context of § 1332(c), "place of business" is a term of art meaning something broader than a corporation's individual office or plant. As discussed in Section II.A *infra*, the term was taken from bankruptcy law and had a long history of usage.

Second, given the Congressional debates, there was a good reason for using the singular form of "place." Congress followed the Judicial Conference Committee's rejection of a proposal to have corporations deemed citizens of every state in which they were doing business. S. Rep. No. 85-1830, at 3111-3112, 3119. Use of the word "place" clarified that, no matter how widespread its national operations, a corporation can have only one "principal place of business."

Finally, Hertz lists a series of federal statutes using the phrase "place of business" and observes that a number of those statutes make sense only if the phrase refers to a particular location, rather than a State as a whole. Pet. Brief 18. True, so far as it goes. But this statutory usage proves nothing about what the phrase "principal place of business" was intended to mean in 1958 in the context of limiting diversity jurisdiction.

II. SECTION 1332's LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS NEVER INTENDED TO MAKE A CORPORATION'S "PRINCIPAL PLACE OF BUSINESS" CO-EXTENSIVE WITH THE MERE LOCATION OF ITS CORPORATE HEADQUARTERS.

A. Section 1332's legislative history demonstrates that Congress rejected any bright line test in favor of a long-established test that focuses on business realities.

Congress enacted the 1958 amendment to Section 1332 to prevent the "evil" whereby "a local business" that chose (for any variety of reasons) to be incorporated in a different State had the option of choosing a federal rather than local court solely for that reason. S. Rep. No. 85-1830. Congress recognized that laws governing incorporation are:

> . . . not intended for the prime purpose ***of doing business*** in the foreign state. 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.

Id. at 3102 (emphasis added).

Congress, therefore, wanted to make corporations citizens of both their States of incorporation and, in addition, the State in which they actually were doing the bulk of their business. The language Congress chose to define this latter jurisdiction was that State

in which the corporation had "its principal place of business." *Id*.

The question, thus, is what did Congress mean in adopting the phrase "principal place of business" as its proxy for the concept of defining where a corporation could be said to be "doing business." Did it, as Hertz insists, intend a bright line test considering only the location of the corporation's "headquarters," or did it intend a more fact-based analysis of where the corporation actually carries on its business? Section 1332(c)'s legislative history demonstrates that Congress eschewed the suggested bright line tests for determining corporate citizenship in diversity cases.

In 1958, the Senate Committee on the Judiciary largely adopted the recommendations made by the Committee on the Jurisdiction and Venue of the District Courts of the United States ("Jurisdiction Committee"), a blue ribbon panel of federal judges commissioned to make recommendations to reduce a post-World War II surge in diversity cases. S. Rep. No. 85-1830, at 3100-101, 3136 n.2. Before settling upon the "principal place of business" language, Congress had already considered – and rejected – both a proposal to disqualify a corporation for diversity citizenship purposes in every State in which the corporation did business (S. Rep. No. 85-1830, at 3119) and a proposal to deem a corporation a citizen of the State in which it receives more than half of its gross business income (*id.* at 3120, 3132).

The initially rejected proposal (deeming a corporation a citizen of each State in which it did business) would have been quite easy to apply. Likewise, the second rejected proposal (corporate citizenship based on the state where over half of gross business income derived) would have left little room for uncertainty. As the Jurisdiction Committee observed, "difficulties of proof on this score will be rare, for in the case of the average business the facts will be clear. . . ." S. Rep. No. 85-1830, at 3120.

Each of the rejected proposals would have instituted an easy-to-administer bright line test. But that was not Congress's priority. Instead of any easy-to-administer test, Congress adopted a "principal place of business" test because such a proposal:

> has a precedent in the jurisdictional provisions of the Bankruptcy Act (U.S.C., Title 11, Sec.11) and so provides a *more familiar criterion*, while at the same time preserving the purpose of our previous recommendations to prevent frauds and abuses of the federal jurisdiction by corporations which are primarily local in character.

S. Rep. No. 85-1830, at 3132 (emphasis added).[8]

---

[8] *Accord*, *Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary,* 85th Cong. ("House Judiciary Hearings"), at 8 (remarks of Rep. Thomas Ludlow Ashley, proponent of the bill with the ultimately adopted language).

As explained in S. Rep. No. 85-1830, there is "ample precedent in the decisions of our courts and in federal statutes such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is thus provided sufficient criteria to guide courts in future litigation under this bill." *Id.* at 3102.

Consideration of that "ample precedent" confirms that the term "principal place of business" was not a mere shorthand for a company's headquarters; rather, it was a term calling for an examination of the breadth of corporate activity. A scholarly review of the pre-1958 bankruptcy venue precedents that was conducted by a district court judge shortly after passage of the 1958 amendments illustrates this point. *Gilardi,* 189 F. Supp. at 86-87. The judge concluded that most cases construing "principal place of business" under the Bankruptcy Act "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." *Id.*

An often cited case on this issue is *Continental Coal Corp. v. Roszelle Bros.,* 242 F. 243 (6th Cir. 1917) ("*Continental Coal*"). It established that "principal place of business" for bankruptcy venue purposes depended upon a factual examination of numerous circumstances in each case. *Id.* at 246. There, the Sixth Circuit Court of Appeals, adopting an operations-based test, found that the bankrupt company's extensive mining operations in Kentucky

determined its "principal place of business," not the location of the company's principal office in Tennessee. *Id.* at 247.[9]

