No. 10-76

IN THE

Supreme Court of the United States

GOODYEAR LUXEMBOURG TIRES, S.A., *et al*.,
Petitioners,

v.

EDGAR D. BROWN, *et al*.,
Respondents.

On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community.

As explained in the Chamber's brief *amicus curiae* supporting the petition for a writ of *certiorari*, the decision below raises just such vital concerns for the nation's business community. Its assertion of personal jurisdiction has an immediate impact for the Chamber's members whose products happen to be distributed in North Carolina. More broadly, the lower court's sweeping assertion of general jurisdiction based simply on the volume of products distributed in a forum state—irrespective of whether those products bear any relationship to the underlying cause of action—sets a dangerous precedent for the scope of a court's personal jurisdiction over a nonresident corporation that has profound implications for the Chamber's members both here and abroad. The Chamber is uniquely positioned to explain those broader implications and to offer a perspective on how this Court can correct the lower court's distortion of the settled constitutional limits on state courts' assertions of personal jurisdiction.

SUMMARY OF THE ARGUMENT

The Due Process Clause does not support the exercise of general jurisdiction based upon a defendant's act of placing products into the stream of commerce. Because the lower court failed to apply this bedrock principle of constitutional jurisprudence, this Court

should reverse its judgment. In addition to the reasons given in Petitioners' brief, which *amicus* fully supports, three additional ones justify this outcome.

First, placing goods into the stream of commerce does not resemble the sorts of activities that traditionally have justified the exercise of general jurisdiction. This Court's precedents reveal five main categories of general jurisdiction—citizenship, locus of incorporation, consent, transient service and continuous and systematic supervision of corporate activities (sometimes known as the "doing business" test). These categories reflect the traditional understanding that a state may exercise general jurisdiction either based on certain status relationships between the defendant and the forum state (such as citizenship) or based on the defendant's voluntary appearance in the forum state (such as transient service). The act of placing goods in the stream of commerce neither creates a status relationship between the defendant and the forum state nor does it establish the defendant's voluntary presence there.

Second, the continuous and systematic supervision test should not be extended to authorize general jurisdiction based upon the act of placing goods in the stream of commerce. Though sometimes labeled the "doing business" test, that label is easily misunderstood. Commercial transactions with the forum state, even when occurring at regular intervals, do not standing alone justify the assertion of jurisdiction over claims unrelated to those transactions. Rather, to satisfy the "doing business" test, a defendant must have engaged in continuous and systematic operations and activities in the forum state such as those that occurred in *Perkins v.*

Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

Third, general jurisdiction predicated on the act of placing goods into the stream of commerce has several deleterious effects on American foreign relations, American economic policy, and American business. Such an unbridled exercise of jurisdiction frustrates the United States' continued efforts to conclude bilateral and multilateral treaties on jurisdiction and judgments. Moreover, as recent experience in the antitrust field demonstrates, aggressive assertions of jurisdiction over foreign companies risk exposing American companies to retaliatory assertions of jurisdictions by foreign courts. By requiring companies affirmatively to block distribution of their goods in a particular state, the lower court's rule cripples interstate and foreign commerce. Finally, the decision below would herald an unprecedented era of forum shopping which would both undermine companies' ability to structure their commercial relationships and, over the long run, deter foreign direct investment in the United States.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT SUPPORT THE EXERCISE OF GENERAL JURISDICTION BASED ON A DEFENDANT'S PLACING PRODUCTS INTO THE STREAM OF COMMERCE.

"The foundation of jurisdiction is physical power." *McDonald v. Mabec*, 243 U.S. 90, 91 (1917). In order to reduce the risks of conflicting assertions of power, whether between states of the Union or between a state and a foreign country, an essential feature of the Founder's constitutional design has been to set

limits on the exercise of state adjudicatory jurisdiction. For the first century following the Founding, the Full Faith and Credit Clause (and the accompanying federal statute) supplied the primary constraint. *See* U.S. Const. Art. IV, §1; 28 U.S.C. §1738. Despite the literal language of these enactments, a state was not obligated to recognize or enforce another state's judgment where the court rendering the judgment lacked jurisdiction. *See, e.g., D'Arcy v. Ketchum*, 52 U.S. 165, 176 (1851); *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855).

Following its ratification, the Fourteenth Amendment introduced a second, independent constitutional limit on state exercise of judicial jurisdiction. Unlike the Full Faith and Credit Clause, the Due Process Clause did not require a post-judgment enforcement proceeding before an assertion of personal jurisdiction triggered a constitutional question. Since the amendment's adoption, this Court has repeatedly stressed that this Clause constrains the exercise of judicial jurisdiction over non-resident defendants, including corporations. *See, e.g., International Shoe Co. v Washington*, 326 U.S. 310 (1945); *St. Clair v. Cox*, 106 U.S. 350, 353 (1882); *Pennoyer v. Neff*, 95 U.S. 714 (1878). While *Pennoyer* employed a territoriality principle to define these limits on state power, *see* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 792-93 (1955), *International Shoe* defined them in terms of the defendant's "contacts" with the forum state.

