No. 12-574

In The
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CHARLES W. ADAMS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

I am not representing any clients, and the views expressed in this brief are my own. I have no monetary interest in this case. Aside from wishing to assist the Court, my interests in this case are entirely academic. I am a professor of law at The University of Tulsa College of Law, where I have taught a class in civil procedure since 1979.

SUMMARY OF ARGUMENT

This brief urges this Court to recognize the need for a federal long arm statute to confer lawful authority over nonresident defendants on the state courts. The American law of personal jurisdiction has developed through this Court's review of the application of state long arm statutes to nonresident defendants who have challenged their constitutionality under the Due Process Clause of the Fourteenth Amendment. The states have an incentive to extend the jurisdiction of their courts as far as possible so that their courts will be capable of providing redress for their citizens, and so, most of the long arm statutes provide for the assertion of jurisdiction to the maximum

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

extent permitted by due process. This Court's proper role in reviewing the long arm statutes is limited to determining the maximum extent of state court jurisdiction that due process will permit, as opposed to determining the most desirable allocation of jurisdiction among the state courts. This arrangement has produced a collective action problem, because neither the legislature of any state nor this Court are in a position to develop an allocation of jurisdiction among the state courts that fairly and reasonably balances the interests of the state's citizens with the interests of nonresidents whom the state's citizens may want to sue.

Congress has the power under Article IV of the United States Constitution as well as the Commerce Clause of Article I, § 8 to enact legislation that would confer lawful authority to a state's courts over nonresidents who are either citizens of other states or have sufficient contacts with the United States. Congress is in the best position to establish a framework for allocating jurisdiction among the state courts that would balance the interests of potential plaintiffs and defendants. Of course, Congress has not established such a framework, but encouragement from this Court may help to bring this about.

This case highlights the need for federal legislation on personal jurisdiction. Under this Court's precedents, the Nevada court would not have personal jurisdiction over the petitioner because the petitioner did not submit to the Nevada court's lawful authority by purposefully availing himself of benefits from

Nevada. Nevertheless, there may be compelling policy reasons why it would be appropriate for a Nevada court to exercise jurisdiction over this case, because the respondents suffered injury in Nevada, and Nevada would be a more convenient forum for the respondents than Georgia. As an American citizen, the petitioner is subject to federal legislation, and it is possible that Congress might decide to allocate personal jurisdiction over American citizens to a forum where an injury occurred, as the European Union has done in the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments. Had Congress done so, the Nevada court would have lawful authority to exercise jurisdiction over the petitioner, but in the absence of a federal long arm statute assigning jurisdiction to the place of injury, the Nevada court lacks jurisdiction over the petitioner.

ARGUMENT

I. THIS COURT SHOULD NOT DEVELOP A FRAMEWORK FOR PERSONAL JURISDICTION ON ITS OWN

Regardless of whether this Court decides to uphold the exercise of personal jurisdiction over the petitioner in this case, it should encourage Congress to enact a statute to clarify the law of personal jurisdiction. The preliminary question of which court is the proper one to decide a case ought to be amenable to a straightforward answer. This Court emphasized in its unanimous decision in *Hertz Corp. v. Friend*,

130 S.Ct. 1181 (2010), the benefits of administrative simplicity for jurisdictional rules. It observed:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. . . . So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.
>
> Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.

Id. at 1193. Although this Court recognizes the need for clarity and simplicity for jurisdictional rules, it has not developed straightforward and predictable rules for personal jurisdiction. The primary reason that it has been difficult for this Court to do so appears to be the peculiar process that has developed over the years for the formulation of the rules governing the personal jurisdiction of the state courts.

In *Perkins v. Benguet Consolidated Mining Co*., 342 U.S. 437, 448 (1952), this Court decided that Ohio's exercise of general jurisdiction over a corporation for claims not arising from its activities in Ohio

was permissible, because Ohio was the corporation's principal place of business. This Court also decided in *Perkins* that the Due Process Clause would not compel a state court to exercise jurisdiction over a foreign corporation. Instead, it ruled that the decision whether the Ohio courts would take jurisdiction over the corporation was reserved to the Ohio courts.