In the years preceding 1958, other bankruptcy decisions largely followed the lead of *Continental Coal*'s operations-based test. *See*, *e.g.*, *In re Pusey & Jones Co.,* 286 F. 88, 94-96, 98 (2d Cir. 1922), *cert. denied*, 261 U.S. 263 (1923) (majority adopted special master's operations-based test emphasizing "the idea of physical presence" and rejected headquarters test where operations were concentrated elsewhere); *Lawrence v. Atl. Paper & Pulp Corp.,* 298 F. 246, 248-49 (5th Cir.), *cert. denied*, 266 U.S. 606 (1924) (bankrupt's principal place of business was in Georgia, the location of its manufacturing operations and property, rather than New York situs of principal business office where corporate meetings were held); *Dryden v. Ranger Ref. & Pipe Line Co.,* 280 F. 257, 258, 263 (5th Cir.), *cert. denied*, 260 U.S. 726 (1922) (bankrupt's principal place of business was located where corporation carried on business and dealt with customers, not where it had its general office where internal management was carried on); *In re Evans*, 12 F. Supp. 953, 954-56 (W.D.N.Y. 1935) ("no definite rule" for determining principal place of business;

---

[9] In reaching this conclusion, the court considered and weighed various factors including: (1) the location of the bankrupt's extensive mining operations; (2) where the bulk of the company's property was situated; and (3) where its superintendents and managers actually resided. *Id.*

"each case necessarily is sui generis;" principal place of business determined by looking at locations of business transactions and creditors even though bankrupt moved around); *In re Monarch Oil Corp.,* 272 F. 524, 526 (S.D. Ohio 1920) (bankruptcy venue proper where bankrupt corporation owned oil wells and engaged in oil production in Kentucky, rather than Ohio situs of its corporate offices).

Two of these decisions articulated why bankruptcy doctrine looked to the locus of operations, rather than the corporate headquarters alone, as the corporation's "principal place of business." Both recognized that focusing upon operations/physical presence factors made sense. For example, *Monarch Oil* explained why it rejected a corporate headquarters test:

> If the principal place of business of this corporation was in [the location of the corporate offices] it must be that whenever the affairs of a corporation, no matter how large they may be, pass into the hands of a receiver and manager appointed in the state where its real business is carried on, its principal place of business shifts to the meeting room of its stockholders, directors and officers, *however remote* from the *real scene of its activities*, the place where its assets to be administered and creditors to be protected are to be found.

272 F. at 526 (emphasis added); *see also Dryden*, *supra*, 280 F. at 259-60.

B. The weight of the case law and the full text of the Maris testimony support the conclusion that Congress did not intend a narrow headquarters test.

1. Hertz's reliance on one phrase from Judge Maris's testimony is unpersuasive.

Hertz concedes that Congress took the "principal place of business" formulation from the Bankruptcy Act of 1898. Pet. Brief 4. It then claims, however, that "Congress *was informed* that the bankruptcy courts applied a *headquarters test* in situations involving a corporation conducting business 'in several States.'" *Id.* at 51 (citing House Judiciary Hearings at 37) (remarks of former Circuit Judge Maris); *accord* Pet. Brief at 4-5.

Given Hertz's implication that Congress believed it was adopting a "headquarters test," consider what Judge Maris actually said in context during the House Judiciary Hearing. During his testimony, Judge Maris stated that: (1) the "principal place of business" language was intended to create the "same test as a basis for jurisdiction in a bankruptcy court;" (2) there were "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"; and (3) "by using that language we will have a *well understood phrase*, and you *have cases* which will help the courts to apply it." House Judiciary Hearings at 36 (emphasis added). A legislator then asked about how the proposed test

would be applied to corporations with production and actual activities in "some several States." Judge Maris responded:

> Yes; that is just why the Committee and the Conference have suggested the use of this term which has been defined in the Bankruptcy Act. All of those problems have arisen in bankruptcy cases, *and as I recall the cases and I wouldn't want to be bound by this statement because I haven't them before me,* I think the courts have generally taken the view that where a corporation's interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort.
>
> *But that has been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here without having to go over it again from the beginning.*

Id. at 37 (emphasis added).

Congress could hardly have relied on Judge Maris's alleged characterization of what the existing bankruptcy law held, given his own express

declaration that he "wouldn't want to be bound" by his recall of the case law. Judge Maris was unequivocally clear that the principal place of business language in the amended diversity statute was to be controlled by the principles that had already "been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here. . . ." *Id*.

Hertz's other argument based on Judge Maris's testimony is also incorrect. Hertz asserts that Congress "rejected" prior proposals (*e.g.*, the initial proposal that a corporation would be a citizen of any state in which it transacted business) after "being informed that corporations continued to rely on access to federal courts 'in States remote from their headquarters,' because of the perceived potential for local bias in non-headquarters States." Pet. Brief 3, citing House Judiciary Hearings at 35-36. But what really occurred is that a legislator asked Judge Maris if people representing corporations would feel handicapped if they could not litigate in the federal courts and Judge Maris responded: "These gentlemen, as I have talked to them, seem to regard pretty highly their privilege of taking their litigation into the Federal courts in States remote from their headquarters *where* they don't know the local people. . . ." House Judiciary Hearings at 35-36 (emphasis added). Read in context, this floor debate exchange only related to how corporations felt about being denied access to federal courts in every State in which they did even the slightest amount of business.

In that sense, they understandably feared the danger of local bias and preferred access to federal courts. But none of this was discussed in the context of delimiting what the phrase "principal place of business" should mean. Nor does it suggest that in States where the corporation has a sizeable presence, the controlling factor should be where the corporate headquarters happen to be located (as opposed to where the predominant amount of the corporation's actual business dealings occur).