Since *International Shoe*, two distinct theories of judicial jurisdiction have emerged—specific jurisdiction (where the cause of action bears a sufficient relation to the defendant's contacts with the forum state) and general jurisdiction (where that relationship

is lacking). *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 9 (1984); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966). The lower court correctly acknowledged that "[t]he present dispute is not related to, nor did it arise from, [petitioners'] contacts with North Carolina." Appendix to Petition for a Writ of *Certiorari* ("Pet. App.") 12a. Thus, this case concerns the proper contours of general jurisdiction.

While the court below unquestionably held that general jurisdiction was proper in this case, the precise basis for that holding is not entirely clear. The Court began and ended its analysis with general jurisdiction principles but interspersed that analysis with a discussion of specific jurisdiction principles. Some language in the lower court's opinion suggests that it sought to build upon this Court's recent stream-of-commerce cases (all of which involved specific jurisdiction) to create a new category of general jurisdiction. *See, e.g.,* Pet. App. 28a (rejecting petitioners' argument that "'stream of commerce' analysis simply does not apply in instances involving general, as compared to specific, jurisdiction"). Subpart A of this brief refutes that possible holding. Elsewhere, the lower court's opinion suggests the court sought to fit this case within the "continuous and systematic" contacts theory of general jurisdiction based upon the volume of Petitioners' goods sold by distributors to North Carolina buyers. *See, e.g.,* Pet. App. 13a (referring to the "'continuous and systematic contacts' required for the assertion of general personal jurisdiction"). Subpart B of this brief refutes that possible holding. Finally, Subpart C explains how, regardless of the precise holding, the exercise of general jurisdiction based on the injection

of goods into the stream of commerce entails several deleterious consequences.

A. The Stream of Commerce Theory Does Not Fit Within the Traditional Categories That Have Supported the Exercise of Judicial Jurisdiction Over Claims Unrelated to the Defendant's Contacts.

From the earliest developments in the Fourteenth Amendment's limits on state power, this Court has carefully cabined the types of relationships and activities that will permit the exercise of jurisdiction over claims unrelated to the defendant's contacts with the forum state. *See generally* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 102-32 (4th ed. 2006); Restatement (Third) Foreign Relations of the United States §421(2) (a)-(h). Such limits are essential. Unlike in the case of specific jurisdiction, the relatedness requirement no longer serves as an independent constraint on the exercise of state power. Clearly recognizing the need for these limits, this Court has identified five categories of general jurisdiction.

First, a court may exercise general jurisdiction where the defendant is a citizen, national, domiciliary or resident of the forum state. *See* Restatement (Third) Foreign Relations of the United States §421(2)(b)-(d); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Blackmer v. United States*, 284 U.S. 421 (1932). For example, in *Blackmer*, this Court upheld the issuance of a federal court subpoena to a United States citizen who was residing in France. The Court explained that "[b]y virtue of the obligations of citizenship, the United States retained its authority over [Blackmer],

and he was bound by its laws made applicable to him in a foreign country." 284 U.S. at 436.

Second, a court may exercise general jurisdiction where the defendant is organized pursuant to the laws of the forum state. *See* Restatement (Third) Foreign Relations of the United States §421(2); Restatement (Second) Conflict of Laws §41; *Pennoyer*, 95 U.S. at 735-36; *Bank of Augusta v. Earle*, 38 U.S. 519 (1839). For example, in *Earle* this Court explained that corporations were artificial persons created by state law. Relying on this principle, *Earle* took the view that corporations could *only* be sued in the state where they were incorporated. While post-*Earle* jurisprudence has relaxed this rule and permitted corporations to be sued elsewhere, *see St. Clair*, 106 U.S. at 354-59, the essential insight of the decision—that the state of incorporation enjoyed a jurisdictional prerogative that other states did not—remained unquestioned.

Third, a court may exercise general jurisdiction where the defendant has consented to the exercise of jurisdiction. *See* Restatement (Third) Foreign Relations of the United States §421(2)(g); *Pennoyer*, 95 U.S. at 733. For example, in *Pennoyer*, this Court explained that the exercise of personal jurisdiction would be appropriate if the non-resident defendant has made a "voluntary appearance." 95 U.S. at 733. Consent as a basis for jurisdiction flows also from this Court's decisions holding that due process, as a personal right, can be waived. *See Insurance Co. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 703 (1982); *D.H. Overmyer Co. v. Frick*, 405 U.S. 174 (1972).

