File Number: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CHEVRON CORPORATION AND CHEVRON CANADA LIMITED

Appellants
(Respondents/Appellants by Cross-Appeal)

– and –

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMONADO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Respondents
(Appellants/Respondents by Cross-Appeal)

MOTION RECORD FOR INTERVENTION
U.S. CHAMBER OF COMMERCE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

July 29, 2014

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TAB 1

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IN THE SUPREME COURT OF CANADA
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– and –

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Respondents
(Appellants/Respondents by Cross-Appeal)

NOTICE OF MOTION FOR INTERVENTION
U.S. CHAMBER OF COMMERCE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that the U.S. Chamber of Commerce (**U.S. Chamber**) hereby applies to a judge of this Court pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for:

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(a) an order granting the U.S. Chamber leave to intervene in this appeal on the following terms and conditions:

(i) the U.S. Chamber shall be entitled to serve and file a factum not to exceed 10 pages in length;

(ii) the U.S. Chamber shall be granted permission to present oral argument not to exceed 10 minutes in length at the hearing of this appeal;

(iii) the U.S. Chamber shall not be entitled to raise new issues or adduce further evidence or otherwise supplement the record of the parties;

(iv) costs of this motion and this appeal shall not be awarded to or against the U.S. Chamber; and

(b) any further or other order that this Court may deem appropriate.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. The U.S. Chamber is the world's largest business federation. Formed in 1912, the U.S. Chamber represents the interests of more than 3 million businesses of all sizes, sectors and regions in the United States of America, as well as many businesses from other countries.

2. A major purpose of the U.S. Chamber is to develop, implement and influence policy on important issues affecting business. It does this through representation of the business community and its interests with each of the legislative, executive and judicial branches of government in the United States.

3. The U.S. Chamber has a demonstrated interest in this appeal. The resolution of this appeal may require this Court to determine whether a foreign judgment may be recognized and enforced in Canada notwithstanding that the judgment debtor has no past, present or realistically-anticipated future connection to the forum. If connections between the judgment debtor and the forum are required, this Court will also have to determine whether the connections of an indirect subsidiary to the forum can suffice.

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4. These are issues of significant concern to the U.S. Chamber, many of whose member companies do business across state lines and international boundaries. As such the U.S. Chamber has a keen interest in the rules governing when businesses can be subject to the jurisdiction of foreign courts. In particular, the U.S. Chamber's member companies have a special interest in the U.S./Canada trade relationship, given that it is the world's largest bilateral trade relationship, exceeding US$430 billion.

5. The U.S. Chamber has well-established knowledge and expertise regarding these issues. The U.S. Chamber has been active in cases involving similar issues in the United States for many years. In particular, the U.S. Chamber has intervened as *amicus curiae* in several cases before the U.S. Supreme Court that address issues of jurisdiction over foreign defendants or foreign legal proceedings. The U.S. Chamber's *amicus* briefs are widely regarded by U.S. courts, legal academics, and the media as helpful to the courts in their decision making.

6. The U.S. Chamber has also investigated the issues that have arisen in the United States as a result of the patchwork of varied legislation among the U.S. states dealing with the recognition and enforcement of foreign judgments, has given testimony before the U.S. Congress, and published a position paper on the issue.

7. The U.S. Chamber has the ability to provide submissions that will be useful and different from those of the parties. Among other considerations, a U.S. perspective may be useful to the Court's consideration of comity and cooperation among countries with a major trading relationship.

8. If granted leave to intervene in this appeal, the U.S. Chamber intends to provide submissions from a policy perspective, and highlight the practical business and political implications that can be expected if actions for recognition and enforcement of foreign judgments are permitted in circumstances where the judgment debtor has no contact with the recognizing forum. These are matters that are not significantly developed in the facta filed by the appellants. Based on its history of dealing with similar matters on behalf of the business community in the U.S., the U.S. Chamber is well-suited to elaborate on those implications based on the U.S. perspective.

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9. If granted leave to intervene, the U.S. Chamber's oral and written submissions would not be duplicative. The U.S. Chamber will coordinate with the parties and other interveners to ensure that its submissions are useful and different.

10. Granting this motion for intervention would not delay this appeal or prejudice the rights of the parties.

11. Rules 47 and 55 to 59 of the *Rules of the Supreme Court of Canada*.

Dated at Toronto, Ontario this 29th day of July, 2014.

SIGNED BY

_____

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

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TAB 2

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Respondents
(Appellants/Respondents by Cross-Appeal)

AFFIDAVIT OF LILY FU CLAFFEE
(Sworn July 28, 2014)
(Motion by the U.S. Chamber of Commerce for Leave to Intervene pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

I, LILY FU CLAFFEE, of Washington, District of Columbia, in the United States of America, MAKE OATH AND SAY AS FOLLOWS:

1. I am Senior Vice President, General Counsel and Chief Legal Officer of the Chamber of Commerce of the United States of America (the **U.S. Chamber**). I have been with the U.S. Chamber since November 2010. I am a member of the bars of the State of Illinois and the District of Columbia.

2. As General Counsel, my responsibilities include overseeing the U.S. Chamber's *amicus curiae* and direct party litigation, which advances legal and policy arguments on behalf of business in courts across the United States.

3. The U.S. Chamber seeks leave to intervene in this appeal. The U.S. Chamber has authorized me to make this affidavit in support of its motion for leave to intervene in this appeal.

I. Overview

4. The U.S. Chamber is the world's largest business federation. It represents the interests of more than three million businesses of all sizes, sectors and regions in the United States of America, as well as many businesses from other countries.

5. A major purpose of the U.S. Chamber is to develop, implement, and influence policy on important issues affecting business. Among other advocacy and informational activities, the U.S. Chamber provides testimony before Congress; disseminates reports and statements to policymakers, the public, and the media; sponsors research; and sends comments and letters to elected representatives and government regulators.

6. In addition, the U.S. Chamber regularly advocates on behalf of its members for the fair treatment of business in U.S. courts and before regulatory agencies. These efforts include filing lawsuits that challenge federal regulations or other governmental actions that are believed to be unlawful or that improperly harm business interests and job growth, and filing *amicus curiae* or intervener briefs to provide information on the practical implications of legal decisions to the broader business community.

7. The U.S. Chamber has a demonstrable interest in the subject-matter of this appeal. Many of the U.S. Chamber's member companies do business across international boundaries. In

particular, the U.S. Chamber's member companies have a special interest in the U.S./Canada trade relationship, given that it is the world's largest bilateral trade relationship, exceeding US$430 billion.

8. As such, the U.S. Chamber has a keen interest in the rules governing when businesses can be subject to the jurisdiction of U.S. courts and the courts of other countries.

9. As I detail more fully below, the U.S. Chamber has been an active participant for many years as an *amicus curiae* in transnational lawsuits in U.S. courts, including jurisdictional issues related to such lawsuits. Most recently, in 2013, the U.S. Chamber filed an *amicus* brief in the Supreme Court of the United States dealing with the issue of whether adjudicative jurisdiction may properly be exercised over a parent corporation based on the in-forum activities of a subsidiary (*DaimlerChrysler AG v Bauman*). In 2012, the U.S. Chamber filed a brief with the U.S. Supreme Court dealing with the effects on business and government policy-making of the federal Alien Tort Statute (**ATS**), which gives U.S. federal courts jurisdiction over tort cases involving aliens, where the U.S. Supreme Court was to consider whether the ATS creates jurisdiction for alleged misconduct in developing countries without a direct connection to the United States (*Kiobel v Royal Dutch Petroleum Co*). The issues in these cases, and many others in which the U.S. Chamber has participated, overlap with the issues in this appeal and, as such, transcend the immediate parties.

10. The U.S. Chamber can provide submissions that should be useful and different from those of the parties. In their facta, the appellants have framed the appeal almost exclusively on a jurisprudential basis. By contrast, and as I outline below, the U.S. Chamber will offer a policy-oriented perspective on the issues that is based on its significant history of dealing with similar matters in litigation on behalf of the business community in the United States in similar cases where litigants have sought to legitimize certain types of foreign judgments through liberal recognition and enforcement rules. The U.S. Chamber will also provide its insight gained from advocating for the reform of legislation addressing the recognition and enforcement of foreign judgments in the United States. Given the important trade relationship between Canada and the United States, consideration of this perspective provides a particularly helpful context for this Court's deliberations.

II. The U.S. Chamber's Background and Mandate

11. The U.S. Chamber was formed in 1912, shortly after U.S. President William Howard Taft noted in a message to Congress the need for a "central organization in touch with associations and chambers of commerce throughout the country" to provide a link with the "different phases of commercial affairs." Since that time, the U.S. Chamber has striven to fulfill that role and has provided a voice for business in all aspects of government activity.

12. A significant portion of the U.S. Chamber's efforts for legal or policy reform takes place through advocacy in the legislative and executive spheres. The range of topics that the U.S. Chamber addresses in those contexts is very broad. They include capital markets and finance, education and workforce development, elections and grassroots advocacy, energy and the environment, food and agriculture, government contracting, health care, immigration, intellectual property, international trade and investment, labor relations, national security, small business, taxes, technology and e-commerce, and transportation.

13. Represented in part by the U.S. Chamber Litigation Center, a non-profit affiliate of the U.S. Chamber, the U.S. Chamber also participates as an *amicus curiae* in litigation throughout the United States, in both federal and state courts. On behalf of the U.S. Chamber, the Litigation Center:

- Files lawsuits challenging federal regulations and other government actions that are believed to be unlawful and that harm business interests or job growth. While such litigation is brought against the government, the U.S. Chamber views its role as being in the public interest as it is able to initiate challenges that ordinary litigants such as individual businesses would be reluctant to file for a number of practical reasons.

- Files *amicus curiae* briefs. The U.S. Chamber's *amicus* strategy includes filing briefs that present unique and compelling arguments, and that provide courts with contextual considerations on the practical implications of legal decisions to the broader business community.

- Hosts moot courts to help advocates to prepare for oral arguments before the U.S. Supreme Court and other courts.

- Works with the media to help the public understand the effect of specific cases and litigation trends on the business community.

III. The U.S. Chamber's Activities and Expertise

14. The U.S. Chamber has a well-established history of participating in litigation involving matters of law and public policy that affect business. This is particularly true at the U.S. Supreme Court, where the U.S. Chamber has participated as *amicus curiae* since 1977. At present, the U.S. Chamber is recognized as a significant organization among *amici* in the Supreme Court bar. The U.S. Chamber also files regularly before U.S. federal appeals courts and state courts.