Indeed, Hertz's example of Boeing forcefully illustrates this point. Although Boeing moved its formal headquarters to Illinois, no one would suggest that given Boeing's sizable presence in Washington – a place where it certainly does "know the local people" and vice-versa – there would be a justification to treat it as a foreigner in Washington in need of diversity protection. *See* Section II.C *infra,* comparing Boeing's operations in Illinois to its operations in Washington.

2. Hertz's treatment of the phrase "simple in application" does not reflect Congressional intent.

After stating that Congress was told that the "principal place of business" test would focus on where the corporation's "officers carry on its day-to-day business, where its accounts are kept, where its payments are made" (House Judiciary Hearings at 37), Hertz then asserts Congress was "informed that the 'principal place of business' test would be 'simple

in application.'" Pet. Brief 4-5 (citing to Letter from Elmore Whitehurst ("Whitehurst letter")). The implication is that "simple in application" is a shorthand for Hertz's proffered bright line test.

The proper context of the "simple in application" concept is revealed in the Senate Committee Report that quotes the same Whitehurst letter. After that letter noted that the "principal place of business" test "has a precedent in the jurisdictional provisions of the Bankruptcy Act (U.S.C., Title 11, Sec. 11) and would be simple in application" it continued "while at the same time would prevent frauds and abuses of the federal jurisdiction by corporations primarily local in character." S. Rep. No. 85-1830, at 3107.

Two points are apparent. First, the focus on the existence of a developed body of Bankruptcy Act case law simply underscores what others had said, *e.g.*, that there was "familiar" and "ample precedent" and there exists "this sufficient criteria to guide courts" in construing the amended diversity statute. S. Rep. No. 85-1830, at 3102, 3132. It was in this context (existing bankruptcy precedent) that the "principal place of business" test was described as "simple in application." This has nothing to do with Hertz's bright line contentions. Indeed, it is inconsistent with them to the degree that Congress elected to use the phrase "principal place of business" when it could have instead easily used bright line language (such as "corporate headquarters") had it so desired.

Second, the Whitehurst letter stresses that use of the "principal place of business" test was intended to further the Congressional purpose of preventing "frauds and abuses of the federal jurisdiction by corporations primarily local in character." S. Rep. No. 85-1830, at 3107. To the degree corporations can more easily change their official headquarters locations (*e.g.*, by opening a skeletal office in a desired state) than they can change the totality of where they actually perform their business activities, Hertz's bright line test would lend itself to the type of abuse the amendment was intended to cure. *See* Section II.C, *infra*; *Gilardi,* 189 F. Supp. at 88 ("To equate principal place of business to executive offices would not only do injustice to defendants, but would run the risk of creating a substitute fiction for the fiction of charter citizenship").

3. The existing bankruptcy precedent supports the use of a broad, fact-based analysis to determine a corporation's "principal place of business."

Although more than one approach to ascertain the "principal place of business" was developed under pre-1958 bankruptcy law, the majority view employed a fact-based analysis of where the corporation actually does most of its business rather than a one-factor "headquarters" test, to make the determination. *See Gilardi*, 189 F. Supp. at 86-87 ("Some of the Federal Courts have found the principal place of

business to be the place where executive officers reside and maintain an office. But this has never been the sole criterion and other decisions greatly minimize the location of executive offices.") (internal citations omitted).

Hertz argues that, because of the "varying tests" applied by the courts, "the actual experience under" the pre-1958 bankruptcy law "sheds little light" on Congress's intent with respect to the definition of a corporation's "principal place of business." Pet. Brief 50. However, as discussed above, the Congressional debates showed that the phrase "principal place of business" was selected *precisely because* it carried:

> ample precedent in the decisions of our courts and in federal statute such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is *thus* provided *sufficient criteria to guide* courts in future litigation under this bill."

S. Rep. No. 85-1830, at 3102 (emphasis added). The "criteria" that was intended to provide guidance in future litigation was the existing body of bankruptcy case law construing the identical term. Many of those cases had engaged in an analysis of multiple factors in determining a corporation's "principal place of business" rather than simply deferring to the location of corporate headquarters.

Hertz cites *Burdick v. Dillon,* 144 F. 737 (1st Cir. 1906), *appeal dism. per stipulation,* 205 U.S. 550 (1907), as the prime bankruptcy venue decision

holding that the "principal office" is the principal place of business. Pet. Brief 50 n.5. However, *Burdick* did not merely apply a rote "headquarters address" test, but rather looked at that factor in addition to the company's selling agency location, the place from where the bulk of sales was negotiated, and the situs of where bills were sent and payments received. *Burdick,* 144 F. at 737-38. In fact, courts have read *Burdick* as actually supporting a comparative analysis of the corporation's activities at each place in relation to their character, importance, and amount. *See*, *e.g.*, *In re Worcester Footwear Co.,* 251 F. 760, 762 (D. Mass. 1918).

In any event, when examined as part of the larger body of pre-1958 bankruptcy law, *Burdick* does not offset the many cases that held a broader, fact-based analysis is required (exemplified by *Continental Coal*). Indeed, as discussed above, shortly after passage of the 1958 amendments, a district court judge conducted a scholarly review of the pre-1958 bankruptcy venue precedents in *Gilardi*, *supra*, and concluded that *most cases* construing "principal place of business" under the Bankruptcy Act "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." *Inland Rubber Corp. v. Triple A Tire Serv. Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963);[10] *see*

[10] *Inland Rubber* reached three conclusions: (1) "the locus of corporate operations [is] a more important factor than the locus

(Continued on following page)

also J.A. Olson Co. v. City of Winona, 818 F.2d 401, 405-06 (5th Cir. 1987) ("from these representative cases interpreting the 'principal place of business' language of the Bankruptcy Act, we draw this lesson applicable to the question before us today: the principal place of business is a fact question that follows no single inflexible test dependent solely upon the situs of the nerve center or upon the situs of activities of the corporation").