Fourth, a court may exercise general jurisdiction where an individual defendant has been personally served with process while physically present in the

forum state. *See* Restatement (Third) Foreign Relations of the United States §421(2)(a); *Burnham v. Super. Ct*, 495 U.S. 604 (1990); *Pennoyer*, 95 U.S. at 733. For example, *Pennoyer* made clear that the Due Process Clause would support the exercise of *in personam* jurisdiction where the defendant has been "brought within [the forum state's] jurisdiction by service of process within the State." 95 U.S. at 733. Likewise, in *Burnham*, this Court unanimously held that the Due Process Clause generally did not prohibit the exercise of personal jurisdiction based on personal service of a defendant who was physically present in the forum state. 495 U.S. at 619, 629, 640. While the members of the Court divided over the proper reasoning, a plurality of four justices observed that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* at 610 (opinion of Scalia, J., joined by Rehnquist, CJ, and White and Kennedy, JJ.)

Fifth, a court may exercise general jurisdiction where the defendant has engaged in continuous and systematic supervision of the company's activities from within the forum state. *See* Restatement (Third) Foreign Relations Law §421(2)(h); *See Helicopteros*, 466 U.S. at 418; *Perkins*, 342 U.S. at 448. This category, discussed in greater detail in Subpart B, is sometimes described as the "doing business" theory of general jurisdiction. That label, however, can be easily misunderstood. Commercial transactions between the defendant and the forum state do not suffice to support the exercise of jurisdiction over claims *unrelated* to those transactions. *See, e.g., Helicopteros*, 466 U.S. at 418. Instead, to satisfy this theory, the defendant must undertake in the forum

state the "continuous and systematic supervision" of the "activities of the company." *Perkins*, 342 U.S. at 448.

Two principles unify these categories of general jurisdiction. First, a limited number of "status" relationships between the defendant and the forum state will give rise to general jurisdiction. This principle explains the cases based on citizenship, the state of incorporation and the theory in *Perkins*. It reflects the state's power over individuals or businesses that derive legal protections from it. *See* von Mehren & Trautman, 79 Harv. L. Rev. at 1141-42 ("From the beginning in American practice, general adjudicatory jurisdiction over corporations . . . could be exercised by the community with which the legal person had its closest and most continuing legal and factual connections. The community that chartered the corporation and in which it had its head office occupies a position somewhat analogous to that of the community of a natural person's domicile and habitual residence."). Second, where the defendant is voluntarily present in the forum state, general jurisdiction will be proper. This principle explains the cases based on consent and personal service. It can be understood either as a voluntary acceptance of the state's power over the defendant or as a satisfactory assurance that a non-resident defendant has received the "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). *See generally St. Clair*, 106 U.S. at 353 ("The doctrine of [*Pennoyer*] applies in all its force to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or

voluntary appearance, whether the party be a corporation or a natural person.").

The stream-of-commerce theory does not fit within either of the two principles unifying this Court's general jurisdiction jurisprudence. The stream-of-commerce theory rests on the idea that the defendant's act of placing goods within the stream of commerce can, under certain circumstances, satisfy the Due Process Clause's requirements for the exercise of *in personam* jurisdiction *See Asahi Metal Industry Co. Ltd. v. Super. Ct.,* 480 U.S. 102, 110-11 (1987) (plurality opinion); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). The act of placing goods in the stream of commerce does not establish a legal "status" relationship between the defendant and the forum state. Nor does that act establish the defendant's voluntary presence in the forum state. Thus, because the stream of commerce theory involves neither of the principles that explain the exercise of *in personam* jurisdiction over claims unrelated to the defendant's contacts with the forum state, it cannot serve as a basis for general jurisdiction.

Of course, this position does not mean that a defendant's act of placing goods in the stream of commerce is irrelevant to the jurisdictional inquiry. Under certain circumstances, that act, coupled with additional conduct by the defendant directed at the forum state, could support the exercise of jurisdiction with respect to claims bearing the necessary relationship to the act. That theory, unlike the theory of general jurisdiction, requires a sufficient nexus between the contacts and claims and, thereby, supplies an extra layer of protection to the non-resident defendant. *Amicus* explores that topic in greater

detail in its brief for the companion case. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in support of Petitioner, *J. McIntyre Machinery Ltd. v. Nicastro* (No. 09-1343). For purposes of this case, however, it is sufficient to hold that the act of placing goods in the stream of commerce does not support the exercise of judicial jurisdiction over claims unrelated to those contacts.

B. The Test Based Upon Continuous and Systematic Supervision of Corporate Activities Should Not Be Extended to Support General Jurisdiction Based Upon the Placement of Goods Into the Stream of Commerce.

As noted above, the lower court's opinion may also be read to hold that the volume of petitioners' products that reached North Carolina *via* a distribution network satisfied the test articulated in *Perkins*. So read, the opinion below does not create a new category of general jurisdiction so much as it expands an existing one. That expansion, however, misinterprets the *Perkins* test and is at odds with this Court's opinions.