By ruling that the Ohio courts could choose whether to take jurisdiction over a foreign corporation, *Perkins* set the stage for the passage of long arm statutes by states that sought to extend jurisdiction over nonresidents. The first comprehensive long arm statute was adopted by Illinois in 1955, and other states soon followed so that every state now has a long arm statute. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 494, 496 (2004). The original Illinois long arm statute enumerated various acts, such as the transaction of business or the commission of torts within the state, that would subject nonresidents to the jurisdiction of the states. In 1960, Rhode Island adopted a long arm statute that extended jurisdiction over nonresidents that had "the necessary minimum contacts" with the state. *Id*. at 496. Other states followed the approach of Rhode Island so that today nearly two thirds of the states extend personal jurisdiction in their courts to the limits of due process, either by statute or through judicial decision. *Id*. at 541. The primary motivation of state legislatures in enacting statutes that reach to the limits of due process, would be to protect the

interests of their own citizens, rather than the interests of nonresidents. State legislatures and courts would naturally tend to be more concerned with maximizing the ability of their own citizens to obtain legal redress for their claims than in devising a fair and rational scheme for allocating jurisdiction among all the states. Because state legislatures and courts are more concerned with providing redress for their citizens than protecting defendants from other states from having to litigate in their courts, they have a strong tendency to overreach by asserting jurisdiction as far as possible, even though it surely would be less burdensome for all the states to allocate jurisdiction more fairly and rationally. The states should not be expected to allocate jurisdiction reasonably among themselves, and clearly they have not done so.

When this Court decides personal jurisdiction cases, it is not developing a common law of jurisdiction, but instead is reviewing the constitutionality of state court assertions of personal jurisdiction under these long arm statutes. In doing so, this Court should properly be concerned with determining whether a state court has attempted to assert jurisdiction beyond the maximum extent that due process permits. This is a different role than formulating a straightforward and predictable set of jurisdictional rules that balance the interests of residents and nonresidents of a forum state appropriately.

The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), emphasized

the limitations of due process on a state court's assertion of jurisdiction over a nonresident defendant. It explained the connection between due process and a state court's assertion of jurisdiction in terms of the court's having acquired lawful authority to adjudicate, noting that "[a]s a general rule, neither statute nor judicial decree may bind strangers to the State." *Id*. at 2787. The plurality opinion identified only one means for a state court to acquire lawful authority to adjudicate, which was through the defendant's submission to the state's authority, but it added that the submission might occur in various ways. These included explicit consent, and in addition, circumstances or a course of conduct that gave rise to an inference of an intent to benefit from and therefore submit to the laws of the forum state, such as presence within a state at the time of service of process, citizenship or domicile for individuals, and incorporation or having a principal place of business in the state for corporations. The final way that the plurality opinion described for a defendant to submit to a state's authority was by purposefully conducting activities within the state, thereby invoking the benefits and protections of its laws, but this form of submission was limited to claims arising or related to the defendant's activities within the state. *Id*. at 2787-80.

The dissenting opinion in the *McIntyre* case based the assertion of personal jurisdiction on considerations of reason and fairness. It stated: "The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*,

gave prime place to reason and fairness." *Id*. at 2800 (Ginsburg, J., dissenting). Rather than focusing on whether the defendant had submitted to the authority of the state court, the dissenting opinion emphasized policy considerations, such as that "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim," *id*. at 2798, whether the defendant had liability insurance, *id*. at 2799, the relative burdens of litigation in different locations on the plaintiff and the defendant, *id*. at 2801-02, and whether rejecting jurisdiction over the defendant would place "United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world," *id*. at 2803. The dissenting opinion pointed out that the European Union permitted jurisdiction in tort cases to be exercised by the courts of the place of injury as well as at the place where the harmful act occurred. The European Union's allocation of jurisdiction derives from the unanimous agreement of the member states of the European Union. *Id*. at 2803 n.16. There is no such agreement for allocating jurisdiction in the United States, however; there are only the long arm statutes of the individual states and the limitations of due process.