Thus, the majority of pre-1958 case law establishes that the determination of a corporation's "principal place of business" involves an analysis of the corporation's activity as a whole. As illustrated by the debate quoted above, Congress recognized the importance of such analysis when it embraced that long-used phrase.

Hertz claims that Frank O. Loveland's bankruptcy treatise supports a "headquarters" test. In particular, it quotes this sentence: "'[t]he principal place of business of a corporation is usually where the general offices or headquarters are located without regard to the *place named in the charter*.'" Pet. Brief

---

of over-all policy direction or control in determining the 'principal place of business' of a corporation" (*id.* at 492); (2) the Senate Judiciary Committee envisioned a test based chiefly on operations, since it is by visible presence that a corporation will become popularly recognized as domestic rather than foreign in nature (*id.* at 495); and (3) "the legislative history of Section 1332(c) suggests by far the dominant emphasis should be placed on the locus of the operations of the corporation." (*id.* at 496).

50 n.5 (emphasis added). This statement has nothing to do with the issue before this Court – whether the headquarters' location trumps all other factors concerning where the entity actually does business. Respondents fully agree with Loveland that, as between the mere state of incorporation and where the headquarters are located, the latter is a more significant indicator of where the corporation's principal place of business exists. Indeed, that is largely why the 1958 amendment was adopted. But Hertz's red herring argument has no bearing on the real issue before this Court.

Moreover, Loveland's treatise actually hurts Hertz's position. For example, it states that a corporation's principal place of business is where business "is actually done" and is "a question of fact to be determined by the circumstances in each particular case." 1 Frank O. Loveland, *A Treatise on the Law and Proceedings in Bankruptcy* 404 (4th ed. 1912).

Finally, we note the inherent inconsistency in Hertz's argument. Assuming *arguendo* that, as Hertz argues, the bankruptcy law was split and really did not "shed light" on the issue, it becomes even clearer that Congress did *not intend* to adopt the bright line headquarters test that Hertz advocates. If Congress really had wanted to impose a bright line test, it would not have selected a phrase which, according to Hertz, was subject to such differing interpretations. It would, instead, have used an unmistakably clear phrase such as "where the corporation's headquarters are located."

C. Hertz's headquarters test does not address the evil targeted by the 1958 amendment.

As discussed, a primary reason for inclusion of the "principal place of business" language was Congress's desire to prevent abuse of the diversity statute under which a company could incorporate in a state that had no connection to its business operations. Pet. Brief 3-4. The Senate Committee Report explained that it was "common knowledge" that the state of incorporation was primarily selected either to obtain tax benefits or other benefits of the foreign state's corporation laws and not "for the prime purpose of doing business in the foreign state." S. Rep. No. 85-1830, at 3102. The report concluded:

> 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.

Id.

The same potential for abuse or unfairness would also exist if a bright line "headquarters" test were recognized here. Empirical research (as well as an examination of Hertz's citation of Boeing's experience) confirms that adoption of a "headquarters" test would result in abuses akin to those which gave rise to the 1958 amendments to § 1332(c).

Both Hertz and its *amici* claim that most corporations have rather static or stable headquarters locations. Pet. Brief 43; *Amici* Brief 21-22. Contrary to those suggestions, however, a recent study of a much more comprehensive nature confirms that corporations move their headquarters with some regularity often for economic reasons similar to the selection of place of incorporation. Vanessa Strauss-Kahn & Xavier Vives, *Why and where do headquarters move?*, 39 Regional Science & Urban Economics 168, 170-71 (2009) ("Strauss-Kahn/Vives Study").

Using a unique firm-level database of 26,195 U.S. headquarters for firms in 276 U.S. metropolitan areas for the 1996-2001 period,[11] that study's conclusions

---

[11] The definition of "headquarters" used by this study is significantly broader than that contemplated by the parties to this case and the case law interpreting "principal place of business." Thus, the statistics cited, while the best available, may be overstated.

By contrast, however, Hertz selectively focused on the Fortune "top 50" firms, an extremely narrow sampling that pales next to the (26,195 U.S. firms) used in the Strauss-Kahn/Vives Study. Beyond that, Hertz engages in no scientifically acceptable sampling techniques, but simply made a crude extrapolation based on data in *Fortune* magazine. Pet. Brief 43. *Amici*, in turn, simply relied on episodic experiences. *Amici* Brief 21-22. However, even if the sampling is narrowed to the 500 largest U.S. headquarters in 1996, 36 moved between 1996 and 2001, or 7.2% every five years – far more than the Boeing relocation cited by Hertz. Strauss-Kahn/Vives Study at 172, 182 & Table A7.

differed starkly from those advanced by Hertz or its *Amici* (who had relied upon an inferior sampling):

- U.S. headquarters relocate a *significant* 5% a year, which over a decade, translates to a 50% relocation rate time frame (Strauss-Kahn/Vives Study at 168, 172 & Table 2);
- Firms with larger sales, young firms, large firms measured in terms of numbers of headquarters, foreign firms, and firms surviving from mergers tend to relocate more often (*id.* at 168-69);
- Headquarters of U.S. multi-site firms (80% of the studied database of 26,195 in U.S. firms) are *typically disconnected* from production sites (*id.* at 170); and
- Economic factors unrelated to operations/production of a firm (*e.g.*, low corporate taxes) are the main reasons for relocating headquarters (*id.* at 168, 169, 176-79).