Though *Perkins* articulated the idea of continuous and systematic supervision of corporate activities, the concept emerged from this Court's post-*Pennoyer* jurisprudence. In the decades following *Pennoyer*, the Court sought to apply the concepts of "consent" and "presence" to juridical entities like corporations. *See Burnham*, 495 U.S. at 610 n. 1 (plurality opinion); *see generally* Phillip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 577-86 (1958) (tracing the development of the constitutional limits of judicial jurisdiction over non-

resident corporations during the era between *Pennoyer* and *International Shoe*). For example, in *People's Tobacco Co. v. American Tobacco Co.*, the Court described the inquiry as whether "the business [is] of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers, present within the state . . . ." 246 U.S. 79, 87 (1918). Similarly, in *Green v. Chicago Burlington & Quincy Ry. Co.* the Court described the inquiry as "whether the corporation was *doing business* . . . in such a manner and to such an extent as to warrant the inference that, through its agents, it was *present* there." 205 U.S. 530, 532 (1907) (emphasis added).

During this era, the Court was careful not to equate commercial transactions in the forum state with "presence" even when those commercial transactions occurred "at regular intervals." *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923). For example, in *Rosenberg*, the Court rejected the idea that regular purchases from the forum state were sufficient to support the exercise of personal jurisdiction over a non-resident corporation. *Id*. Similarly, in *Green*, the Court held that the solicitation of "considerable" business in the forum state by an agent of the non-resident corporation did not support the exercise of personal jurisdiction over the corporation. 205 U.S. at 533-34. *See also People's Tobacco*, 246 U.S. at 87 (collecting cases). In *Philadelphia & Reading Ry. Co. v. McKibbin*, the Court held that a railroad's sale of coupon tickets for use with connecting carriers in the forum state did not support the exercise of personal jurisdiction over the corporation. 243 U.S. 264, 268-69 (1917). Finally, consistent with the principle announced in the foregoing cases, the Court held in *Bank*

of America v. Whitney Central Nat'l Bank, that a Louisiana bank's maintenance of relationships with several correspondent banks in New York did not constitute "doing business" in New York even though the bank maintained a "large New York business" and its transactions with the correspondent banks were "varied, important, and extensive." 261 U.S. 171, 173 (1923). In several of these cases, the Court emphasized that the corporate defendant lacked offices, property, employees or other indicia of presence within the forum statute. *See Bank of America*, 261 U.S. at 173; *Rosenberg*, 260 U.S. at 518; *McKibbin*, 243 U.S. at 266-67.

To be sure, a few decisions in the post-*Pennoyer*, pre-*International Shoe* era could be read to suggest that a non-resident corporation was "doing business" in the forum state based on its sales there. *See Henry L Dougherty & Co. v. Goodman*, 294 U.S. 623 (1935); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914). Yet the critical feature in those cases (lacking in this one) was that the defendant's sales in the forum state bore a direct relationship to the underlying suit. For example, in *International Harvester*, the underlying suit was a criminal action alleging violations of Kentucky's antitrust laws. That allegation rested upon the sales of defendant's goods into Kentucky. Likewise, *Goodman* concerned a state statute that authorized personal jurisdiction over a non-resident securities business "*growing out of or connected with* the business of that office or agency" 294 U.S. at 625 (emphasis added). *International Harvester* and its progeny did not hold (and had no reason to consider) the entirely independent question whether the "doing business" theory supported personal jurisdiction over the defendant with respect to

claims entirely unrelated to its activities in the forum.

Indeed, only a few years after *International Harvester*, the Court declared unambiguously that a state's ability to designate an agent for service of process over a non-resident corporation was limited to suits that "relate[ ] to business and transactions within the jurisdiction of the state enacting the law." *Simon v. Southern Ry. Co.*, 236 U.S. 115, 130 (1915). *See also Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 215-16 (1921). Consistent with this principle, the Court in *Chapman Ltd. v. Thomas B. Jeffrey Co.* held that jurisdiction would not lie over a non-resident corporation that had appointed (but later removed) a registered agent for service of process where the cause of action did not arise "out of acts or transactions within the state." 251 U.S. 373, 378 (1920). Otherwise, "claims on contracts, wherever made, and suits for torts, wherever committed, might . . . be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business" which would work a "manifest inconvenience and hardship" on the non-resident corporation. *Simon*, 236 U.S. at 130.

After *International Shoe* finally introduced the notion of "contacts," it did not discard these well established limits on the "doing business" test. *Shoe* was careful to cite several of these post-*Pennoyer* precedents. *See* 326 U.S. at 314-19. Later, the Court in *Helicopteros* relied on *Rosenberg*'s rule—that purchases from the forum state at regular intervals did not establish "presence"—to conclude that such activities also did not supply the necessary "continuous and systematic contacts." 466 U.S. at 418.