15. At the Supreme Court level, the U.S. Chamber filed 40 *amicus* briefs in 2013 addressing a wide range of issues important to business. To illustrate, the U.S. Chamber has been involved in the following matters during the last two Supreme Court terms:

- **Class actions:** *Comcast v Behrend*, 133 S Ct 1426 (2013)
- **Arbitration:** *American Express v Italian Colors Restaurant*, 133 S Ct 2304 (2013)
- **Property rights:** *Horne v Department of Agriculture*, 133 S Ct 2053 (2013) and *Koontz v St Johns River Water Management District*, 133 S Ct 2586 (2013)
- **Transportation regulation:** *American Trucking Associations, Inc v City of Los Angeles*, 133 S Ct 2096 (2013)
- **Tax:** *PPL Corp v Commissioner of Internal Revenue*, 133 S Ct 1897 (2013)
- **Securities law:** *Gabelli v SEC*, 133 S Ct 1216 (2013)
- **Employee benefits:** *Heimeshoff v Hartford Life & Accident Ins Co*, 134 S Ct 604 (2013)
- **Forum selection clauses:** *Atlantic Marine Construction Co v U.S. District Court*, 134 S Ct 568 (2013)
- **Jurisdiction and procedure:** *Sprint Communications Co v Jacobs*, 134 S Ct 584 (2013)

16. In addition, the U.S. Chamber has recently been involved in a number of high profile cases that are relevant to this appeal:

- ***Kiobel v Royal Dutch Petroleum*, 133 S Ct 1659 (2013):** A case involving international commerce and the jurisdiction of U.S. courts. At issue was whether and under what circumstances the ATS allows U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. In the course of its submissions in the case, the U.S. Chamber addressed the foreign policy implications of making the United States a magnet jurisdiction for overseas disputes. It also argued that the significant expense and potential bad publicity enabled by allowing access to U.S. courts for alleged misdeeds in foreign jurisdictions had the potential to force settlements in unmeritorious cases. Copies of the U.S. Chamber's *amicus* briefs in the case are attached to my affidavit as **Exhibit A**.

- ***DaimlerChrysler AG v Bauman*, 134 S Ct 746 (2014):** A case involving the adjudicative jurisdiction of U.S. courts over foreign defendants. At issue was whether general adjudicative jurisdiction could be asserted over a foreign parent company based solely on the contacts of its indirectly-held subsidiary within the United States. The U.S. Chamber argued, among other things, that commerce benefits from clear rules regarding jurisdiction, and that "extraordinary assertions of general jurisdiction 'may dissuade foreign companies from doing business in the United States thereby depriving United States customers of the full benefits of foreign trade.'" Copies of the U.S. Chamber's *amicus* briefs in the case are attached to my affidavit as **Exhibit B**.

- ***Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011):** A further case involving jurisdiction. At issue was whether North Carolina was a proper jurisdiction for a personal injury claim against a foreign defendant, based on an incident that occurred in France with respect to a tire that was made in Turkey and sold in Europe. The U.S. Chamber argued that extending the categories of general jurisdiction to include merely placing products into the stream of U.S. commerce would have deleterious effects for U.S. businesses and

for foreign commercial relations. Copies of the U.S. Chamber's *amicus* brief in the case are attached to my affidavit at **Exhibit C.**

17. The U.S. Chamber views these prior cases and this appeal as significant to the general issue of "global forum shopping," which is a matter of concern to the business community that the U.S. Chamber represents.

18. Other cases in which the U.S. Chamber has been involved on the issue of global forum shopping are listed on the resources page that the Litigation Center has dedicated to the issue. A copy of that web page is attached to my affidavit as **Exhibit D.**

19. The U.S. Chamber's *amicus* briefs are widely regarded by U.S. courts, legal academics, and the media as helpful to the courts in their decision making. U.S. courts often cite the policy arguments advanced by the U.S. Chamber's *amicus* briefs in their opinions, including in jurisdictional cases, such as *DaimlerChrysler AG v Bauman* (citing the briefs of the U.S. Chamber and other *amici curiae* to justify deciding a broader jurisdictional issue). Just last month, the U.S. Court of Appeals for the D.C. Circuit expressly relied in part on the U.S. Chamber's *amicus* brief to support its decision to grant an "extraordinary writ" of *mandamus* to prohibit a lower court from abrogating the attorney-client privilege for documents related to a company's internal investigation. According to the D.C. Circuit, the U.S. Chamber's *amicus* brief "convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the privilege context, for the Supreme Court has told us that an 'uncertain privilege or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" A copy of the D.C. Circuit court's decision in *In Re: Kellogg Brown & Root, Inc* is attached to my affidavit as **Exhibit E.**

20. In addition to the U.S. Chamber's litigation activities and experience, the U.S. Chamber has also been involved in more general research and analysis that may be relevant to a determination of the present appeal. The U.S. Chamber Institute for Legal Reform, a non-profit affiliate of the U.S. Chamber, has published a position paper entitled "Taming Tort Tourism," which sets out a case for legislating a federal solution to foreign judgment recognition in the United States. A copy of that paper is attached to my affidavit as **Exhibit F.** The paper explains

the varied approaches that have been taken to recognition and enforcement of foreign judgments among the various U.S. states.

21. The "Taming Tort Tourism" paper builds on testimony delivered to the U.S. Congress on behalf of the U.S. Chamber and the U.S. Chamber Institute for Legal Reform in 2011 on the subject of global forum shopping. A copy of that testimony is attached to my affidavit as **Exhibit G**. The research and testimony provided in Exhibits F and G describes a wider trend of the pursuit of tort lawsuits in weak or corruptible foreign courts in order to secure large awards, after which the prevailing parties attempt to legitimize the judgments in countries with liberal rules favoring recognition of foreign judgments.

22. For example, the U.S. Chamber's testimony and research discussed a tort judgment obtained in Nicaragua against U.S. companies based on "Special Law 364," which was passed by Nicaragua in 2000 to create an irrefutable presumption of causation, and to impose minimum damages far in excess of existing law. In all, more than 10,000 Nicaraguan plaintiffs obtained over $2 billion in judgments against U.S. companies under this law, which the plaintiffs have sought to enforce in the United States. Every U.S. court that has considered the Nicaraguan judgments has refused recognition on the basis of the fundamental unfairness in the Nicaraguan legal process. The litigants, unable to secure recognition in the United States, have begun proceedings in foreign jurisdictions with more lenient approaches to judgment enforcement. If such global forum shopping techniques are successful in one instance, the strategy may become a roadmap for future cases.

23. The U.S. Chamber's knowledge of the history of this trend, the different jurisprudential approaches to the enforcement of foreign judgments, and the deficiencies that have been noted in more lenient jurisdictions, may assist this Court in evaluating the potential ramifications of its decision in this case.

24. The U.S. Chamber has previously been involved as *amicus* on behalf of the broad business community in a number of U.S. decisions concerning the same Ecuadorian judgment against Chevron Corporation at issue in the present appeal (which are listed on the web page attached as Exhibit D).

V. The U.S. Chamber has a Demonstrated Interest in the Issues on this Appeal

25. The resolution of the appeal in this case may require this Court to determine whether a foreign judgment may be recognized and enforced in Canada notwithstanding that the judgment debtor has no past, present or realistically-anticipated future connection to the forum. If connections between the judgment debtor and the forum are required, this Court will also have to determine whether the connections of an indirect subsidiary to the forum can suffice.

26. As indicated by the initiatives and activities described above, the U.S. Chamber has already given significant consideration to both of these issues. Both issues are also matters of profound and far-reaching impact that transcend the immediate interests of the parties. Indeed, the U.S. Chamber believes that a determination of these issues may affect Canada/U.S. trade and foreign direct investment, and since Canada is the United States' most significant trading partner, any such effect is a matter of utmost concern to the U.S. Chamber and its members.

27. As a result, I believe that the U.S. Chamber has a demonstrated interest in this appeal.

VI. The U.S. Chamber Has a Useful and Different Perspective

28. A U.S. perspective may be useful to this Court's consideration of the comity and cooperation among countries with a major trading relationship.

29. If granted leave to intervene in this appeal, the U.S. Chamber intends to provide submissions from a policy perspective, and highlight the practical business and political implications that can be expected if actions for recognition and enforcement of foreign judgments are permitted in circumstances where the judgment debtor has no contact with the recognizing forum. The facta of the appellants refer to some of these effects. However, as noted above, the U.S. Chamber has extensive experience in addressing the very same issue in the United States, and is well-suited to elaborate on those implications based on the U.S. experience.

30. In particular, the U.S. Chamber will argue that an overly expansive assertion of jurisdiction in the recognition and enforcement context raises similar concerns to the misuse of ATS claims in the United States to exert jurisdiction for non-judicial and often political purposes (a practice that has now been curtailed as a result of the Supreme Court's decision in *Kiobel*). The U.S. Chamber will argue that just as an expansive reading of jurisdiction under the ATS

deterred investment in developing countries, an expansive conception of jurisdiction in the recognition and enforcement context would provide a strong disincentive for foreign companies to do business in the recognizing forum, and could cause them to direct their investments to alternate markets with more predictable legal risks. The Chamber will explain that expansive enforcement jurisdiction would deter companies from establishing subsidiaries in the forum, hiring independent contractors based in the forum, or engaging in transactions with domestic distributors and other business partners. In short, the U.S. Chamber will show that foreign investment and cross-border trade would suffer.

31. In the U.S. Chamber's view, permitting recognition and enforcement actions without a connection to the forum would subject companies to the needless expense of defending a multiplicity of foreign proceedings that have no legitimate legal purpose for the judgment creditor (since, by definition, the judgment debtor has no assets there). Moreover, such actions often have the design, and the effect, of pressuring the foreign company to settle even meritless claims as a result of the publicity that may attend the imprimatur of a respected court on a foreign judgment that could otherwise lack credibility. For example, the U.S. Chamber will explain that, in the U.S. experience, several suits involving allegations of foreign wrongdoing have been timed to coincide with important dates for publicly-traded companies, with the apparent hope that settlement pressure could be exerted through the effect of negative publicity on share prices.

32. Many of the risks of an overly-expansive concept of jurisdiction, and the resulting and related issue of forum shopping, have already materialized in the United States. It is notable that U.S. courts have recently begun to take action against these abuses, and that several states have enacted legislation dealing with recognition and enforcement of foreign judgments (based on draft legislation proposed by the Uniform Law Commission in 2005) to address the risks of an overly-lenient recognition and enforcement regime. The U.S. Chamber can elaborate on this context for the benefit of the present appeal.

33. The relief sought by the U.S. Chamber will not unduly complicate this appeal, nor does the U.S. Chamber seek to adduce any evidence.

34. I make this affidavit in support of the U.S. Chamber's motion for leave to intervene in this appeal and for no other purpose.

SWORN BEFORE ME at the City of Washington D.C., in the United States of America on July 28, 2014

A Notary Public

LILY FU CLAFFEE

WILLIAM CASEY PERRY
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 31, 2018

TAB 2A

No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE
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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae*.

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket *amicus* consent letters.

organizations of every size, sector, and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court.

The Chamber has a direct and substantial interest in the issues presented in this case. Its members transact business around the world, and many of them—based on nothing more than doing business around the world—have been targeted by plaintiffs suing under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. In the past two decades, various plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations doing business in two dozen industry sectors, including agriculture, financial services, manufacturing, and communications. *See* J. Drimmer & S. Lamoree, *Think Globally, Sue Locally: Trends & Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460-462 (2011). These lawsuits have maligned business activities in more than 60 countries as alleged human-rights abuses actionable in U.S. courts. *See id.* at 464. And they have had—and have the potential to create in the future—substantial adverse effects not just on the targeted businesses themselves, but on U.S. foreign policy and on the countries where the claims originate. In light of those adverse effects, the Chamber has filed *amicus* briefs in a host of ATS cases in this Court and the lower courts. *See* National Chamber Litigation Center, *Alien Tort Statute (ATS) Cases*.[2]

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[2] *Available at* http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats.

While the Chamber takes no position as to the validity of the factual allegations in the Complaint, it unequivocally condemns violations of human rights. But the question here is not whether such wrongs occurred. Rather, it is whether private plaintiffs can reach defendants who fall outside the scope of the relevant law. The Chamber has a substantial interest in encouraging this Court to hew to its own teaching in *Sosa*: The federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004). The decision below should be affirmed.