The Strauss-Kahn/Vives Study confirms that the rate of headquarter relocations of U.S. firms is significant. *Id*. at 168. Moreover, when the study was conducted, the vast majority of the courts applied fact-based tests to determine "principal places of business" rather than the Seventh Circuit's headquarters test. If, however, this Court were to embrace the Seventh Circuit test, corporations in all the other circuits – that had no incentive to move their headquarters for strategic reasons relating to diversity

– would now have such an incentive. Therefore, the already significant number of relocations would presumably increase significantly.

Hertz asserts that the possibility of a "strategic move" to avoid the courts of a particular state "also exists under the Ninth Circuit's test." Pet. Brief 49. Without citation to authority for this point, Hertz asserts that undefined "accounting mechanisms" or "marketing" changes could somehow affect the state where a corporation has the substantial predominance of its business activities. *Id.* Assuming *arguendo* that were true, it plainly is far easier to relocate an official headquarters (*e.g.,* given the existence of "virtual" offices, Cayman Island mail-drops, or similar devices) than moving (or seeming to move) the locus of the corporation's actual, daily operations.

Hertz also insists that relocation of corporate headquarters is difficult because it would allegedly require relocation of the "physical location of its office, its tangible property, and its books and records." Pet. Brief 48. But this is not so. Nothing requires that a "headquarters" contain a corporation's "books and records," most of its "tangible property," or any of its real property. Indeed, Hertz's own experience amply illustrates this. Although Hertz stated that its "corporate headquarters" are in New Jersey, its supporting evidentiary showing asserted that its "core executive and administrative functions" are "carried out in New Jersey and Oklahoma." Pet. App. 29a-30a. Thus, it is unclear whether "records," "tangible

property" or other indicia are the *sine qua non* of a corporate "headquarters."

Hertz cites Boeing's experience as an example of a headquarters relocation that somehow supports its position that such relocations are overwhelmingly difficult and undesirable to undergo. Pet. Brief 49. But, the example of Boeing actually buttresses Respondents' contention that a headquarters test is too mechanical, and will lead to unfair results in determining a corporation's principal place of business. Boeing relocated to Illinois because it was offered more than $50 million in potential incentives to relocate. Strauss-Kahn/Vives Study at 169. An examination of Boeing's circumstances show why it would be unfair to view it as a "citizen" of Illinois for diversity purposes based on the relocation of its headquarters to Chicago.

According to its website, as of August 31, 2009, Boeing employed 159,094 people, 73,637 of whom work in Washington State, with the next highest employee count being in California with 25,373. http://www.boeing.com/employment/employment_table.html. According to Hertz, Boeing relocated as many as 500 employees to its new Chicago headquarters in 2001. Pet. Brief 49. While Boeing's website does not reveal its number of employees in Illinois today, assuming that the number has remained constant over time, 500 employees would amount to less than one half of one percent of its work force. Further, Boeing's website reveals that its factory in Mukilteo, Washington is the world's largest building (by

volume) and is where Boeing builds all but one model of its commercial aircrafts. http://www.boeing.com/commercial/tours/index.html.

Given that Boeing's vast operations and strong presence remained in Washington, changing its headquarter's address to Chicago does not justify treating it as a "foreigner" in Washington.[12] Moreover, a corporation is more likely to have its greatest contacts with the public at its place of operations, through activities such as the employment of personnel, purchasing of materials, and sales of goods and services. These dealings *increase local familiarity with the corporation* and accordingly *warrant considering* the entity as a "citizen" of that state, without concern for the possible danger of local prejudice against outsiders. 13F Charles Allan Wright & Arthur B. Miller, Federal Practice & Procedure, Jurisdiction and Related Matters § 3625 (3d ed. 2009) at 114 (citation omitted) (emphasis added).

[12] Indeed, even after relocating its "headquarters" to Chicago, Boeing itself has asserted to at least one federal court that its principal place of business was in Washington State. *Aspley v. Boeing Co.,* 2008 WL 191418 (D. Kan. Jan. 22, 2008) at *3 (Boeing succeeded in quashing a deposition in Kansas by "assert[ing] that Seattle, Washington is its principal place of business and location of the witness; thus, the deposition should take place in Seattle").

III. HERTZ'S "SIMPLICITY" ARGUMENT AND ITS OTHER PUBLIC POLICY ARGUMENTS FAIL.

Hertz devotes much energy to describing how allegedly difficult and unworkable the Ninth Circuit's test is. *See*, *e.g.*, Pet. Brief 31. It then asserts that its proposed test demonstrates its purported simplicity. *Id.* at 30.

Before addressing this argument, the following overriding propositions must be noted:

- Because nothing in the 1958 amendment states (or suggests) that Congress placed a priority on simplicity, Hertz's stress on that factor invites this Court to ignore the plain language of the statute and Congressional intent.
- Hertz's insistence that "jurisdictional rules" must be easily administered is not true. There are many examples of threshold jurisdictional issues which require careful factual analysis, often aided by discovery rights.

A. District courts are frequently required to apply complicated, fact-intensive jurisdictional tests at the outset of a case.

Hertz repeatedly asserts that this Court's precedents "require jurisdictional rules to be clear and easily administered." Pet. Brief 26; *accord*, *id.* at

34, 39. However, both Supreme Court precedent and Congressional actions fully rebut Hertz's assertion. Indeed, that the business realities test proposed by Respondents might require fact-intensive analysis is not a reason to assume Congress did not mean to adopt it. Congress has often imposed similar – or indeed more complicated – fact-based inquiries which must be addressed early in litigation. Such inquiries include citizenship/domicile, personal jurisdiction, standing, and federal jurisdiction under CAFA.