This Court's decision in *Perkins*, remains the only post-*International Shoe* decision of this Court upholding general jurisdiction based upon the non-resident defendant's continuous and systematic supervision of company activities from the forum state. *Perkins* involved a suit against a company organized under the laws of the Philippines. Following the Japanese invasion of that country, the company's president (who was also its general manager and principal stockholder) relocated to Ohio. From there, he maintained the company's files, held director's meetings, carried on correspondence on behalf of the company, drew and distributed salary checks, maintained several bank accounts, supervised the company's rehabilitation, and oversaw the purchase of machinery for the company's operations. 342 U.S. at 447-48. The Court found that this pattern of "continuous and systematic supervision of the necessarily limited wartime activities of the company" (which it characterized elsewhere as "continuous and systematic corporate activities," *id.* at 445) supported the exercise of jurisdiction over claims that were concededly not related to the company's contacts with Ohio. *Id.* at 448-49.

The Court revisited this theory in *Helicopteros*. *Helicopteros* involved a suit against a company organized under the laws of Colombia. Unlike the foreign corporation in *Perkins*, the defendant in *Helicopteros* had no property, offices or records in the forum state (Texas). Its contacts with the state consisted of purchasing helicopters and parts from a Texas-based company, sending prospective pilots to Texas for training and holding a negotiating session for a helicopter-services contract. Relying on *Rosenberg*, the Court held that the Colombian company lacked the contacts necessary to support

jurisdiction over claims that were, again, concededly unrelated to the company's contacts with Texas.

Perkins and *Helicopteros* thus demonstrate that the focus of this theory, as with the pre-*International Shoe* "doing business" test, depends on the quantity and types of corporate acts taking place in the forum state. *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n. 11 (1984) (canvassing the facts in *Perkins* and observing that "[i]n those circumstances, Ohio was the corporation's principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State"). Where the corporate defendant has engaged in the exceptional sort of supervision and conduct of corporate activities from the forum state as occurred in *Perkins*, general jurisdiction may lie. By contrast, where such supervision and conduct is lacking, as was the case in *Helicopteros*, it will not. After *Shoe*, like before, the volume of commercial transactions taking place in the forum state does not satisfy this test.

C. Extending the Categories of General Jurisdiction to Include the Stream of Commerce Theory Would Have Deleterious Effects for American Businesses and the Foreign Commercial Relations of the United States.

Apart from its incompatibility with this Court's doctrine, several practical considerations also counsel against the rule adopted by the lower court. Here, *amicus* offers four—(1) the damage to federal government's ability to manage the foreign relations of the United States, (2) the risk of retaliation by foreign courts against United States companies, (3) the

chilling effect on commercial activity, and (4) the invitation to engage in blatant forum shopping.

1. The Decision Below Damages Efforts by the United States to Complete a Treaty on Jurisdiction and Judgments.

Decisions about the management of America's foreign affairs rest with the federal government. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Consequently the Supreme Court has frowned upon activities that interfere with this foreign affairs function. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Just as state laws must "give way [where they] impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), so too must assertions of judicial jurisdiction pursuant to those laws. The decision below has just such an impermissible effect on the "exercise of the Nation's foreign policy." Specifically, it hampers the ability of the United States Government to conclude a multilateral treaty on jurisdiction and judgment enforcement.

"The recognition and enforcement of judgments from one jurisdiction to another has long been understood as a fundamental requirement for fully integrated markets." Jeffrey D. Kovar, Assistant Legal Adviser, U.S. Dep't of State, Prepared Statement for Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 106th Cong., at 3 (July 29, 2000). Consequently, for decades, the United States has sought to conclude a

treaty on jurisdiction and judgment enforcement with its major trading partners. Such a treaty is not only in the interests of the United States Government, it is also in the interests of American businesses. Among other things, such a treaty holds forth the prospect of enhancing the currency of United States judgments and limiting exotic forms of foreign jurisdiction to which American businesses are sometimes subject. *See, e.g., Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*) (describing French court's assertion of jurisdiction against American internet service provider based on content contained on company's website).

Despite the importance of such a treaty to both the United States Government and the American business community, efforts to conclude one have proven unsuccessful to date. *See generally* Born & Rutledge, *International Civil Litigation in the United States* at 1011-12. A constant sticking point in these efforts has been the inability of the United States and its trading partners to achieve consensus on common principles governing judicial jurisdiction. The decision below, unless soundly rejected by this Court, threatens to complicate those efforts and to undermine this important diplomatic and economic objective.