SUMMARY OF ARGUMENT

As Respondents cogently explain, the notion that there is a customary international norm of corporate liability for alleged human-rights violations is not "debatable." *Sosa*, 542 U.S. at 728. There is no such norm. *See* Resp. Br. 27-48; *see also* Br. of Chamber of Commerce of the U.S. in Support of Defendants-Appellees 8-20, *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (No. 10-3675).[3] But even if the Court could somehow discern such an international norm, it would be inappropriate to apply it through the mechanism of the ATS. *Sosa* also taught, after all, that "[t]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to

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[3] *Available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Flomo,%20et%20al.%20v.%20Firestone%20Natural%20Rubber%20Co.,%20et%20al.%20(NCLC%20Brief).pdf.

litigants in the federal courts." 542 U.S. at 732-733. Those "practical consequences" cut sharply against recognizing corporate ATS liability.

First, ATS suits against corporations are often based on nothing more than allegations that the corporations did business in countries where human rights abuses are known to occur. Such suits seek, in other words, to punish companies for—and thus deter them from—engaging in commerce with troubled nations. But there is a term for those sorts of deterrents: economic sanctions. And economic sanctions fall squarely within the purview of the political branches. The prospect of multitudes of private plaintiffs—hailing from other countries throughout the world—who attempt to shape American foreign policy through *ad hoc* ATS litigation is precisely the sort of "practical consequence" that counsels against extending ATS liability. *Id.*

Second, ATS lawsuits against corporations certainly threaten to harm corporations, but they also threaten to harm the countries where those corporations do business. Complaints asserting ATS claims impose a severe social stigma that may scuttle stock values or destroy debt ratings; they often require extraordinarily burdensome overseas discovery; they take many years to litigate; and they result in coerced settlements. These are harms that corporations will, naturally, take concrete steps to avoid. As a result, if this Court endorses corporate ATS litigation, corporations will divest from countries with tarnished human-rights records—a potentially catastrophic result for the countries that need that investment most. And once again U.S. foreign policy will suffer as well; for the federal government has aggressively promoted a policy of using commercial

engagement to help developing nations along the path to democracy.

Third, corporate ATS liability can harm the domestic economy, too, by tightening the spigot of foreign investment in the United States. After all, foreign companies in our global economy often have ties to the United States that suffice—at least in the view of some courts—to give the federal courts jurisdiction over alleged overseas ATS violations. Thus under plaintiffs' ATS theories, a foreign corporation can be brought into U.S. courts for alleged activity in a third country. The best—and in some cases the only—way for a foreign company to insulate itself from that risk is to avoid the U.S. market altogether, thus making it impossible for a federal court to assert *in personam* jurisdiction over it.

In short, we agree with Respondents that corporate ATS liability for the offenses alleged here does not comport with customary international law. But even if the question were close, the "practical consequences" of such a regime would counsel against its adoption. The decision below should be affirmed.

ARGUMENT

I. CORPORATE ATS SUITS RISK DANGEROUS ALTERATIONS OF FOREIGN POLICY THROUGH LITIGATION.

1. The first two centuries of the ATS saw no recorded lawsuit against a corporate defendant. Now, however, there are scores of ATS actions pending or recently decided in the federal courts, the vast majority of which involve corporate defendants.[4] In many

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[4] *See, e.g.*, *Arias* v. *DynCorp.*, 517 F. Supp. 2d 221 (D.D.C. 2007); *Baloco* v. *Drummand Co.*, 631 F. 3d 1350 (11th Cir.

of those cases, the plaintiffs' allegations boil down to this: The defendant corporation did business in a nation known to have a tarnished human-rights record—a category that unfortunately includes many developing countries throughout the world.[5] For example, in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010), the plaintiffs alleged that an energy company "understood that the [Sudanese] Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that understanding that to be so, [the company] should not have come." *Id.* at 261 (quoting district court opinion; alteration in original). As the court of appeals recognized, the actual corporate activities

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2011); *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011); *In re Chiquita Brands Int'l Inc.*, No. 10-CV-80954 consolidated (S.D. Fla.) (six actions); *Doe* v. *Cisco Systems, Inc.*, No. 11-cv-2449 (N.D. Cal.); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (No. 01-CV-01357 (D.D.C.)); *Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010); *Daobin* v. *Cisco Systems, Inc.*, No. 11-cv-01538-PJM (D. Md.); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Kiobel, supra*; *Mujica* v. *Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Obe* v. *Royal Dutch Shell PLC*, No. 2:11-cv-14572 (E.D. Mich.).

[5] Although many ATS suits are brought on an aiding-and-abetting or doing-business theory of liability, that is not always the case; in some suits, plaintiffs claim that a company directly engaged in human-rights violations overseas. *See, e.g.*, *Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*, 517 F.3d 104, 112-114 (2d Cir. 2008) (alleging that a U.S. chemical company violated international norms in manufacturing Agent Orange). The practical consequences of ATS liability we discuss here—such as impact on U.S. foreign policy, *infra* at 8-11—are equally applicable to direct-action theories of ATS liability.

the plaintiffs identified in their complaint—for example, scouting out sites for their physical plant—"generally accompany any natural resource development business or the creation of any industry." *Id.*

Likewise, in *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.*, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008), plaintiffs sued a host of manufacturing, financial, and other companies, arguing that by doing otherwise lawful business in apartheid-era South Africa they helped prolong apartheid. *See also Balintulo* v. *Daimler AG*, No. 09-2778-cv (2d. Cir.) (alleging that companies aided and abetted the apartheid-era South African government's human-rights abuses). In *Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007), plaintiffs argued that a manufacturer should be held liable under the ATS because its bulldozers were purchased by the Israel Defense Force and allegedly used to commit human rights violations. And in *Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), *appeal pending*, No. 10-56739 (9th Cir.), plaintiffs alleged that three multinational corporations should be held liable for providing "logistical support" to farming activities in Côte d'Ivoire, including agreeing to purchase cocoa from various farms and providing farming supplies. The plaintiffs claimed that those workaday business actions were enough to trigger ATS liability because the companies should have known that some Ivorian farmers might end up using child labor and involuntary labor on their farms. First Am. Compl., *Doe* v. *Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 22, 2009). The plaintiffs did not allege that the defendant companies

participated in any way in the alleged imprisonment or abuse; as the district court found, "the overwhelming conclusion" is that the companies were merely "purchasing cocoa and assisting the production of cocoa." *Doe*, 748 F. Supp. 2d at 1109.

2. These cases—and many others too numerous to recount here—are essentially bids to block corporations from investing in, or doing business in, countries with poor human-rights records. *See Talisman Energy*, 582 F.3d at 261 (plaintiffs' allegations "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan") (quoting District Court opinion). Such efforts have a pair of interrelated adverse effects on foreign policy. First, as this Court has recognized, they may interfere with the domestic-policy prerogatives of foreign nations. *See Sosa*, 542 U.S. at 733 & n.21. Developing countries emerging from periods of human-rights turmoil often seek reconciliation through nonjudicial means. *See id.* at 733 n.21 (noting South Africa's objection that ATS litigation interfered with the work of its Truth and Reconciliation Commission). ATS lawsuits risk usurping those countries' considered decisions that a non-adversarial process is the best way to heal the wounds of past conflict.

Second, as the *Talisman Energy* court recognized, plaintiffs' efforts to block corporate investment in countries with tarnished human-rights records amount to an attempt "to impose embargos or international sanctions through civil actions in United States courts." 582 F.3d at 264. That is an inappropriate use of the federal judiciary.

To let federal courts—at the behest of ATS plaintiffs located half a world away—dictate *ad hoc* foreign policy would place federal courts well outside of their constitutional responsibilities. It is well settled that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); *accord Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). That distribution of authority holds true with respect to economic sanctions just as with other aspects of foreign affairs: The Legislative branch typically authorizes sanctions, and the Executive then implements them according to the terms Congress has fashioned. *See, e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 374 (2000) (discussing statute that gave the President "flexible and effective authority over economic sanctions against Burma"). The International Emergency Economic Powers Act, for example, authorizes the President to impose peacetime sanctions but "subject[s] the President's authority to a host of procedural limitations." *United States* v. *Amirnazmi*, 645 F.3d 564, 572 (3d Cir.), *cert. denied*, 132 S. Ct. 347 (2011). Those limitations exist "to ensure Congress would retain its essential legislative superiority in the formulation of sanctions regimes erected under the Act's delegation of emergency power." *Id.*; *see also* S. Maberry, *Overview of U.S. Economic Sanctions*, 17-WTR Currents: Int'l Trade L.J. 52, 52 (2008) (sanctions themselves "generally are imposed by the President through the issuance of an Executive Order," though Congress will sometimes "impose sanctions directly"); *Crosby*, 530 U.S. at 374.

The key point is that questions about whether and how to impose sanctions are to be decided by Congress and the President—not the Judiciary, and certainly not private alien plaintiffs pursing their own idiosyncratic agendas. The political branches can calibrate sanctions to the circumstances they are meant to address. And as we discuss *infra* at 28, they can use the threat of sanctions together with economic-engagement strategies to achieve maximum effect. Courts can do neither. Precisely because sanctions fall squarely within the "foreign affairs powers" of the political branches, *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1983 (2011), this Court has rejected attempts to use the federal judiciary to interfere in decisions regarding when to—and when not to—impose sanctions. *See, e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984); *see also Diggs* v. *Shultz*, 470 F.2d 461, 465 (D.C. Cir. 1972). As the D.C. Circuit explained, the decision to discontinue sanctions against a foreign country "present[s] issues of political policy which courts do not inquire into." *Diggs*, 470 F.2d at 465.

Those precedents underscore the dangerous "practical consequences" of using the ATS to deter transnational business activities. *Sosa*, 542 U.S. at 732-733. The Executive branch has long maintained that "sanctions measures [must be] well conceived and coordinated, so that the United States is speaking with one voice," lest an uncoordinated effort "put the U.S. on the political defensive." *Crosby*, 530 U.S. at 382 n.16 (quoting *Testimony of Under Secretary of State Eizenstat before the Trade Subcommittee of the House Ways and Means Committee* (Oct. 23, 1997)). But ATS litigants regularly seek just such uncoordinated, *de facto* sanctions regimes: Litigant after

litigant has sought to make his or her own foreign policy by punishing corporations for investing in troubled nations and thus deterring other corporations from similar investments. That is "a direct challenge to U.S. foreign policy leadership." E. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 153 (2003). And even if that "direct challenge" does not render a particular ATS case non-justiciable, *cf. Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 88-89 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), the fact that conflicts arise again and again certainly amounts to an adverse "practical consequence" that undermines the coherence of U.S. foreign policy. *Sosa*, 542 U.S. at 732. This consequence weighs against any finding that the purported corporate-liability norm is "sufficiently definite to support a cause of action." *Id.*

3. The Solicitor General has decided to support the Petitioners in this particular case. His brief, however, ignores the problems that an *ad hoc* sanctions mechanism can create for United States foreign policy—a notable omission, given *Sosa*'s command that "practical consequences" are central to the ATS analysis. 542 U.S. at 732. It is unclear whether the Solicitor General sees no adverse practical consequences or has not considered them. But in any event, even if the Department of Justice were willing to accept the foreign-policy consequences that accompany corporate ATS liability, that would not mean *Congress* is similarly willing to do so. That is an important distinction, given that Congress shares in the constitutional authority to craft sanctions regimes. *See supra* at 9. And that Congressional prerogative takes on additional significance in light of the fact that the Office of the Solicitor General has

long insisted, in this Court and others, that the foreign-policy consequences of broad ATS liability are *not* acceptable.