1. Citizenship/Domicile.

For purposes of diversity jurisdiction, district courts must determine the citizenship of natural persons. This requires a complicated and fact-intensive inquiry as to that person's "domicile," often at the very beginning of a case. *See Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979). Though the test of a person's "domicile" (citizenship) is at least as fact-intensive as Hertz claims the "place of operations" test is, this Court has approved that process for at least a century. *See*, *e.g.*, *Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 383 (1904).

In assigning a person's domicile, "two things are indispensable: first, residence in a new domicile; and second, the intention to remain there." *Sun*, 194 U.S. at 383. The "intention to remain" inquiry is both arduous and fact-specific because there are "many factors which should be considered." *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334

F.3d 444, 448 (5th Cir. 2003). If a person's citizenship is challenged, the court must evaluate a range of factors including where the litigant exercises civil and political rights, pays taxes, owns real and personal property, has various licenses, maintains accounts, belongs to clubs and churches, has places of business or employment, maintains membership in unions and other organizations, and maintains a family home. *Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996); *McCann v. George W. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

In considering these numerous factors, no single one "is determinative." *Acridge*, 334 F.3d at 448. Therefore, the court must exercise its discretion if some factors point to different States.

2. Personal jurisdiction.

Early in litigation, a district court must determine whether it has *in personam* jurisdiction over a foreign corporation. Under *International Shoe Co. v. Washington*, 326 U.S. 310, 317-20 (1945), this is an uncertain and fact-specific inquiry. Contrary to Hertz's claims that "jurisdictional rules" must be "clear and easily administered," *International Shoe* held that no bright line test applies to personal jurisdiction determinations:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a

> corporation to suit, and those which do not, cannot be simply mechanical or quantitative.

Id. at 319.

This Court has created jurisdictional tests that require district courts not only to find facts, but to use their discretion to apply those facts – all at the outset of a case. In addition, the fact-driven inquiry for personal jurisdiction could yield differing determinations as to whether a single corporation is subject to suit in federal court depending on the specific circumstances of each case: "The application of that rule will vary with the quality and nature of the defendant's activity[.]" *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

For decades, circuit courts have approved the use of discovery to determine facts relevant to personal jurisdiction. *See*, *e.g.*, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (citing a long list of cases from various circuits supporting jurisdictional discovery). While Hertz may characterize the personal jurisdiction inquiry as "complicated and unpredictable," and discovery into jurisdictional facts as "wasteful litigation" (Pet. Brief 26), it is one that has stood the test of time and met this Court's repeated approval. Hertz's suggestion that the alleged need for a "simple" rule should supplant Congress's intent because of alleged difficulties or expense of determining where a corporation's actual "principal place of business" is located should be rejected.

3. Standing.

This Court has required district courts to apply intricate, fact-intensive tests for determining standing, another issue that often arises at the beginning of a case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992), laid out the requirements, developed over decades, to determine if a party has standing. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* at 560. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id*. at 560-61 (citations omitted).

The standing inquiry requires many subjective determinations left to the district courts' discretion, such as deciding whether an injury is "concrete" rather than "conjectural," or whether redress is "likely" rather than "speculative." The answers to these (and related) questions may require extensive discovery.

4. CAFA confirms that accuracy trumps simplicity in making jurisdictional determinations.

CAFA sheds light on the interpretation of "principal place of business" in two respects: it shows that Congress intended: (i) a factually enmeshed evaluation of jurisdictional requirements, and (ii) that local controversies (as determined using the long-standing "principal place of business" test for corporations) would not be foisted on the federal dockets.

a. CAFA creates a remarkably complex factual test for determining jurisdiction.

Hertz's argument that jurisdictional evaluation requires simple, bright line tests, is disproven by CAFA itself. CAFA creates a factually complex scheme for determining jurisdiction. Chief among these facts, the court is required to determine the citizenship of all putative class members – potentially thousands or millions of members, who would be evaluated under the "domicile" test (Section III.A.1 *supra*),[13] and every defendant at the time of removal. 28 U.S.C. § 1332(d). Once those facts are determined, the court must engage in a rigorous analysis requiring complex factual findings (shown by the bold type below) pursuant to which:

---

[13] Unless the class member was a corporation.

- It must decline jurisdiction if: (1) more than ***two-thirds of the class*** are citizens of the state where the action was originally filed and at least one defendant, who is a citizen of that state, is someone from whom plaintiffs seek "***significant relief***" and is alleged to have engaged in "***conduct [that] forms a significant basis***" of plaintiffs' claims, and the "***principal injuries***" were incurred in that state, and ***no other similar class action*** has been filed against any of the defendants in the prior three years; or (2) ***two-thirds of the class*** and the "***primary defendants***" are citizens of the state where the action was filed. 28 U.S.C. § 1332(d)(4)

- It "***may, in the interests of justice and looking at the totality of the circumstances***" decline jurisdiction if: more than ***one-third*** but ***less than two-thirds*** of the class members and "***the primary defendants***" are citizens of the state where the action was filed. This determination is made by evaluating: (i) whether claims involve "***national or interstate interest***," (ii) ***which states laws will apply,*** (iii) whether the case was plead to avoid federal jurisdiction, (iv) the "***nexus***" between the forum state, the class members, the alleged harm, and the defendants, (v) ***how the class members are disbursed among the states***, and (vi) whether any ***other similar class action*** has been

> filed against any of the defendants in the prior three years. 28 U.S.C. § 1332(d)(3).

It strains logic to suggest that, as part of this statutory scheme, properly ascertaining the "principal place of business" of a multistate corporation should not be subject to a factual evaluation based on business realities.

b. CAFA's requirement that local controversies remain in state court supports the business realities interpretation of "principal place of business."