Absent an international agreement, the courts of one country are under no particular obligation to recognize or to enforce the judgments of another country's court. *Hilton v. Guyot*, 159 U.S. 113 (1895). This stands in contrast to the "full faith and credit" that courts within the United States give to each other's judgments. Instead, when a judgment rendered by a court in the United States is taken abroad, the enforceability of that judgment often

turns on the eccentricities of foreign law, which can be especially dubious of United States judgments particularly when they are predicated on jurisdictional theories unfamiliar to the foreign court. *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173 (2008).

This skeptical treatment of United States judgments stands in stark contrast to the treatment that foreign countries afford each other's judgments. Over the course of the twentieth century, European nations concluded dozens of bilateral treaties providing for the recognition and enforcement of each other's judgments. *See* European Council Regulation 44/2001 ("Regulation 44/2001") Art. 69. Beginning in the 1960's, European nations undertook efforts to complete a multilateral treaty on the subject, which resulted in the Brussels Convention of 1968 and, later, the Lugano Convention of 1988. *See* Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, O.J. (L 319); Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, O.J. (L/299/32). These treaties have largely been subsumed within European Council Regulation 44/2001 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. *See* Regulation 44/2001. That regulation sets forth uniform, harmonized provisions governing jurisdiction, including jurisdiction over non-resident defendants (*see, e.g., id.* Art. 5). It also obligates member states to recognize and to enforce each other's judgments, subject to very narrow exceptions (*see id.* Arts. 34-35). Similarly, at least thirty treaties between China and other countries regarding the recognition

and enforcement of judgments are currently in force. *See* Graeme Johnston *et al*., *China*, in Getting the Deal Through 43 (2007).

By contrast, the United States stands in relative diplomatic isolation with respect to the global architecture governing the harmonization of jurisdictional principles and the enforcement of foreign judgments. *See* American Law Institute, The Foreign Judgments Recognition and Enforcement Act §7 cmt. b (May 2005). This has not been for a lack of effort. In the 1970's, the United States sought to conclude a bilateral agreement on the mutual recognition of judgments. *See* Peter North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 Nw. J. Int'l L. & Bus. 219 (1979). After the parties initialed a preliminary draft, negotiations collapsed over, among other things, the United Kingdom's opposition to expansive principles of personal jurisdiction under United States law. *See* Born & Rutledge, *International Civil Litigation in the United States* at 1012 n. 30. More recently, under the auspices of the Hague Conference on Private International Law, the United States sought to conclude a multilateral treaty on jurisdiction and judgment enforcement. Those efforts also failed, and a key problem again was the chasm on matters of jurisdiction that separated the United States from other countries. Among other things, civil law countries objected to jurisdiction principles based on "doing business" as well as the vagueness and unpredictability of United States jurisdictional standards. *See id.* at 101-02. Give these jurisdictional differences, countries were forced to settle for a more limited treaty (not yet ratified by the United States) that governed only cases where the parties had agreed upon a contractually specified forum. *See*

Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

Manufacturing an entirely new theory of general jurisdiction based on the stream of commerce, as the lower court has done, would further complicate the efforts by the United States and its major trading partners to conclude the long sought-after treaty on jurisdiction and judgments. Of course, the United States may have strong reasons—whether grounded in policy or bargaining position—to want to maintain some existing categories of judicial jurisdiction. But creating an entirely new one simply throws fuel on the fire and complicates the diplomatic efforts. Given that over half the states of the Union have linked the scope of their courts' judicial jurisdiction explicitly to the limits set by the Due Process Clause, *see* Petition for a Writ of *Certiorari* at 17, only this Court can ensure that the legal chasm separating the United States and its trading partners over principles of jurisdiction and judgment enforcement does not widen.

2. The Decision Below Invites Retaliation by Foreign Courts Against United States Companies.

Unless corrected, the lower court's decision signals an unprecedented expansion of principles of general jurisdiction under United States law. Not only would that expansion have profound implications for foreign companies whose goods reach the United States, it could also have equally profound implications for United States companies exporting abroad. History demonstrates that expansive assertions of jurisdiction over foreign companies by United States courts can easily trigger retaliatory action by foreign countries against United States companies.

Experience under United States antitrust law illustrates the risk. Following the development of the effects test for application of United States antitrust laws to foreign conduct, *see United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945), United States courts increasingly entertained private actions under United States antitrust laws against foreign companies. These assertions of legislative jurisdiction sparked significant protests from the United States' major trading partners. *See, e.g.,* Joseph P. Griffin, *Foreign Government Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505 (1998). In their mildest form, these protests came through diplomatic statements. *See* James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* §4.15 (2d ed. 1985). In a more extreme form of protest, countries adopted blocking statutes which barred the production of evidence for use in the United States proceedings. *See* Bate C. Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l L. 585 (1981). In its most extreme form, some nations (including the United Kingdom) adopted clawback statutes entitling the foreign defendant to recover damages from the American antitrust plaintiff. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act of 1980*, 75 Am. J. Int'l L. 257 (1981). Most recently, European competition authorities have begun aggressively to apply competition principles to conduct taking place outside the European Union, including cases directed at American Companies. *See* Born & Rutledge, *International Civil Litigation in the United States* at 657-58.