In *Sosa*, for example, the Solicitor General told this Court that ATS suits "may frustrate if not displace the efforts of the political branches to address international events or foreign policy issues by speaking with *one* voice[.]" Br. for the United States as Respondent Supporting Petitioner at 43, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581. In *Enahoro* v. *Abubakar*, 408 F.3d 877 (7th Cir. 2005), the Justice Department emphasized that ATS litigation has "serious consequences for both the development and expression of the Nation's foreign policy." Br. for the United States as Amicus Curiae at *1, 2004 WL 5706063. In *Mujica* v. *Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009), the Department of Justice explained that corporate ATS lawsuits brought under an aiding-and-abetting theory "could be the basis for a wide range of claims" that indirectly, and inappropriately, seek "to challenge the lawfulness of a foreign government's conduct." Br. of the United States as Amicus Curiae in Support of Affirmance, 2006 WL 6202351. And in *Ntsebeza*, the Solicitor General told this Court that ATS "[l]itigation such as this would also interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." Br. for the United States as Amicus Curiae in Support of Petitioners at *21, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389 ("*Ntsebeza Brief*"). He offered this example:

> [I]n the 1980s, the United States supported economic ties with black-owned companies and urged companies to use their influence to press for change away from apartheid, while at the same time *using limited sanctions* to encourage the South African government to end apartheid. Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence. [*Id.* (emphasis added)].

Our point exactly. Corporate ATS liability has the effect of empowering *civil litigants*—aliens suing in U.S. courts—to curtail U.S. economic interactions with foreign nations. The Solicitor General has long recognized the potential for mischief that such a species of liability invites.[6] Under *Sosa*, and despite the Solicitor General's new views, those factors continue to militate against recognizing corporate ATS liability.

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[6] The Solicitor General's brief in this case generally fails to acknowledge the striking degree to which its current position is at war with the one it took just a few years ago in *Ntsebeza*. The Solicitor General at that time told this Court that the ATS does not authorize aiding-and-abetting liability, *id.* at *8, and cannot be applied extraterritorially. *Id.* at *12. The Solicitor General also cited with approval the district court's conclusion that "[i]n a world where many countries may fall considerably short of ideal economic, political, and social conditions," the courts "must be extremely cautious in permitting suits * * * based upon a corporation's doing business in countries with less than stellar human rights records[.]" *Id.* at *3. Each of those positions counsels in favor of affirmance here.

II. CORPORATE ATS LIABILITY HARMS DEVELOPING COUNTRIES BY DETERRING CORPORATE INVESTMENT.

The long shadow of corporate ATS liability also has a second adverse "practical consequence[]": the extraordinary expenses and risks associated with such liability. These expenses and risks harm defendant corporations regardless of whether those corporations have done anything wrong. And those harms, in turn, create important secondary effects: They deter corporate investment in developing countries, retarding those countries' growth and further undercutting executive branch policies that encourage economic engagement abroad.

A. The Potential For ATS Liability Presents Extraordinary Risks For Corporations Considering Foreign Investment.

Petitioners downplay the extraordinary corporate risks engendered by ATS litigation, suggesting in a footnote that "a relatively small number of cases are pending" and that they "constitute an insignificant portion of the dockets of federal courts." Pet. Br. 57 n.55, 60; *see also* Amicus Br. of Joseph Stiglitz 5. Not so. Plaintiffs have filed more than 125 ATS cases against corporate defendants in the past 15 years alone,[7] dozens remain pending, and those suits have sought as much as *$400 billion* in damages. J. Auspitz, *Issues in Private ATS Litigation*, 9 Bus. L. Int'l 218, 220 (2008). But beyond those absolute values, petitioners ignore many other reasons why ATS litigation "presents a danger of vexatiousness different in degree and in kind from that which

[7] Drimmer, 29 Berkeley J. Int'l L. at 460.

accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). That danger is especially significant here given the need in the ATS context to examine the "practical consequences" of adopting a plaintiff's theory. *Sosa*, 542 U.S. at 732.

1. The mere filing of an ATS case can topple corporate stock values and debt ratings. *See* J. Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Poly. J. 60, 63 (2004). To be sure, other litigation may carry some of that risk if a corporation faces an extraordinarily lurid accusation or an unusually sweeping class action. But here, of course, the Court has *required* an examination of the practical consequences of the rule plaintiffs seek. Moreover, the burden is particularly pronounced in ATS cases for several reasons. ATS cases tend to feature extreme allegations—genocide, torture, slavery—as a matter of course. Needless to say, those allegations can inflict significant damage on a business's reputation, regardless of whether the business has done anything wrong. And courts have permitted ATS lawsuits based on vague allegations of wrongdoing and have employed variable, unpredictable legal standards regarding third-party liability. *See* Chamber of Commerce Br. as Amicus Curiae in Support of Petitioners at *13-*17, *Rio Tinto PLC* v. *Sarei*, No. 11-649 (9th Cir. Dec. 28, 2011), 2011 WL 6859447. That uncertainty invites stigmatizing lawsuits that are hard to dismiss even when the allegations are dubious at best.

ATS plaintiffs themselves understand quite well that even vexatious lawsuits can taint corporations doing business abroad, damage corporate identities,

and chill foreign investment. *See* C. Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009). Indeed, plaintiffs have exploited those dynamics as part of their overall litigation strategy. To take just two examples of many: In the *Doe* case, press releases and demonstrations just before Halloween and Valentine's Day urged parents and children to refuse to purchase chocolate candy from the defendant corporations because it was allegedly the product of "child slavery"—with the pending ATS action cited as support for that claim. *See, e.g.*, D. Orr, *Slave Chocolate?*, Forbes, Apr. 24, 2006;[8] A. Buffa, *Chocolate's Horror Show* (Oct. 31, 2006).[9] And in a case against Coca-Cola based on the alleged activities of its subsidiaries in Colombia, the plaintiffs and their lawyers launched protests at the company's shareholder meetings. *See* Drimmer, 29 Berkeley J. Int'l L. at 517. The news that the company was being accused of murder and torture prompted some shareholders to quickly dump Coca-Cola stock, even though the case ultimately was dismissed. Kurlantzick, 21 World Poly. J. at 63-64; *see Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009). That sort of reputational harm is different in kind from the publicity accompanying a run-of-the-mill commercial or tort suit.

2. Because ATS claims typically relate to conduct occurring in distant corners of the globe, the discovery process can be unusually expensive and burdensome. *See* G. Hufbauer & N. Mitrokostas, *Interna-*

[8] *Available at* http://www.forbes.com/forbes/2006/0424/096.html.

[9] *Available at* http://www.tompaine.com/articles/2006/10/31/chocolates_horror_show.php.

tional Implications of the Alien Tort Statute, 7 J. Int'l Econ. L. 245, 253 (2004) ("*International Implications*") (describing "massive costs" associated with ATS lawsuits). As this Court has recognized, the costs involved in complex civil litigation like ATS cases give plaintiffs an "*in terrorem* increment of the settlement value." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). The burdens can be greater than usual in ATS litigation for at least two reasons.

First, "obtain[ing] discovery from foreign sources" almost invariably is an "expensive, cumbersome, and difficult" process—one that often renders the litigation as whole "prohibitively expensive and resource-consuming." M. Chalos, *Successfully Suing Foreign Manufacturers*, Trial, 44-NOV Trial 32 (Nov. 2008). Second, the usual difficulties of overseas discovery are magnified in ATS cases. "Witnesses and documents are overseas, typically in remote locations and developing countries." Auspitz, 9 Bus. L. Int'l at 221. "[S]uits often involve dozens of defendants, their interactions with each other and government agencies, claims going back dozens of years, documents in foreign languages, and similar logistical hurdles." *Id.* Discovery is therefore "vastly expensive." *Id.* Courts and commentators have recognized as much, observing that discovery in ATS cases is "costly and time-consuming," A. Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 Fordham L. Rev. 2177, 2208 (2008), and imposes "financial hardships" and "significant delays" on parties and courts alike. *Turedi* v. *Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009); *accord Mujica* v. *Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134,

1152 (C.D. Cal. 2005) ("significant cost and delays" caused by need for translation of foreign documents).

A few examples illustrate the problem. Chiquita Brands International, in defending against an ATS suit, recovered over $8 million for defense costs from just one of its five insurers. Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q), at 23 (Nov. 7, 2011). And in the Unocal ATS litigation, the company's legal bill ran to $15 million—and that case was not even a class action. Auspitz, 9 Bus. L. Int'l at 221. As one commentator observed: "Where plaintiffs and defendants are more numerous than in *Unocal*, and the challenged conduct more complex, the costs of litigation might make the $15 million Unocal reportedly spent look like a bargain." *Id.*

These sorts of expenses can accompany ATS litigation even in developed countries where formal methods of obtaining discovery for use in the United States—for example, the Hague Convention procedures—are available. *See* P.J. Youngblood & J.J. Welsh, *Obtaining Evidence Abroad: A Model for Defining & Resolving the Choice of Law Between the Federal Rules of Civil Procedure & the Hague Convention*, 10 U. Pa. J. Int'l Bus. L. 1, 46-47 (1988) (cost of complying with Hague Convention formalities is "exceedingly high"). And with respect to undeveloped countries—from where virtually all ATS cases take root—those nations are often not signatories to the conventions. Parties accordingly are stuck with relying on letters of request from U.S. courts to foreign ones—requests that often go unheeded due to unequipped, or even corrupt, judiciaries. *See* L.J. Dhooge, *A Close Shave in Burma*, 24 N.C. J. Int'l L. & Com. Reg. 1, 53-54 (1998) (discussing difficulties in obtaining evidence from Burma in ATS cases); U.S.

Dep't of State, *Preparation of Letters Rogatory* (warning that execution of a letter of request may take "a year or more worldwide").[10] That means "delays, increased costs, a narrower scope of discovery, and loss of control of the process, all of which may prove prejudicial to [d]efendants." Dhooge, 24 N.C. J. Int'l L. & Com. Reg. at 54. Meanwhile, the specter of large amounts of monetary liability (and negative publicity) will hang over a company for years.

3. ATS cases also inevitably take years to litigate, even just to the point of a ruling on dismissal motions. One reason, of course, is that litigation at the motion-to-dismiss stage often requires the court and the parties to explore complex issues of international law. And ATS plaintiffs have been creative in identifying novel "norms" for the courts to consider. "[R]ecognizing the elasticity of the term 'law of nations,' " plaintiffs "have brought suits alleging that the following acts violate the 'law of nations': * * * environmental harms; violations of cultural, social, and political rights; breach of a duty to provide the best proven diagnostic and therapeutic treatment; and breach of a duty to treat with dignity." *International Implications*, 7 J. Int'l Econ. L. at 249. No doubt many of these claims are meritless. But they may not be " 'frivolous' in the legal sense because of the expansive reading courts have given the ATS." *Id.* They therefore drag on, with the parties conducting preliminary discovery and enlisting the assistance of experts and *amici* even before the case has survived a motion to dismiss.

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[10] *Available at* http://travel.state.gov/law/judicial/judicial_683.html.

The result is massive briefing and extensive delays. In *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), for example, a jury verdict came after 10 years of litigation. And in the *Doe* case involving Côte d'Ivoire chocolate, it took five-plus years and multiple rounds of briefing before the district court even ruled on the motion to dismiss. *See* 748 F. Supp. 2d 1063. That decision is now up on appeal—an appeal that has already drawn a passel of *amicus* briefs and that could take years to resolve in its own right. As one commentator has put it: "Multinational corporations will spend millions of dollars moving these cases through motions and procedures and changing forums[.]" R. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 Ariz. L. Rev. 797, 820-821 (2010).