CAFA seeks to insure that "local controversies" remain in state courts. *See* 28 U.S.C. §§ 1332(d)(3)-(5) (permitting or requiring federal courts to decline jurisdiction for local controversies). It is thus significant for two reasons that, in re-enacting § 1332 with CAFA's amendments, Congress left untouched § 1332(c)'s test for corporate citizenship, which applies to corporations equally regardless of whether the case is removed under CAFA or traditional diversity principles.[14]

---

[14] This was intentional. *See* S. Rep. No. 109-14, at 36 (CAFA "does not alter current law" for determining citizenship, "including the provisions of 28 U.S.C. § 1332(c) specifying that 'a corporation shall be deemed to be a citizen of any State . . . where it has its principal place of business.")

First, it is a canon of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . [or] adopts a new law incorporating sections of a prior law[.]" *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). As shown above, prior to CAFA's enactment all but one circuit court interpreted "principal place of business" as requiring a fact-based comparative analysis.

Second, adopting a headquarters test could allow corporations the opportunity to thwart the Congressional determination that local controversies should not be litigated in federal court.[15] For example a retailer with all of its stores in California could locate its "headquarters" in Arizona and thus create federal jurisdiction for what clearly would be a local controversy between it and a class of customers, all of whom made their purchases in California.

[15] *See* S. Rep. No. 109-14, at 27, 39 (explaining that CAFA provides a "narrowly-tailored expansion of federal diversity jurisdiction to ensure that class actions that are truly interstate in character are heard in federal court" while "leav[ing] in state court" class actions that involve "local controversies," because "state courts have a strong interest in adjudicating such disputes.").

B. Contrary to Hertz's assurance, there would be nothing "easy" in administering a "headquarters" test.

Had it desired to do so, Congress had ample opportunity to create any one of a number of easy-to-administer tests. For example, as earlier discussed, the two rejected tests discussed in Section II.A *supra*, would have satisfied that criterion. Congress's selection of the "principal place of business" language confirms that neither "simplicity" nor "ease-of-administration" was Congress's priority when it selected the test to use in limiting corporations' access to federal courts under the diversity statute.

Even if one assumes *arguendo* that such "ease" or "simplicity" is a valid goal for this Court to consider, Hertz's argument still fails because its proposed "headquarters" test is not nearly as simple and easily administered as Hertz proclaims. Indeed, if this Court were to adopt Hertz's proposed test, a series of questions would immediately arise about where a corporation's "headquarters" actually is. For example:

- Is the "headquarters" where the chief executive has his or her office, where the Board of Directors meets, or at some other place? What if the Board meets in various (rotating) States?
- Where would the "headquarters" be located if the chief executive's office is in one State, and other officers work in one or more other States?

- If the corporate books and records are kept in one State and the officers live in another, which State is the "headquarters"?
- How significant, if at all, is the place that the corporation identifies as its "headquarters" in public filings with either the government or the public? What if (as Hertz does) the corporation identifies more than one location as its major administrative offices (Pet. App. 7)?

Indeed, corporations often have multiple places they designate as "headquarters." For example, Boeing has designated its offices in Chicago as its "World Headquarters." "*Boeing Begins World Headquarters Operations in Chicago,*" available at http://www.boeing.com/news/releases/2001/q3/nr_010904z.htm. However, "Boeing Commercial Airplanes" which is a "business unit" of The Boeing Company, has its headquarters in Washington State. Overview available at http://www.boeing.com/companyoffices/aboutus/brief/commercial.html. Boeing has "headquarters" for several other units throughout the country. *See*, *e.g.*, "*Boeing Selects St. Louis for Headquarters of Major Military Program,*" available at http://www.boeing.com/defense-space/ic/fcs/bia/news/2003/q2/nr_030403m.html; "*Boeing to Move Missile Defense Division of Headquarters to Alabama,*" available at http://www.boeing.com/ids/network_space/news/2009/q2/090512a_nr.html.

Likewise, while the SEC disclosures of Bank of America list North Carolina as the location of the company's "principal executive offices" (*see* SEC Form 10-K filed 2/27/2009), the Bank also has a "New York Headquarters" which "serve[s] as the headquarters for Bank of America's operations in New York City, and house its global corporate and investment banking, wealth and investment management and consumer and commercial banking businesses." *See* "*Bank of America and the Drust Organization Break Ground on the Bank of America Tower at One Bryant Park in New York City,*" available at http://bankof america.mediaroom.com/index.php?s=43&item=4405.

Perhaps the best response to Hertz's argument is to point to two real world examples which directly affect Hertz and demonstrate the folly of describing a "headquarters" test as simple to administer.

The very decision which Hertz asks this Court to overrule, *Tosco Corp. v. Communities for a Better Environment,* 236 F.3d 495 (9th Cir. 2001) ("*Tosco*"), undercuts any claim that a "headquarters" test is simply administered. In that case, Tosco Corporation admitted it had *three* different headquarters. *See Tosco*, 236 F.3d at 502. According to Tosco Corporation, its "principal corporate headquarters" was in Stamford, Connecticut, its "refining company headquarters" was in Linden, New Jersey, and its

"marketing headquarters" was located in Phoenix, Arizona. *Id*.[16]

But Hertz's simplicity argument has even a greater barrier to overcome. By its own admission, Hertz's "major administrative offices" are not located solely in its alleged main headquarters in New Jersey, but also in Oklahoma and "[t]he core executive and administrative functions for Hertz and its domestic subsidiaries are carried out" in New Jersey and (allegedly "to a lesser extent")[17] in Oklahoma. Pet. App. 29a-30a.