The disagreement between the plurality and dissenting opinions may be related to differing views of the appropriate role of this Court in reviewing assertions of personal jurisdiction by state courts. The plurality opinion in *McIntyre* was strictly limited to deciding whether the exercise of jurisdiction exceeded

the limits of due process, while the dissenting opinion was concerned with "the fair and reasonable allocation of adjudicatory authority among States of the United States." *Id*. at 2798. Achieving a fair and reasonable allocation of jurisdiction among the state courts is a worthwhile ultimate goal, but for several reasons, it should be accomplished primarily by the political branches of government, rather than this Court acting on its own. First, the role that this Court has articulated in its review of assertions of personal jurisdiction has been to determine whether state courts have exceeded the limits of due process, rather than to fashion a federal common law for the allocation of jurisdiction among the states. *See Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987) ("We reject the suggestion that we should create a common-law rule authorizing service of process, since we would consider that action unwise, even were it within our power."). In addition, the political branches of government are better suited than this Court for balancing conflicting interests and policy considerations. Moreover, the political branches of government are more able to engage in the sort of line-drawing that is needed for clear jurisdictional rules than this Court can readily accomplish through either analysis of due process or the development of a federal common law.

Federal legislation allocating personal jurisdiction among the state courts in a rational and comprehensive way could accommodate the concerns expressed in both the plurality and dissenting opinions in

McIntyre. Since the federal government has lawful authority over American residents, regardless of the particular state they reside in, a federal long arm statute could provide a designated state court with the lawful authority over a nonresident defendant that the plurality opinion would require. At the same time, a federal long arm statute could take into account the various policy considerations of reason and fairness, such as litigational convenience, that the dissenting opinion looked to as controlling. In addition, a federal long arm statute could consider the modern-day consequences of an allocation of personal jurisdiction among the states as well as the relevant commercial circumstances that the concurring opinion in *McIntyre* emphasized. Of course, there would have to be a source of Congressional power for a federal long arm statute for it to be effective, however.

II. CONGRESS SHOULD PROVIDE A FRAMEWORK BY ADOPTING A COMPREHENSIVE FEDERAL LONG ARM STATUTE

Congressional authority for legislation for the allocation of jurisdiction among state courts could be based on either the Full Faith and Credit Section in Article IV, § 1 or the Interstate Commerce Clause for defendants who are citizens of the United States and the Foreign Commerce Clause for foreign defendants. Article IV, § 1 provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the

Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The second sentence of this Section expressly grants Congress authority to regulate the effect of judgments, and this would appear to include placing restrictions on personal jurisdiction for state courts.

Congress first exercised its authority under the Full Faith and Credit Section in Article IV in 1790 by adopting the predecessor to current 28 U.S.C. § 1738, which requires the federal courts to give full faith and credit to state court judgments. Act of May 26, 1790, ch. 11, 1 Stat. 122. Beginning in 1980, Congress has also enacted several statutes in the area of family law under the Full Faith and Credit Section. Because child custody decrees may generally be modified on grounds of changed circumstances to serve the best interests of children, there had been a problem with divorcing parents filing subsequent actions to relitigate unfavorable child custody decisions. *See Thompson v. Thompson*, 484 U.S. 174, 180-82 (1988). In response to this situation, Congress passed the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006), to prohibit states from modifying a child custody decree from another state, as long as the state that issued the decree had various specified connections with the child (such as that the state issuing the decree was the home state of the child). 484 U.S. at 181-82. Similar problems existed with child support obligations, and so, Congress adopted the Full Faith and Credit for Child Support Orders

Act, 28 U.S.C. § 1738B (2006), to prevent relitigation of child support orders in other states. In addition, Congress provided for full faith and credit to be given to domestic protection orders in the Violence Against Women Act, 18 U.S.C. § 2265(a) (2006). Each of these three Acts specifies conditions for the various orders to satisfy in order for other states to be required to give them full faith and credit. Finally, the Defense of Marriage Act, 28 U.S.C. § 1738C (2006), provides that other states are not required to give effect to particular public acts and judicial determinations by a state: those that involve same sex marriages. Thus, there is substantial precedent for Congress relying on the Full Faith and Credit Section to enact legislation that specifies conditions for states to give full faith and credit to judicial proceedings from other states.

Congressional authority for the allocation of jurisdiction among the states could also be based on the Interstate and Foreign Commerce Clauses. The state court's assertion of jurisdiction over defendants from other states or countries does not involve a purely local matter, and, therefore, it would affect interstate or foreign commerce. *Compare United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (possession of a gun in a local school zone did not substantially affect interstate commerce), *with National Fed'n of Indep. Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Congressional power extends to the regulation of an activity that by itself substantially affects interstate commerce and to activities that do so only when aggregated with similar activities of others).