While the experience under the antitrust laws technically involves assertions of legislative jurisdic-

tion, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J. dissenting, joined by O'Connor, Kennedy and Thomas, JJ.), expansive assertions of judicial jurisdiction by state courts can equally implicate "the procedural and substantive policies of other *nations* whose interests are affected . . . ." *Asahi*, 480 U.S. at 115 (plurality opinion); *see also Pacific Atlantic Trading Co. Inc. v. M/V Main Exp.*, 758 F.2d 1325, 1130 (9th Cir. 1985) (opinion of Judge Nelson joined by Judges Kennedy and Alarcon) ("[W]hen the nonresident defendant is from a foreign nation, rather than from another state in our federal system, the sovereignty barrier is higher . . . .). Several European nations have enacted "retaliatory jurisdictional" laws. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). *See also* Wendy Perdue, *Aliens, The Internet and 'Purposeful Availment:" A Reassessment of the Fifth Amendment's Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 464 (2004). Under these retaliatory laws, the courts of these countries may exercise jurisdiction over foreign persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." Born, 17 Ga. J. Comp & Int'l L. at 15. Applied to the rule announced by the lower court, these laws would allow foreign courts to assert jurisdiction over United States companies—and only United States companies—based on the volume of products distributed in the countries where those courts sit. (European law prohibits the application of such laws to citizens of other member countries, *see* Council Regulation 44/2001, art. 3(2) & Annex I.) The obvious effect would be to punish United States companies for an aggressive assertion of jurisdiction by a North Carolina court, just like the clawback

statutes punished United States plaintiffs for aggressive assertions of legislative jurisdiction under American antitrust laws. Moreover, because the lower court's opinion asserts jurisdiction over foreign companies for products unrelated to those giving rise to the suit, assertions of jurisdiction under such retaliatory laws would be virtually without boundary. It would be literally open season in foreign courts on United States companies. Such an outcome would thereby undermine the flow of goods by United States companies to foreign countries and undercut the commercial interests of this country. *See* Brief for the United States as *Amicus Curiae* in *Helicopteros v. Hall* No. 82-1127) at 6 (urging the Court to refuse to exercise jurisdiction over foreign company due to its deleterious effect on foreign trade that is of "critical importance . . . to our national economy").

Thus, in order to avoid the risks of retaliation to United States companies and the consequent undermining of United States' strong commercial interest in export promotion, the lower court's aggressive assertion of general jurisdiction based on the volume of products flowing into the forum state should be rejected.

3. The Decision Below Cripples Commercial Activity.

The federal government serves as the primary regulator of interstate and foreign commerce. *See* U.S. Const. Art. I, §8, cl. 3. Just as the interstate commerce and foreign commerce clauses ensure that state legislative enactments do not unduly encumber the flow of commerce, *see Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), so too does the Due Process Clause operate as an "instrument of interstate federalism" to ensure that state court

assertions of judicial jurisdiction do not have similarly commerce-crippling effects. Unfortunately, the decision below has precisely that undesirable effect.

According to the lower court, a company whose products are distributed into a forum state can only avoid the sweep of general jurisdiction by taking affirmative steps to *prevent* the distribution of its products into the forum state. Pet. App. 17a. For companies that cannot risk the potentially crippling costs of having to defend in a foreign forum, their only safe harbor is to cease distribution of goods altogether, even when those goods bear no relationship to the goods giving rise to a particular claim.

While the case before the Court involves foreign companies and has an immediate effect on foreign commerce, the decision has an equally profound impact on American businesses and, consequently, on interstate commerce. The impact is especially devastating for small businesses, which comprise a core component of the Chamber's membership. Such small businesses represent the vast majority of American businesses and make up a significant share the American economy. U.S. Small Business Administration, Office of Advocacy, The Small Business Economy: A Report to the President (2009). They supply a variety of goods, ranging from consumer goods to component parts used in a broader manufacturing process. These small businesses lack the necessary resources to finance a legal defense in a faraway forum, even another state in the United States. Yet the logic of the decision below suggests that they must be prepared to do so—or take affirmative steps to ensure that their products are not distributed (or incorporated into other goods

which are subsequently sold) in states where they are unprepared to finance a legal defense. Such a rule works an impermissible drag on interstate commerce and hampers the ability of the Due Process Clause to operate as an "instrument of interstate federalism."