4. All of these factors—the stigma of human-rights allegations, the unique burdens of overseas discovery, and the prospect of lengthy litigation—make ATS suits particularly effective vehicles to coerce settlements from corporate "deep pockets," even in meritless actions. *See* Holzmeyer, 43 Law & Soc'y Rev. at 291; *Khulumani*, 504 F.3d at 295 (Korman, J., dissenting) (characterizing ATS litigation in that case as "a vehicle to coerce a settlement").

As this Court has recognized, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value * * * out of any proportion to its prospect of success at trial so long as [the plaintiff] may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740. Indeed, "cost and delay, or threats of cost and delay, can themselves force parties to settle underly-

ing disputes." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). Given the stigma that can attach to even a baseless ATS complaint, *see supra* at 15-16, it is all the more likely that a business might make the rational—but costly—decision to settle a claim just to avoid years of expense and burden. Myriad members of the Chamber have had the misfortune of being targeted—often repeatedly—by such lawsuits. Faced with the prospect of a "decade or more litigating, extensive world-wide discovery and seemingly endless procedural motions, coupled with the likely prospect of negative and graphic publicity campaigns," some companies choose to settle even dubious ATS claims. J. Cowman, *The Alien Tort Statute—Corporate Social Responsibility Takes On A New Meaning*, Metro Corp. Couns., July 1, 2009.[11]

In the last few years alone, several corporate ATS cases have settled for well over $10 million. Unocal, for example, reportedly settled its ATS case for $30 million. *See* P. Magnusson, *A Milestone for Human Rights*, Bus. Wk., Jan. 24, 2005.[12] Shell settled an ATS case against it for $15.5 million. *See* J. Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. Times, June 9, 2009.[13] And various American clothing manufacturers settled an ATS case involving labor conditions in Saipan for $20

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[11] *Available at* http://www.metrocorpcounsel.com/articles/11491/alien-tort-statute-corporate-social-responsibility-takes-new-meaning.

[12] *Available at* http://www.businessweek.com/magazine/content/05_04/b3917113_mz017.htm.

[13] *Available at* http://www.nytimes.com/2009/06/09/business/global/09shell.html.

million. J. Strasburg, *Saipan Lawsuit Terms OK'd: Garment Workers to Get $20 Million*, S.F. Chron., Apr. 25, 2003, at B1.[14] These examples, of course, are only the settlements that have managed to become public. Yet they suggest a cause of action sufficiently vague, broad, and burdensome that ATS plaintiffs are able to force corporations to pay millions of dollars to short-circuit cases rather than launch long fights to seek vindication. These risks and expenses to U.S. businesses—and the jobs and communities they support—are alone a sufficient "practical consequence[ ]" to reject expanded ATS liability. *Sosa*, 542 U.S. at 732.

B. The Risks Of Being Sued Under The ATS Can Chill Investment And Damage Developing Countries.

For the reasons set forth above, some U.S. corporations faced with the pall of ATS liability will withdraw from developing markets. And that will inevitably disrupt the U.S. economy in ways Congress never could have envisioned or intended. In the global marketplace, developing countries supply an important source of raw materials and eventually serve as export markets for U.S. business. *See* U.S. Chamber of Commerce, *Africa Business Initiative, A Conversation Behind Closed Doors: Inside the Boardroom: How Corporate America Really Views Africa* 5 (May 2009).[15] Without these sources of raw materials, U.S. businesses will find their supply chains

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[14] *Available at* http://articles.sfgate.com/2003-04-25/business/17486250_1_san-francisco-s-levi-strauss-saipan-rubin-factory-workers.

[15] *Available at* http://www.uschamber.com/sites/default/files/international/africa/files/abi_ceo_suvey.pdf.

snarled, their costs increased, and their ability to employ American workers jeopardized.

But corporate withdrawal from developing markets also produces a second, closely related adverse effect: The loss of direct foreign investment can severely harm developing nations themselves. Many rely on foreign investment to provide the income and political stability they need to develop democratic institutions and economic self-sufficiency; without that investment, their progress may be stopped or reversed. That is just the sort of unintended cross-border effect that led this Court in *Sosa* to counsel "caution," "restraint," and "vigilance" when asked to expand the ATS's scope. 542 U.S. at 726-729.

1. It is no exaggeration to say that any corporation that sets foot in a developing country—and some that do not—risk being sued under the ATS. "Since human rights, political and economic freedoms, and absence of corruption are highly correlated with per capita income, it is not surprising that target countries [for ATS litigation] are by and large poor countries." G. Hufbauer & N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, at 15-16 (2003) ("Hufbauer"). Given the theories of liability advanced by ATS plaintiffs—including theories in which business presence, with little more, suffices to trigger multi-million-dollar claims—any corporation that actually sets up operations in such a country surely is at risk. *See id.*

But the risk runs deeper still. That is because "all companies whose supply chains or distribution markets reach into developing countries are suspect" under plaintiffs' ATS theories. Schrage, 42 Colum. J. Transnat'l L. at 159. Foreign direct investment by

corporations likewise can trigger ATS liability under these theories. And "private lenders, particularly international banks, are surely at risk," given that they could be accused of lending to foreign businesses or regimes with knowledge that those regimes engage in some activity that can be packaged and branded as a violation of international law. *Id.* at 17. As one study noted: "The total public debt of target countries is now $1,229 billion; more than half represents credit extended by private creditors. It is no exaggeration to say that every major international bank is exposed to ATS liability." *Id.*

Just recently, the Solicitor General warned that an ATS regime featuring corporate and aiding-and-abetting liability would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." *Ntsebeza Brief*, 2008 WL 408389, at *20. That remains true today. And the effect of that deterrent is clear enough: At the margins, it will dissuade corporations from "investing in countries with a poor human rights record." D. Diskin, Note, *The Historical & Modern Foundations for Aiding & Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809 (2005). Indeed, "[e]ven the unstated threat of future ATS suits might dissuade some corporations from doing business in ATS magnet countries," *International Implications*, 7 J. Int'l Econ. L. at 249-250, while actual adverse ATS decisions would likely "prompt firms to disinvest en masse." Hufbauer, *supra*, at 40.[16]

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[16] The *amicus* brief of Joseph Stiglitz calls these concerns "little more than hyperbole," Br. 5, but the arguments it offers to

2. Corporate ATS liability does not simply deal a severe blow to businesses expanding into new markets; it also deals a severe blow to the target country itself. "Since the Second World War, trade has been an engine of world growth." *Id.* at 42. And trade between the United States and developing nations, and U.S. investment in those nations, is a major factor in facilitating the economic growth of developing nations. *See U.S.-Africa Trade Relations: Creating a Platform for Economic Growth: Joint Hearing Before the H. Comm. on Energy and Commerce and the H. Comm. on Foreign Affairs*, 111th Cong. (2009) (statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa). That growth promotes the development of stable political institutions. And stable political institutions, in turn, create the conditions for further foreign investment. *See* Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002).

ATS suits against corporations can destroy that cycle. Such suits, and the threat of them, tend to

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support that assertion are insubstantial. Professor Stiglitz argues that "the risk of liability" is "just one among many considerations that drive investment decisions," *id.*, but that does not answer our point—that at the margins, firms that might otherwise have invested in a country will be dissuaded by potential ATS claims. And he argues that "although corporations have faced the specter of ATS liability for more than a decade, there is little empirical evidence that it has had any impact on foreign direct investment." *Id.* at 5-6. But that ignores the fact that the frequency of ATS suits has grown exponentially in recent years, *see supra* at 5, and no doubt would explode if this Court were to confirm that corporate liability is available. That adverse effects have thus far been difficult to measure does not mean they would remain so in a world where the risk of ATS liability is impossible to ignore.

curtail trade and investment for the reasons just discussed. *See* Letter from William H. Taft, Legal Adviser, U.S. Dep't of State, to Daniel Meron, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice (Dec. 3, 2004) (corporate ATS lawsuit in Colombia could "deter[ ] present and future U.S. investment in Colombia" and "damage the stability of Colombia").[17] But they can also mean "access denied to international credit markets" because "[c]ountries on the losing side of ATS cases will find that bank credit and bond placements are more difficult." Hufbauer, *supra*, at 43. ATS suits, in short, "will damage target countries[.]" *Id.* at 42. As the Department of Justice has explained, that disincentive "adversely affect[s] U.S. economic interests as well as economic development in poor countries." Br. for the United States as Amicus Curiae Supporting Appellees at *9-*10, *Balintulo* v. *Barclay Nat'l Bank Ltd.*, No. 09-2778-cv (2d Cir. Nov. 30, 2009), 2009 WL 7768609. The consequences are stark. As the Solicitor General emphasized in the past, deterring foreign investment due to ATS litigation " 'could have significant, if not disastrous, effects on international commerce.' " *Ntsebeza Brief*, 2008 WL 408389 at *3 (quoting district court opinion).

Worst of all, after companies abandon developing countries in response to ATS risks, the human-rights situation in the country is unlikely to improve. Talisman Energy's withdrawal from the Sudan in response to ATS pressure is a chilling example. While Talisman was in the country, it hired PriceWaterhouse Coopers to help verify compliance with

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[17] *Available at* http://www.state.gov/s/l/2004/78089.htm. This letter was filed in the docket in *Mujica*, 381 F. Supp. 2d 1164.

its voluntary adoption of the International Code of Ethics for Canadian Businesses. S.J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 444 (2004). It also "engaged in extensive community development efforts, including building hospitals, clinics, schools and wells" where it operated. *Id.* Yet in the wake of continuing pressure—including an ATS suit—it finally sold its assets and left Sudan. *Id.* at 426. For the activists who orchestrated a massive campaign against Talisman, this should have been a tremendous victory. The reality was much bleaker. The vacuum produced by Talisman's departure has been filled by Chinese companies that take an official policy of "noninterference in domestic affairs"—a polite way of saying China will not interfere with local regimes' oppression of their populations. *See* S. Hanson, Council on Foreign Relations, *Backgrounder: China, Africa, and Oil* (Jun. 6, 2008);[18] *see also* Council on Foreign Relations, *More Than Humanitarianism: A Strategic U.S. Approach Towards Africa* 43 (2006) (describing how "China * * * quickly filled the gap" after Talisman and other Western companies departed the Sudan).

3. The deterrent effect ATS litigation has on foreign investment also underscores a second and related way in which corporate ATS liability impinges on U.S. foreign policy: It impedes the political branches' informed choice to encourage investment in certain strategically important nations.

The business community plays a central role in the effective execution of U.S. foreign policy. As this Court has explained, the President's power to per-

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[18] *Available at* http://www.cfr.org/china/china-africa-oil/p9557.

suade other nations rests on his capacity "to bargain for the benefits of access to the entire national economy." *Crosby*, 530 U.S. at 381. When the political branches decide to promote trade with another nation, American businesses can and frequently do export their goods. And when the political branches decide to permit investment in a country with a problematic human rights record, as a means of advancing U.S. interests or helping that country along the road toward stability, American businesses can and frequently do make the investment.

Petitioners' theories of corporate ATS liability fly in the face of that constructive-engagement strategy. If their theories were correct, then private plaintiffs—alien plaintiffs who may have no connection at all to the United States—could pull the rug out from under the United States' efforts to bolster trade with carefully selected foreign nations. As the Solicitor General recently told this Court: "[I]n certain circumstances, the U.S. government may determine that * * * limited commercial interaction is desirable in encouraging reform [in foreign nations] and pursuing other policy objectives. * * * Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Ntsebeza Brief*, 2008 WL 408389, at *21.