A federal statute allocating jurisdiction among the state courts would supply an alternative basis besides submission to a state's authority for the exercise of jurisdiction by the state court. The plurality opinion in *McIntyre* addressed only one way for a state court to acquire lawful authority to adjudicate, which was through the defendant's submission to the state's authority. *McIntyre*, 131 S.Ct. at 2787. But if the real basis for satisfying the requirement of due process is a court's having lawful authority over a defendant, rather than the defendant's purposefully availing itself of the privilege of conducting activities in the forum state, then there ought to be other ways to satisfy due process besides the defendant's submission to the state's authority. The enactment of federal legislation pursuant to the Full Faith and Credit Section and the Commerce Clauses that allocated personal jurisdiction among the state courts would surely also provide state courts with lawful authority over American defendants. In general, United States residents are bound by Acts of Congress that have been duly adopted by their elected representatives. Federal legislation conferring jurisdiction over non-resident defendants on state courts would provide a firmer basis for jurisdiction over defendants from other states than the implied consent to jurisdiction that the plurality opinion in *McIntyre* relied on. In addition, to the extent that a foreign defendant submitted to American authority by purposefully conducting activities within the United States, thereby invoking the benefits and protections of the laws of the United States, federal legislation could provide a

state court with lawful authority over the foreign defendant. A federal long arm statute would also make assertions of state court jurisdiction more predictable, which this Court has identified as an important benefit that the Due Process Clause protects. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The plurality opinion in *McIntyre* alluded to the possibility of federal legislation: "It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts." 131 S.Ct. at 2790. Since Congress has not enacted any applicable legislation concerning personal jurisdiction, however, it was not necessary for the opinion to address whether Congress had authority to legislate with respect to state court jurisdiction.

There are a variety of approaches to allocating state court jurisdiction that Congress might consider. One possibility would be an approach based on the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, Council Reg. 44/2001, 2001 O.J. (L.12) [hereinafter the European Regulation], which governs jurisdiction in disputes between persons domiciled in different countries in the European Union. Article 2 of the European Regulation provides for general jurisdiction over a defendant where the defendant is domiciled. *Id*. 2001 O.J. (L.12) 3. In addition, there are a number of special provisions for various types of claims. Jurisdiction over matters relating to a contract is assigned to the

place of performance of the obligation, which is the place where goods were delivered or should have been delivered for contracts for the sale of goods, and the place where services were provided or should have been provided for contracts for services. *Id*. Art. 5, 2001 O.J. (L.12) 4. Jurisdiction over tort matters is assigned to the place where the harmful event occurred or may occur, *id*., and as the dissenting opinion in *McIntyre* noted, 131 S.Ct. at 2801-02 (Ginsburg, J., dissenting), the European Court of Justice has interpreted this to mean either where the damage occurred or the place of the event that gave rise to the damage. The European Regulation also has special provisions for matters relating to insurance and consumer contracts, which authorize jurisdiction where the policy holder, insured, or beneficiary, or consumer is domiciled as well as where the defendant is domiciled. European Regulation, Arts. 9, 16, 2001 O.J. (L.12) 5, 7. In addition, it authorizes jurisdiction in cases involving multiple defendants where any of them are domiciled if the claims against them are so closely connected that there would be a risk of irreconcilable judgments from separate actions. *Id*. Art. 6, 2001 O.J. (L.12) 4-5.

These examples illustrate the type of sensible and practical jurisdictional rules that federal legislation could provide. It is likely that this Court would find that a number of these examples would violate due process in the absence of Congressional action in cases where it could not be shown that the defendants submitted to jurisdiction. For example, a provision

authorizing jurisdiction in the state where the plaintiff's injury occurred would have permitted the Oklahoma state court to exercise jurisdiction over the retailer and distributor in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), but this Court held in that case that jurisdiction over the retailer and distributor violated due process. *Id*. at 299. Congressional action would supply an alternative basis for extending lawful authority to the designated forum states, however, so that these examples of jurisdictional rules would comply with due process under the plurality opinion in *McIntyre*. Federal legislation might also provide an exception from jurisdiction for small businesses, such as the hypothetical owner of a small Florida farm who sold crops to a nearby national distributor that the plurality opinion in *McIntyre* expressed concern about, 131 S.Ct. at 2790, but whether the legislation should include such an exception ought to be a policy matter, rather than a requirement of due process.