Moreover, Hertz runs its entire reservations system through its Oklahoma City headquarters. This is critically important because Hertz argues that the "headquarters" is the "most important" place of business because "it bears responsibility for directing and controlling the corporation's activities at all business locations." Pet. Brief 21. But for a car-rental company, no location "controls" more activities than the reservations command center.

Therefore, identifying the location of Hertz's "headquarters" is no simpler than identifying where

---

[16] The Ninth Circuit also noted the existence of a fourth "headquarters," Tosco's "lubricant company headquarters" was located in Costa Mesa, California. *Id*.

[17] No discovery was undertaken concerning the assertions in Hertz's declaration, so the degree to which this statement about "to a lesser extent" may be exaggerated or subject to contradiction is unknown.

Hertz conducts the predominance of its actual business, *i.e.,* California.

IV. NEITHER HERTZ'S "NARROW EXCEPTION" NOR ITS PROPOSED "PER CAPITA" ADJUSTMENT CAN BE JUSTIFIED.

A. Hertz's "narrow exception" is both illogical and easily circumvented.

Implicitly recognizing how easily its "headquarters test" can be abused (or that it is an inaccurate reflection of a corporation's true "principal place of business"), Hertz argues that there could be – although there should not be – a "narrow exception" to its bright line proposal: an exception "confined to situations involving a corporation that performs *all* of its business activity in one State, with the exception of the business activity conducted at its headquarters site in a different State." Pet. Brief 54 (emphasis added).

Simply verbalizing the proposed exception demonstrates how illusory it is. Any corporation seeking to escape the "exception" and benefit from Hertz's unmitigated "headquarters test" need do no more than open a skeletal sales office (or other location doing "non-headquarters" business activity) in a different state than where the remaining 99% of business activity is performed. Moreover, Hertz never suggests why business operations should be 100% in a single state before the exception can operate.

Another problem with Hertz's proposed "narrow exception" is that neither the wording of the statute nor its legislative intent supports recognition of this strategically-driven exception. There is no principled reason why the exception should be limited by the artificial (and illogical) 100% rule. In fact, as discussed above, Congress specifically rejected another "bright line" rule (*i.e.,* deeming a corporation a citizen of a state from which it receives 50% of its revenue). *See* Section II.A *supra*. Like that rule, once that 100% rule is abandoned, the inescapable conclusion is that Congress intended that the courts undertake a factual balancing that necessarily entails a fact-based inquiry which Hertz insists is so untenable.

In short, Hertz's proposed "fix" actually fixes nothing. Rather, it underscores the futility of attempting to divorce a "principal place of business" test from the inherently factual determination of where the corporation actually performs its business operations. *See*, *e.g.*, *Soliman*, 506 U.S. at 175-76 ("In determining the proper test for deciding whether a home office is the principal place of business, we 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").

B. Hertz's proffered "per capita" test would actually prevent large states from enforcing their own laws in their own courts.

As Hertz notes, after this case was decided, the Ninth Circuit issued *Davis v. HSBC Bank Nev., N.A.,* 557 F.3d 1026 (9th Cir. 2009), recognizing that for the purposes of diversity jurisdiction, a national retailer "will not be a citizen of California merely because its operations in California cater to California's larger population." *Id.* at 1030. *Davis* was careful to underscore that its holding does not require courts to apply a per capita approach to determining a corporation's principal place of business in every case. *Id.*

Hertz argues that if its headquarters test is rejected, any business operations test must be based on a per capita analysis rather than using actual gross statistics. However, the per capita test does not accurately identify the "principal place of business" of a company. A simple hypothetical illustrates the reason that the state's size does not matter in making the determination, and can actually distort the resulting determination. For example, California, the largest state, contains 11.95% of the country's population, while Wyoming, the smallest, contains 0.17%. Even if Hertz did 98% of its business in California and 2% of its business in Wyoming, Wyoming would be considered Hertz's "principal place of business" under the per capita approach, because Hertz would be doing much more business per capita in Wyoming than in California.

Not only does the per capita test risk distorting the evaluation of a business's principal place of business, the per capita approach would unjustifiably prevent large States from enforcing their own laws through their own courts. Diversity jurisdiction was not designed to allow a major California employer such as Hertz to profit from California's large economy and then, for purposes of removal, avoid the jurisdiction of California's courts when its labor practices in California are challenged under California law. Rather it was designed to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries." S. Rep. No. 85-1830, at 3102. It can hardly be said that a company that has 20.5% of its employees in California, 273 rental locations (17% of its tangible property) at which it rented over 3.8 million cars, and in a single year earned $811 million (18.6% of its total revenue) could be considered "foreign" to either California courts or juries.

CONCLUSION

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

TODD M. SCHNEIDER
JOSHUA G. KONECKY
W.H. "HANK" WILLSON, IV
MEGAN M. LEWIS
SCHNEIDER WALLACE COTTRELL
BRAYTON KONECKY LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104
(415) 421-7100

NORMAN PINE
BEVERLY TILLETT PINE
PINE & PINE
14156 Magnolia Blvd.,
Suite 200
Sherman Oaks, CA 91423
(818) 379-9710

ROBERT J. STEIN III
Counsel of Record
WILLIAM M. HENSLEY
MARC D. ALEXANDER
AILEEN M. BANELLIS
VALERIE K. BRENNAN
ADORNO YOSS ALVARADO
& SMITH
1 MacArthur Place
Suite 200
Santa Ana, CA 92707
(714) 852-6837

ARTHUR N. ABBEY
STEPHEN T. RODD
STEPHANIE AMIN-GIWNER
ORIN KURTZ
ABBEY SPANIER RODD
& ABRAMS LLP
212 East 39th Street
New York, NY 10016
(212) 889-3700

Counsel for Respondents