The Solicitor General's point underscores the absurdity of permitting ATS claims in this circumstance: How can it be that an American corporation is subjected to suit for doing what the political branches asked it to do? And yet that is exactly what has happened in the past. For example, the South African ATS lawsuits discussed above, *see supra* at 7,

named as defendants companies that responded to President Reagan's call for constructive engagement to help end apartheid in that country. And the same dynamic threatens to rear its head again in the future. If ATS corporate liability is endorsed by this Court, efforts ranging from rebuilding in Afghanistan to trade with China would be subjected to second-guessing by alien plaintiffs dissatisfied with the pace of change. *See* U.S. Dep't of Defense Task Force for Business and Stability Operations, *Mineral Resource Team 2010 Activities Summary* 3 (Jan. 29, 2011) (calling on American businesses to assist in resource extraction efforts in Afghanistan to reinvigorate its economy).[19]

For this reason, too, the threat of corporate ATS liability has "potential implications for the foreign relations of the United States" that "should make courts particularly wary" of expanding the ATS beyond the limits of well-established international law. *Sosa*, 532 U.S. at 727.

III. CORPORATE ATS LIABILITY HARMS FOREIGN COMPANIES AND THREATENS FOREIGN INVESTMENT IN THE UNITED STATES.

For all of these reasons, corporate ATS liability can damage corporate reputations and financial health, torpedo U.S. businesses' foreign operations, and damage the economies of developing countries. But it also has another effect closer to home: It discourages foreign investment in the United States, potentially costing the domestic economy jobs.

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[19] *Available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada545347.pdf&Location=U2&doc=GetTRDoc.pdf.

Foreign investment is critical to the long-term health of the U.S. economy. *See* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 2 (2008). Mindful of its importance, this Court has routinely rejected doctrines discouraging such investment. *See, e.g., Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2855-56 (2011); *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-164 (2008). In *Stoneridge*, for example, the Court concluded that the "practical consequences" of expanding securities liability "provide[d] a further reason to reject petitioner's approach." 552 U.S. at 163-164. Specifically, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here" if securities liability were broadened in the way the petitioner suggested, and that deterrent "in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Id.* at 164.

Corporate ATS liability has the same discouraging effect. Foreign companies often invest in the United States by establishing a business presence here. But that step may subject a company, and its assets, to the jurisdiction of U.S courts—including to ATS claims arising out of conduct occurring elsewhere. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415 (1984) ("continuous and systematic" general business contacts can suffice to subject foreign companies to the general jurisdiction of U.S. courts). The most obvious way for those companies to avoid ATS litigation is to invest their resources outside the United States. A letter by the

former Secretary General of the International Chamber of Commerce made precisely this point: "[T]he practice of suing EU companies in the US for alleged events occurring in third countries could have the effect of reducing investment by EU companies in the United States * * * if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui to Roman Prodi, President, European Commission (Oct. 22, 2003).[20]

Of course, many foreign companies will decide that access to the U.S. market outweighs the risk of ATS litigation. Those foreign corporations that decide to forge ahead will face all the risks of potential ATS liability recounted above, *see supra* at 15-22, and their decisions on where in the world to invest will be affected not only by their home country's foreign policy directives but also by private ATS plaintiffs who sue in U.S. courts. But not all foreign companies will accept that risk; "[a]t the margin, some * * * may simply decide to avoid the United States in order to avoid ATS liability." Hufbauer, *supra*, at 42. "That decision will deprive the US economy of the benefits that come from inward foreign investment." *Id.*

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[20] *Available at* http://www.iccwbo.org/policy/environment/icccbhc/index.html.

CONCLUSION

Even if a norm of corporate liability could be teased out of the law of nations—which it cannot—numerous "practical consequences" would counsel against incorporating that norm through the ATS. This Court should affirm the decision below.

Respectfully submitted,

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No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America respectfully submits this brief as *amicus curiae*.

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket *amicus* consent letters.

three million businesses and trade and professional organizations of every size, sector, and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the Judiciary.

The Chamber has a substantial interest in this case. As the Chamber explained in its earlier brief, many of its members have been targeted by plaintiffs suing under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. These lawsuits, based on conduct occurring in more than 60 countries, have maligned routine business activities as "violations of international law" actionable in U.S. courts. By purporting to hold companies liable for workaday transactions half a world away, these ATS suits have not only had a pernicious effect on businesses—both at home and abroad—but also on U.S. foreign policy. To highlight those troubling consequences, the Chamber filed an *amicus* brief in this case last Term and has filed many more in ATS cases here and in the lower courts.[2] The Chamber continues to urge the Court to rule, regardless of its conclusion on extraterritoriality, that there is no corporate liability under the ATS.

To be clear: The Chamber unequivocally condemns violations of human rights. But as in the first round of briefing, the question here is not whether such wrongs occurred. Rather, it is whether Congress intended the ATS to reach across national borders, bestow on U.S. judges the power to adjudicate claims arising within other nations, and invite the sorts of foreign disputes that the Framers who enacted the

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[2] *See* http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats.

ATS were keen to avoid. The answer on all counts is no. The decision below should be affirmed.

SUMMARY OF ARGUMENT

1. The governing rule of decision is clear: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). None means none. Because the ATS provides no clear indication of extraterritorial application, that ends the inquiry. The ATS therefore does not apply to causes of action arising within the sovereign territory of other nations, regardless of whether the alleged tortfeasor is a citizen of, or has connections to, the United States. Because the Complaint here involves alleged torts occurring in Nigeria, the suit must be dismissed.

2. Petitioners and their *amici* insist the inquiry is more complicated, but each of their arguments is ultimately answered by *Morrison* itself. Petitioners, for instance, argue that the presumption does not apply to jurisdictional statutes. But *Morrison* reaffirmed that courts must "apply the presumption in all cases." 130 S. Ct. at 2881. And applying the presumption to provisions such as the ATS makes sense. After all, the ATS is not merely jurisdictional; it also identifies the type of substantive legal claim to which that jurisdiction attaches. And Congress said nothing about the extraterritorial reach of those substantive claims. Faced with such a statute, there is no reason for the Court to stray from the usual rule: For a statute to have global reach, Congress must clearly signal *somewhere* that it so intended.

Petitioners also argue that the presumption is trumped because the ATS applies on the high seas.

Not so. It is not at all a foregone conclusion that the ATS reaches the high seas. But the Court need not reach that issue because even if the ATS *did* reach the high seas, that would not prove that Congress intended the Act to reach conduct taking place on distant sovereign lands, potentially entangling the United States in any number of foreign conflicts. As *Morrison* explains, even "when a statute provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* at 2883 (emphasis added).

3. In an about-face from the United States' earlier view that the ATS categorically lacks extraterritorial application, the Solicitor General now argues for a multi-factored case-by-case approach. Under that approach, the Solicitor General envisions district courts examining a hodgepodge of variables to determine whether a "foreign-squared" ATS case—*i.e.*, one involving foreign events and foreign plaintiffs but a U.S. defendant—may proceed in federal court.

The Solicitor General's indeterminate approach should be rejected for multiple reasons. It flies in the face of *Morrison*. It flatly contradicts the Solicitor General's previous ATS briefs, which argued—correctly—that the ATS lacks extraterritorial effect regardless of the defendant's identity. It would destabilize corporate investment as well as U.S. foreign policy. It would trigger the very conflicts with foreign governments that the ATS was designed to avoid. It would create disincentives for U.S. companies to invest in developing nations. It would create perverse incentives for U.S. companies to move jobs offshore. And it would put those American companies at a substantial disadvantage vis-à-vis

their foreign competitors. That is because the Solicitor General would have this Court declare that only "foreign-cubed" cases—where *foreign* defendants are sued by foreign plaintiffs for torts committed on foreign soil—are categorically beyond the reach of the ATS. Under the Solicitor General's unprecedented view of extraterritoriality, Plaintiffs seeking a deep pocket in ATS cases could simply target U.S. companies, thus ensuring that they would face an intensified wave of ATS litigation while their foreign competitors would sidestep those costs altogether. This penalty for being an American company finds no support in logic, the text of the statute, or the previous positions of the Solicitor General.

The Court should reject the invitation to leave the door open to an uncertain universe of extraterritorial ATS suits. It should squarely resolve the question now—holding that the ATS has no extraterritorial application—so that all businesses, domestic and foreign, may proceed with investment abroad free from the cloud of litigation risk that the current ATS regime has created.

ARGUMENT

I. DISTRICT COURTS LACK JURISDICTION TO ADJUDICATE EXTRATERRITORIAL ATS SUITS.

A. The ATS Has No Extraterritorial Reach.

1. The Law Requires A Clear Indication Of Extraterritorial Reach.

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)

(quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption against extraterritoriality is so "longstanding" that it dates back to the founding generation, when the ATS was enacted. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (describing the importance of not violating "the independence and sovereignty of foreign nations"); *Rose* v. *Himeley*, 8 U.S. (4 Cranch) 241, 259 (1808). The presumption's continued vitality underscores that today, just as at the Founding, the Judiciary must guard against "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. And it applies "in all cases," even if there is no "risk of conflict between the American statute and a foreign law" and even if Congress clearly has the raw power to legislate extraterritorially on the issue in question. *Morrison*, 128 S. Ct. at 2877-78, 2881.

Under *Morrison* and its predecessors, the question in cases seeking extraterritorial application is not whether Congress *could* regulate particular conduct abroad, as some *amici* have suggested; it is whether Congress actually did so. And if Congress in fact wants to do so, it must do so clearly: "When a statute gives no *clear* indication of an extraterritorial application, it has none." *Morrison*, 128 S. Ct. at 2878 (emphasis added). Congress, of course, need not actually say " 'this law applies abroad' " in order to give a statute extraterritorial reach—but at the same time hints and "uncertain indications" will not do. *Id.* at 2883.

2. The ATS Offers No Such Indication.

The ATS does not provide the "clear statement," *id.*, that this Court requires to overcome the pre-

sumption against extraterritoriality. The statute provides jurisdiction for federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This "terse provision" is "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." *Sosa*, 542 U.S. at 692. But as this Court held in *Sosa*, it also has a substantive element: With its enactment, Congress permitted the federal courts to recognize certain limited substantive violations of law. The question, then, is whether Congress provided a clear statement of extraterritorial intent *anywhere* in the Act, either as to its jurisdictional or its substantive reach. The answer is no.

Missing in the Act is any indication that Congress intended federal district courts to exercise their jurisdiction over persons engaged in activities taking place wholly within another sovereign's borders. Certainly the words "any civil action" do not suffice to defeat the presumption. *See United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (reaching same conclusion with respect to the words "any person"). Nor do the statute's references to "alien[s]" or "the law of nations" carry the day. This Court has held that the word "alien" does not suffice to overcome the presumption; without more, it merely permits a particular class of plaintiffs to bring suit. *See Aramco*, 499 U.S. at 255 (Title VII did not apply extraterritorially despite the fact that, by its terms, it protects aliens). Likewise, Congress's use of international-sounding terms, such as "the law of nations," does not dictate extraterritorial application where the terms just as easily can refer to domestic application. *See id.* at 251 ("[E]ven statutes that

contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad").