An alternative to the enactment of a federal long arm statute that would suffice to some extent for cases such as the present one that were filed in the federal courts could perhaps be accomplished by revision of FED. R. CIV. P. 4. *See* FED. R. CIV. P. 4 advisory committee's note to 1993 amendment, 28 U.S.C. app. at 94. FED. R. CIV. P. 4(k)(1)(A) incorporates the long arm statute of the state where the federal district court is located, but FED. R. CIV. P. 4(k) also authorizes the district court to assert personal jurisdiction beyond the limits of the state's long arm

statute to a limited extent. FED. R. CIV. P. 4(k) might be amended to allow for expansion of the personal jurisdiction over a defendant to the place of injury in tort cases, for example, as long as the defendant had minimum contacts with the United States, rather than with the state where the district court is located. This alternative is less desirable than a federal long arm statute that would confer jurisdiction over non-resident defendants on the state courts, because it would not apply to actions filed in state courts. Moreover, an amendment to FED. R. CIV. P. 4(k) would create a larger disparity in the reach of personal jurisdiction between state and federal courts. This would provide incentives for filing actions in federal court, where there was concurrent subject matter jurisdiction between federal and state court, and thus encourage forum-shopping between federal and state courts. *See generally Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (aims of *Erie R. Co. v. Tompkins* rule were discouragement of forum-shopping and inequitable administration of the laws).

A significant benefit of federal legislation is that the legislation could specify clear boundaries that would be difficult for this Court to establish by itself through analysis of due process. The level of a corporation's business activity in a state that would be both necessary and sufficient for a state to exercise general jurisdiction over the corporation provides a good example. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), this Court unanimously held that a parent corporation's sale

in a state of goods that were manufactured by a foreign subsidiary was not an adequate basis for general jurisdiction over the foreign subsidiary when the subsidiary did not direct the shipment of the goods to the state. However, this Court did not limit general jurisdiction to a corporation's state of incorporation or principal place of business or attempt to specify the kind or level of activity that would be necessary for the assertion of general jurisdiction, because there was no need for the Court to do so in order to reach its decision. In contrast, Congress could choose to authorize general jurisdiction over a corporation beyond its state of incorporation and principal place of business, and if it did so, Congress could also specify requirements for the continuous and systematic activity in a state that would warrant the exercise of general jurisdiction there. These requirements might include being registered to do business or having a place of business with a specified number of employees in the state, owning a requisite amount of property, or conducting a specific level of business activity in the state for a requisite period of time. These matters ought to be governed by policy considerations appropriate for legislative determinations, rather than the limits of due process as declared by this Court.

Another advantage of Congressional legislation over the development of the law of personal jurisdiction through this Court's pronouncements is that a federal long arm statute could be modified as needed to take into account technological developments and changing social conditions. The concurring opinion

in *McIntyre* expressed concern about the need to have "a better understanding of the relevant contemporary commercial circumstances" before changing the law of personal jurisdiction. 131 S.Ct. at 2794. It also raised hypothetical questions about how the plurality opinion's standards would apply to businesses that market their products through Web sites or popup advertisements. Federal legislation could not only adjust to current business methods, but it could also respond to future developments.

Technological developments may affect court operations as well as national and global transportation and commerce. Electronic filing has already become the norm in the federal courts, *see* FED. R. CIV. P. 5(e) (authorizing local rules to require electronic filing if reasonable exceptions are allowed), and it is spreading rapidly to the state courts as well. Electronic filing facilitates litigation from distant locations, and thus it may affect considerations of convenience of the forum with respect to the parties, which may in turn influence the reasonableness of the assertion of jurisdiction. Further developments are inevitable, and one day traditional trials may be replaced by the virtual trials that Professor Carrington predicted with prerecorded testimony being introduced through multi-media presentations, rather than through live witnesses. *See* Paul D. Carrington*, Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1524-29 (1998). Once the defendant's right to participate in a trial could be accommodated by electronically transmitting the trial

to the defendant's location, the defendant's convenience would nearly be eliminated as a factor in the analysis of jurisdiction. *Id*. at 1535. The reach of a federal long arm statute could be adjusted to respond to these kinds of developments.