4. The Decision Below Invites Blatant Forum Shopping.

It is worth recalling that this case involves an accident taking place in a foreign country where the alleged tortious act also occurred overseas. As the case involves both a French defendant and an accident taking place in France, French courts almost certainly would have jurisdiction over most, if not all, of the claims. *See* European Council Regulation 44/2001 Arts. 2(1), 5(3).

Yet the decision below invites plaintiffs to import these sorts of lawsuits into North Carolina (or other states) based on the volume of Petitioners' other products distributed there. Not only does this outcome force the Petitioners to defend themselves in a distant forum, *see Asahi*, 480 U.S. at 116 (plurality opinion), it has profound effects on the course of the suits themselves. For example, North Carolina procedural law, which differs markedly from French law on matter such as discovery, would apply. *Compare* N.C. R. Civ. P. 26-37 (North Carolina discovery rules), *with* Institute for the Advancement of the American Legal System, *A Summary of Comparative Approaches to Civil Procedure* at 22 (describing French approach to discovery). Likewise, North Carolina conflicts principles, which differ markedly from French principles, would determine the applicable substantive law. *Compare* Symeon Symeonides, *Choice of Law in American Courts in 2009: Twenty-Third Annual Survey*, 58 Am. J. Comp. L. 227, 231 (2010)

(classifying North Carolina's conflicts rules on tort matters), *with* Symeon Symeonides, *Rome II and Torts Conflicts: A Missed Opportunity*, 56 Am. J. Comp. L. 173, 186-87 (2008) (discussing European conflicts principles governing torts cases).

Moreover, the forum shopping possibilities are not limited merely to North Carolina and France. For companies that have regional or nationwide sales networks, the flow of products into multiple states broadens the options for the plaintiffs' bar. They can seek out the forum offering the most desirable mix of substantive and procedural law for their case.

These forum shopping opportunities affect every potential commercial relationship for a company that crosses the lower court's undefined tripwire for general jurisdiction. Because general jurisdiction does not require any relationship between the contacts and the claims, the decision below means that a court may hear *any* claims against *any* defendant whose distribution of products to North Carolina crosses the general jurisdiction tripwire. Any commercial partner or tort claimant from around the world can, under the logic of the decision below, cherry pick from among several possible forums in deciding where to bring suit. Since states take a variety of different approaches on prudential doctrines such as *forum nonconveniens*, *see Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171 (R.I. 2008) (surveying state approaches and noting that some states reject the doctrine altogether), the non-resident defendant has little opportunity to avoid the forum shopping traps created by the lower court's rule.

These enhanced opportunities for forum shopping threaten core principles of the Due Process Clause. Those core principles include "giv[ing] a degree of

predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Woodson,* 444 U.S. at 297. Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). Yet the decision below deprives companies of any predictability whatsoever. It creates huge ambiguities about what volume of goods distributed in the forum state will trigger the general jurisdiction theory. It does not explain whether the requisite volumes are measured in absolute terms or as a percentage of sales. The test leaves unanswered whether the volume measures vary across different industries, depending on whether the company manufactures mass-produced goods or a few specialized goods. The rule provides virtually no guidance on the relevant time period during which the volume sales should be measured. Consequently, a company seeking to structure its primary conduct in order to limit being haled into a faraway forum has practically no guidance on how to plan for those volume triggers.

Not only do these forum shopping effects harm businesses, they also discourage future foreign investment in the United States. As the Department of Commerce recently explained, foreign direct investment plays a vital role in the health of the United States economy and accounted for nearly 17 percent of U.S. GDP in 2004. United States Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty ("Litigation Environment") at 2. Despite the importance of foreign direct investment to the United States economy, the tort liability system in the United States serves

as a major drag on additional investment. According to one study, cited by the Commerce Department, over the past fifty years annual tort costs in the United States have risen from 0.62% to 1.87% of GDP, far higher than most European nations. Litigation Environment at 5. *See also* Robert Litan, Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System at 17 (citing study comparing tort costs as a percentage of GDP and noting that costs "are higher in the United States than in other developed countries"). While many features of the tort system contribute to the problem, the Commerce Department identified forum shopping as a key cause: "[P]ractices such as forum shopping have contributed to [foreign investors'] fear of litigation (and liability) and are seen as a source of significant investor uncertainty." Litigation Environment at 7. By declaring open season on companies wherever their products are sold or distributed (irrespective whether those products related to a cause of action), the decision below undermines the competitiveness of the United States economy.

Put simply, the lower court's rule obliterates any meaningful constitutional limitation on the forums in which suits may be filed. To hold that commercial transactions supply "a basis for the assertion of *in personam* jurisdiction over unrelated actions . . . would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment." *Kulko v. Super. Ct.*, 436 U.S. 84, 93 (1978). The effect on forum shopping deprives businesses of an essential predictability about the jurisdictional consequences of their operations and stokes the "fear of litigation and liability" that, according to the Department of Commerce, chills essential investment in the United States.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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