That is the situation here. An "alien" certainly could sue an individual under the ATS for a "law of nations" violation that occurred in the United States. (Indeed, as we discuss below, that is what Congress had in mind when it enacted the statute.) The terms "alien" and "law of nations" thus are consistent with domestic application. They do not provide the "clear indication of an extraterritorial application" required to overcome the presumption. *Morrison*, 128 S. Ct. at 2878.

And they are a far cry from the sorts of statutory phrases that *do* overcome the presumption—namely, phrases that can only be understood to contemplate application to conduct abroad. *See, e.g.*, Torture Victim Protection Act, 28 U.S.C. § 1350 note (defining a defendant as one who acts under color of law of "*any foreign nation*" and a plaintiff as one who has exhausted his remedies "*in the place in which the conduct giving rise to the claim occurred*") (emphasis added). As Judge Kavanaugh recently explained: "[T]he mere fact that statutory language could plausibly apply to extraterritorial conduct does not suffice to overcome the presumption against extraterritoriality. Otherwise, most statutes, including most federal criminal laws, would apply extraterritorially and cover conduct occurring anywhere in the world." *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

But unlike the criminal prohibitions Judge Kavanaugh described, the petitioners cannot even point to some positive-law prohibition of ambiguous geo-

graphic reach. Instead, they rely on a provision through which Congress at most accepted that federal courts would engage in common-law recognition of certain limited substantive rules. To infer an extraterritorial intent from that delegation to the Judiciary would not only be unprecedented; it would offend the basic separation-of-powers principles that animate the presumption against extraterritoriality. After all, if the presumption requires *Congress* to speak clearly, and Congress does not do so, it makes little sense for *courts*, exercising common-law powers, to claim the extraterritorial reach that was within Congress's power to provide. *See Sosa*, 542 U.S. at 726 ("[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law.").

The ATS's history and context confirm that Congress never intended such a result. As this Court explained in *Sosa*, the ATS was borne of a problem dating to the Articles of Confederation. The United States at that time lacked the authority to remedy violations of the law of nations on its own soil. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716-717 (2004); J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893) (Continental Congress could not "cause infractions of treaties, or of the law of nations to be punished."). That posed colossal diplomatic problems: At least twice in the 1780s, foreign diplomats suffered invasions of their customary rights on U.S. soil and Congress could not ensure redress. *See Sosa*, 542 U.S. at 717. The First Congress responded by enacting the ATS. *Id.*; *see also id.* at 720 ("Uppermost in the legislative mind appears to have been offenses against ambassadors."). Congress, in short, "was concerned about aliens who

were injured in the United States in violation of customary international law"—not those injured abroad by foreign actors. *Doe*, 654 F.3d at 77 (Kavanaugh, J., dissenting).

Finally, the ATS's purpose confirms that the statute was not meant to apply extraterritorially. As the Solicitor General has observed in the past, the ATS was designed " 'to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations.' " Br. of U.S. as Respondent, *Sosa* v. *Alvarez-Machain*, No. 03-339, 2004 WL 182581, at *49 (Jan. 23, 2004) (U.S. Sosa Br.) (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring)); *accord Sosa*, 542 U.S. at 715-718. Applying the ATS to cases premised on foreign conduct threatens the very foreign-relations difficulties the statute was designed to avoid. Indeed, foreign nations—including the U.K., Switzerland, and Germany—have frequently objected that the ATS violates their rights to regulate conduct in their own territory. *See Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1283 (2011); *see also* Br. of the Governments of the United Kingdom of Great Britain & Northern Ireland & the Kingdom of the Netherlands 32-34, *Kiobel*, No. 10-1491 (June 13, 2012) (UK-Netherlands Br.). The statute's modest purpose explains why Congress provided no "clear statement of extraterritorial effect" when enacting the ATS. *Morrison*, 128 S. Ct. at 2883.

B. Petitioners Seek An Unwarranted Extraterritorial Application Of The ATS.

For the reasons above, the ATS does not apply extraterritorially. That conclusion dooms petitioners'

case because the claims they advance require extraterritorial application.

Morrison explained that allegations of some domestic activity—even a substantial amount of domestic activity—do not necessarily render a case domestic for purposes of the extraterritoriality canon. 130 S. Ct. at 2884-87. After all, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 2884. Instead, the Court held, Congress's statutory goals must drive the analysis. Where a complaint alleges activity transcending national borders, the question whether the case involves extraterritorial application of a statute turns on two factors: the statute's "focus" and whether the event on which the statute focuses occurred abroad. *Id.* at 2884-85. If it did, then the application is extraterritorial.

Applying that test, *Morrison* determined that the plaintiffs were seeking to apply Section 10(b) of the Securities Exchange Act extraterritorially. The Court explained that Section 10(b) "focuse[s]" on actual "purchases and sales of securities," not on underlying conduct such as "the place where the deception originated." *Id.* at 2884. A case in which the purchase of securities was consummated abroad thus sought extraterritorial application, despite the fact that the defendants allegedly "engaged in * * * deceptive conduct" and "made misleading public statements" in the United States. *Id.* at 2883-84. Because Section 10(b) did not apply extraterritorially, the case had to be dismissed. *Id.* at 2888.

The test set forth in *Morrison* shows why petitioners' extraterritorial application of the ATS is imper-

missible. The ATS's "focus," *Morrison*, 130 S. Ct. at 2884, is on "a tort only[.]" 28 U.S.C. § 1350. The question, then, is whether the "tort[s]" alleged here occurred abroad. The answer is yes. Plaintiffs alleged torts such as extrajudicial killing and property destruction (though the property destruction claim was dismissed by the District Court). They alleged, in other words, torts involving bodily harm and harm to property. Yet this Court has already explained in *Sosa* that the "place of wrong for torts involving bodily harm" and "torts involving harm to property" is "*the place where the harmful force takes effect upon the body*." 542 U.S. at 706 (quoting Restatement (First) of Conflict of Laws § 377 note 1 (1934)) (emphasis in Restatement); *accord id.* at 705 n.3 (" 'Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred.' ") (quoting Restatement (Second) of Conflict of Laws § 412 (1969)); *American Safety Cas. Ins. Co.* v. *City of Waukegan*, 678 F.3d 475, 479-480 (7th Cir. 2012) (Easterbrook, J.) (under state and federal law "the tort occurs when its last element comes into being").

Here there is no allegation that any "harmful force t[ook] effect" on any individuals or property within the United States. *Sosa*, 542 U.S. at 706. To the contrary, the "last event" of every alleged tort, *id.* at 705 n.3, occurred in Nigeria. Petitioners thus seek an extraterritorial application of the ATS. That application is impermissible given the statute's lack of extraterritorial reach.

C. Petitioners' Contrary Arguments Should Be Rejected.

Petitioners advance several arguments aimed at steering the Court away from straightforward application of its extraterritoriality jurisprudence. These arguments are foreclosed by *Morrison* and should be rejected.

1. The Usual Presumption Against Extraterritoriality Applies To A Jurisdictional Statute Like The ATS.

Petitioners argue that the presumption against extraterritoriality "does not apply to jurisdictional statutes." Pet. Supp. Br. 34-35. That argument—for which petitioners offer no support, save an inapposite reference to *Morrison*—has no merit.[3] This Court has made clear that the presumption applies "*in all cases*," *Morrison*, 130 S. Ct. at 2881 (emphasis added)—not "in all cases minus certain jurisdictional statutes."

Applying the presumption to a jurisdictional statute like the ATS makes particularly good sense. That is because the Act does not merely confer

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[3] Petitioners cite *Morrison* for their position on the theory that the Court "did not apply the presumption to the jurisdictional provisions of the Securities Act." Pet. Supp. Br. 34. That argument is misguided. *Morrison* had no need to—and did not—address the extraterritorial effect *vel non* of the Act's jurisdictional provisions, because Section 10(b)'s lack of extraterritorial effect sufficed to resolve the case. *See* 130 S. Ct. at 2877. And while the Court said the Act's jurisdictional provisions gave courts "jurisdiction * * * to adjudicate *the question whether § 10(b) applies*" extraterritorially, *id.* (emphasis added), it nowhere suggested that those jurisdictional provisions themselves give the courts the power to reach events occurring overseas. The cited passage sheds no light on whether the presumption applies to jurisdictional statutes.

jurisdiction; instead—unlike the purely jurisdictional statutes to which Petitioners point, Pet. 34—it both grants jurisdiction and sets the parameters of the substantive offense that courts can recognize under common law: a violation of the law of nations. The question therefore remains whether Congress intended *that substantive offense* to encompass acts that took place half a world away—whether, in the words of the United States, Congress meant to give courts power "to project U.S. law into foreign countries through the fashioning of federal common law." Br. for U.S. as Amicus Curiae in Support of Petitioners, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008), No. 07-919 (Feb. 11, 2008), 2008 WL 408389, at *12 (U.S. Ntsebeza Brief). Under *Morrison*, the answer to that question hinges on whether Congress provided a clear statement of extraterritorial intent somewhere—anywhere—in the Act. Because the ATS lacks such a clear textual commitment to extraterritorial effect, this Court must presume Congress intended it to have none.

It is therefore irrelevant that the ATS is denominated a "jurisdictional" statute. What matters is whether the substantive norm over which Congress vested the district courts with jurisdiction is a norm that Congress intended to apply beyond U.S. borders.

Applying the usual presumption against extraterritoriality to this "jurisdictional" statute not only faithfully hews to *Morrison*, but it also avoids meaningless formalism. After all, from the perspective of a foreign sovereign, it is immaterial whether Congress creates U.S. authority over matters within the sovereign's territory through a separate "substantive" statutory provision or whether it incorporates the substantive proscription into a "jurisdictional"

provision like the ATS. Either way, it is an intrusion into the foreign sovereign's prerogatives. *See* Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation (Apr. 15, 2003) ("We consider it completely unacceptable that matters that are central to the future of our country *should be adjudicated in foreign courts* which bear no responsibility for the well-being of our country[.]") (emphasis added). As the *amicus* brief filed by the Netherlands and the United Kingdom observed: "[T]here is no reason why the risks to international comity are somehow less when a statute is labeled 'jurisdictional' rather than 'substantive.'" UK-Netherlands Br. 31.

For these reasons, the presumption against extraterritoriality applies to jurisdictional statutes like the ATS. The presumption requires Congress to speak clearly if it wants to provide U.S. courts with authority to rule on—and thus, effectively, to exercise control over—events overseas. *See Aramco*, 499 U.S. at 248. If a jurisdictional statute is triggered by specific prohibited conduct, and Congress does not specify where that conduct may occur, the courts should assume—as they do in every other context—that Congress does not intend to project U.S. authority into other sovereign nations. That approach best serves a fundamental purpose of the presumption: to avoid reading congressional ambiguity to produce "interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

Congress itself appears to share this understanding of the presumption. In the wake of *Morrison*, Congress amended jurisdictional provisions of the Securities Exchange Act and related statutes to provide

that "district courts of the United States * * * shall have jurisdiction" over certain types of actions involving "*conduct occurring outside the United States that has a foreseeable effect within the United States*" or "within the United States that constitutes significant steps in furtherance of the violation, *even if the securities transaction occurs outside the United States and involves only foreign investors.*" Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (emphases added). Congress would have had no reason to enact this language if it believed the presumption inapplicable to jurisdictional statutes. More to the point, the amendments demonstrate that Congress got the message this Court sent in *Morrison*—"be clear about extraterritorial application or there won't be any"—and that Congress knows how to give a jurisdictional provision extraterritorial effect when it wants to. To back away from *Morrison*'s simple, clear rule is to undermine the "stable background" the Court intended *Morrison* to create. 130 S. Ct. at 2881.