The need for involvement of the political branches of the federal government in the law of personal jurisdiction is especially pronounced with respect to foreign defendants. State legislatures and courts can be expected to be even less concerned with the interests of foreign defendants than they are with the interests of defendants from other states, and so, they are at least as likely to overreach with respect to asserting personal jurisdiction over foreign defendants. A state court's exercise of jurisdiction over a defendant from a foreign country may affect foreign relations, but foreign relations are properly within the purview of the federal government, rather than the states. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). This Court emphasized the effect of the assertion of personal jurisdiction over alien defendants on the procedural and substantive interests of other nations and the federal interest in foreign relations in rejecting a state court's assertion of jurisdiction over the Japanese manufacturer in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987). Treaties with foreign countries would be helpful for securing the enforcement of American judgments in foreign countries, but in contrast to the federal government, the states are barred from making treaties with foreign countries.

U.S. Const. art. I, § 10 ("No state shall enter into any treaty, alliance, or confederation."). It is therefore incongruous that personal jurisdiction over foreign defendants should be determined by long arm statutes enacted by state legislatures and interpreted by state courts, rather than by federal statutes and treaties. Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 484 (1981) ("Using state long-arm statutes to obtain jurisdiction over aliens effectively enables state legislatures to establish the requisite level of contacts, and thus to intervene in an area that properly demands direct congressional supervision.").

A federal long arm statute would not be adequate for obtaining jurisdiction over foreign defendants who did not submit to the jurisdiction of American courts, however. This Court would probably not uphold the constitutionality of a judgment against a foreign defendant if the defendant did not submit to American jurisdiction. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). And even if such a judgment was found to be constitutional, it would probably not be enforceable in another country, because other countries are not subject to the Full Faith and Credit Section of Article IV. Instead, a treaty between the United States and the particular foreign country where a foreign defendant resides would be necessary for a state court to exercise jurisdiction over a foreign defendant who had not submitted to the jurisdiction of United States courts.

The United States has not entered into any treaties that govern personal jurisdiction, as the European Regulation does for the European Union. *See* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 329 (2004). Part of the reason the United States has not made treaties governing personal jurisdiction has been the lack of predictability of the American law of personal jurisdiction coupled with the possibility that this Court might decide that a treaty's provisions violated due process. *See* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1041 (2005) ("[T]he United States Supreme Court has not only created an unsatisfactory body of jurisdictional law, it has tied the hands of the Executive. Frustrating efforts to reach an accommodation with foreign nations in the field of judgments recognition, the Court unduly limits this nation's treaty-making power."); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 22 (1993) ("[T]he Court's linkage of jurisdiction to the Due Process Clause ties the negotiators' hands. Indeed, curtailing this country's ability to enter into accords with foreign nations may well be the worst aspect of the Court's jurisdictional case law."). Like a federal long arm statute, duly adopted treaties between the United States and foreign countries that authorized personal jurisdiction in designated state courts would provide those courts with the lawful authority that due process requires. In addition, treaties could provide for the

enforceability of American judgments that were rendered in compliance with the terms of the treaties.

By establishing clear and predictable jurisdictional rules, a federal long arm statute and jurisdictional treaties would have numerous advantages from a theoretical standpoint over the complex and uncertain case law based on the Due Process Clause.

CONCLUSION

Twenty four years ago, this Court decided in *Finley v. United States*, 490 U.S. 545 (1989), that there was no pendent-party subject matter jurisdiction in the federal courts over nonfederal claims against additional parties where the nonfederal claims were related to federal claims against other parties, because there was no statutory authorization for the pendent-party subject matter jurisdiction. The Court included the following suggestion in its opinion: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Id*. at 556. Congress responded to this suggestion by adopting 28 U.S.C. § 1367 (2006), which authorized supplemental jurisdiction over pendent-party claims, such as the one in *Finley*. *See Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 557 (2005)

("In 1990, Congress accepted the invitation."). Section 1367 provided a statutory foundation for pendent and ancillary jurisdiction, which had been lacking for many decades. Hopefully, similar guidance from this Court would encourage Congress to clarify the law of personal jurisdiction by adopting a federal long arm statute to confer lawful authority over nonresident defendants on the state courts.

Respectfully submitted,

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