2. The Presumption Is Not Trumped By Statutory Provisions Regulating Piracy.

Petitioners separately argue that even if the presumption applies, it is overcome because—in their view—the ATS reaches piracy, an extraterritorial offense. Pet. Supp. Br. 35-36. Echoing the D.C. Circuit majority's opinion in *Doe*, petitioners argue that respondents' extraterritoriality argument seeks "to apply a new canon of statutory construction," Pet. Supp. Br. 36, because there is supposedly "no authority supporting the existence of a presumption that a statute applies to the high seas (e.g., piracy) but not to foreign territory." 654 F.3d at 22.

Petitioners are wrong. Even if their premise is indulged—that the ATS actually reaches piracy[4]—that would say nothing about the extraterritorial reach of the ATS to violations beyond piracy. The reason: This Court in *Morrison* clarified that even "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2883; *accord id.* at 2883 n.8 (Congress "knows * * * how to limit [extraterritorial] effect to

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[4] The ATS by its terms does not say, or even suggest, that it applies to piracy; nor is there any legislative history suggesting that it does. *See Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) ("The debates over the Judiciary Act * * * nowhere mention the provision, not even, so far as we are aware, indirectly."). Moreover, Section 9 of the First Judiciary Act—the multi-faceted provision of which the ATS is just one clause—indicates that the ATS in fact does *not* apply to piracy. That is because two separate clauses of Section 9 *explicitly* give district courts "cognizance of [certain] crimes and offences * * * upon the high seas" and of "civil causes of admiralty and maritime jurisdiction * * * within their districts as well as upon the high seas." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Therefore, the First Judiciary Act vested the district courts with jurisdiction over claims for piracy occurring beyond the immediate borders of the United States. But that express grant of extraterritorial power did not reside in the clause that has since become known as the ATS. Nor, unlike those earlier clauses in Section 9, does the ATS clause say anything about the "high seas" or foreign lands. That is significant, because "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). *See also* T. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 847 (2006) ("[T]he evidence indicates that the ATS was addressed only to the safe-conduct violation * * *. Ambassadorial infringements were addressed by section 13, which set forth the Supreme Court's original jurisdiction; piracy was addressed by the admiralty statute, a clause preceding the ATS in section 9 of the Act.").

particular applications."). The Court explained, in other words, that a statute can have *limited* extraterritorial reach, and that that congressional intent for limited extraterritorial reach does not knock the presumption out altogether.

That principle fatally undermines petitioners' argument. If the ATS was intended to have "some extraterritorial application," *id.* at 2883—namely, to piracy—that would not suggest an intent to apply the ATS within the territory of foreign sovereigns across the globe. Far from it: Piracy by definition occurs on the high seas, "out of the jurisdiction of any particular state." Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113 (1790); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (Story, J.). As Judge Kavanaugh pointed out, the high seas "are 'the common highway of all nations,' governed by no single sovereign," and often fall within the jurisdiction of the federal courts. *Doe*, 654 F.3d at 78-79 (Kavanaugh, J., dissenting) (quoting *The Apollon*, 22 U.S. at 371). Moreover, because no single sovereign can claim exclusive authority over the high seas, "[a]pplying the ATS to conduct on the high seas does not pose the risk of conflicts with foreign nations that the presumption against extraterritoriality and the ATS itself were primarily designed to avoid." *Id.* at 78. It therefore makes perfect sense that Congress could have understood ATS jurisdiction to extend to the high seas but not to foreign territory. And under *Morrison*, that limited, specific extraterritorial application would not eliminate the presumption altogether. The presumption would still "operate[ ] to limit" the extraterritorial application "to its terms." 130 S. Ct. at 2883.

Thus to say that respondents seek a "new canon" is quite wrong; they seek to apply the same canon this Court has long hewed to, including most recently in *Morrison*. It is petitioners who seek to blow past the canon's animating logic by proposing the following formulation: Congressional intent to apply a statute to a limited area of international concern—the high seas—should be read as congressional intent to apply the statute everywhere on Earth. That approach makes little sense in the context of a canon whose purpose is to "construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

II. THE SOLICITOR GENERAL'S APPROACH CONTRADICTS *MORRISON*, CONFLICTS WITH THE U.S. GOVERNMENT'S PRIOR POSITIONS, AND WOULD HARM U.S. BUSINESS AND FOREIGN POLICY.

The Solicitor General's supplemental brief skips by the extraterritoriality canon altogether and argues that federal courts, employing a collection of indeterminate factors, should decide on a case-by-case basis whether to adjudicate extraterritorial ATS claims. U.S. Supp. Br. 3. Applying its amorphous test, the Solicitor General suggests that courts in certain cases may be able to adjudicate extraterritorial ATS claims involving U.S. corporate defendants. That approach should be rejected. It cannot be reconciled with this Court's cases or with the Solicitor General's past positions. It is unworkable. And it risks serious harm to U.S. businesses and U.S. foreign policy interests, as the United States itself has recognized in previous briefs.

A. The Solicitor General's Common-Law Formulation Is Unprecedented And Fatally Indeterminate.

The Solicitor General declines to apply the presumption against extraterritoriality. U.S. Supp. Br. 3. Instead, he forges ahead with a common-law test of his own invention: He argues that courts should decide on a case-by-case basis whether to hear extraterritorial ATS claims, picking and choosing from among the following factors in making their decision: "the modern conception of the common law"; the "evolution in the understanding of the proper role of federal courts in making that law"; the "general assumption that the creation of private rights of action is better left to legislative judgment"; "the potential implications for the foreign relations of the United States"; the possibility of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; "the absence of a congressional mandate"; "the practical consequences of making a cause [of action] available to litigants in the federal courts"; the citizenship of the defendants; the location of the alleged conduct; and the role of foreign sovereigns in that conduct. *Id.* at 3-4, 13-21 (citations omitted).

The Solicitor General admits that this formulation "calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion." *Id.* at 6. Applying his test, he argues that courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct." *Id.* at 21. But the Solicitor General would leave the door ajar for other

extraterritorial ATS claims, including in cases "where the defendant is a U.S. national or corporation." *Id.*

The Solicitor General's position is problematic on many levels. First and foremost, it cannot be reconciled with *Morrison*. That decision held that the canon applies "in all cases." 130 S. Ct. at 2881. And yet the Solicitor General simply declines to apply the presumption to the ATS. U.S. Supp. Br. 3. That will not do. For the reasons already given, the presumption should apply here as it does in any other case. And importantly, the presumption leaves no room for the distinctions the Solicitor General draws between "foreign squared" cases involving U.S. defendants and "foreign cubed" cases involving foreign defendants. That is so because under *Morrison*, the key question is whether the event on which the statute "focuses"—here, a tort—occurs abroad. *See supra* at __. That question does not turn on the defendant's nationality. *Morrison* itself made that clear: It held that plaintiffs were seeking to apply the Securities Exchange Act extraterritorially, despite the fact that the case involved "American defendants" and alleged conduct in the United States. 130 S. Ct. at 2875, 2883-84. Just so in ATS cases. If the tort at the heart of a plaintiff's suit occurred abroad, the plaintiff seeks an extraterritorial application—and the suit cannot be maintained—regardless of whether the defendant is a U.S. or foreign corporation.

Second, the Solicitor General's proposed approach is unworkable. Indeed, it suffers from the precise flaws this Court identified with the test at issue in *Morrison*: It is "complex in formulation and unpredictable in application," it is "not easy to administer," and it would result in "judicial-speculation-made-

law" that forces courts to "guess anew in each case." 130 S. Ct. at 2878-79, 2881. As this Court wrote in *Morrison*: "There is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases * * * is not necessarily dispositive in future cases.' " *Id.* at 2879 (citation omitted). That describes the Solicitor General's "test" perfectly, by his own admission: He writes that "the question whether a court should fashion a federal common-law cause of action" under the ATS for extraterritorial violations "calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion." U.S. Supp. Br. 6. The test's malleability is as "damning" here as it was in *Morrison*.

The extraterritoriality canon's power lies in its simplicity and predictability. *See Morrison*, 130 S. Ct. at 2881 (the canon "preserv[es] a stable background against which Congress can legislate with predictable effects."). The Solicitor General's common-law mélange of factors, by contrast, would invite needless confusion in an area of law that demands certainty—particularly for U.S. businesses planning international investment.

Third, the Solicitor General's proposed approach—ignoring the presumption against extraterritoriality in favor of a case-by-case approach—is in flat conflict with its approach in previous ATS briefs to this Court. In *Sosa*, for example, the United States wrote that "Section 1350 does not apply extraterritorially to claims based on alleged violations of international law occurring in a foreign country" and that "[n]othing in Section 1350, or in its contemporary

history, suggests that Congress contemplated that suits would be brought based on conduct against aliens in foreign lands." U.S. Sosa Br., 2004 WL 182581, at *10, *48. That is, nearly verbatim, respondents' position here. Likewise, in *Ntsebeza*, the United States wrote that the presumption applies "*a fortiori*" to a case, like this one, where the question is whether Congress has given courts power "to project U.S. law into foreign countries through the fashioning of federal common law." U.S. Ntsebeza Brief, 2008 WL 408389, at *12. Just so. The Solicitor General's sudden epiphany that the presumption does *not* apply to ATS cases does not just contradict *Morrison*; it contradicts the simple, linear extraterritoriality analysis the United States previously and powerfully advanced before this Court.

B. The Solicitor General's Test Would Impose Undue Hardships On American Businesses And The U.S. Economy.

The results of the Solicitor General's test are as troublesome as the test itself. The Solicitor General suggests that the door be left ajar for ATS cases involving foreign conduct "where the defendant is a U.S. national or corporation." U.S. Supp. Br. 21. But that approach would do nothing to ameliorate the serious harms that the current ATS regime imposes on U.S. businesses, U.S. foreign policy, and developing countries—harms the Solicitor General himself has warned about in past briefs. In fact, it would exacerbate them.

The Chamber's prior brief pointed out that many recent ATS suits amount to "bids to block corporations from investing in, or doing business in, countries with poor human-rights records" and are the

equivalent of attempts " 'to impose embargos or international sanctions through civil actions in United States courts.' " Chamber Br. 8 (quoting *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009)). Such quasi-sanctions are particularly harmful, as the Solicitor General himself has observed in the past, because they "interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." U.S. Ntsebeza Brief, 2008 WL 408389, at *21. For example, "in the 1980s, the United States * * * urged companies to use their influence to press for change away from apartheid, while at the same time using limited sanctions to encourage the South African government to end apartheid"; such policies "would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Id.*

The Solicitor General, in short, has recognized that permitting ATS actions in these circumstances unfairly punishes U.S. companies and undermines American foreign policy. And yet the Solicitor General's newly-minted approach to extraterritoriality, like the approach proposed by Petitioners, would allow precisely those same actions to continue unabated.

The Chamber's prior brief likewise demonstrated that overseas application of the ATS can deter investment in developing nations, harming both U.S. companies and the developing nations themselves. Chamber Br. 23-27. That is so because the risk of ATS suits can dissuade corporations from "investing in countries with a poor human rights record," D.

Diskin, Note, *The Historical & Modern Foundations for Aiding & Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809 (2005), and it is often those very nations that most desperately need foreign investment. *See* Sec. of State Hillary Clinton, Remarks at the UN Conference on Sustainable Development Plenary, June 22, 2012 (noting that official development assistance accounts for only 13 percent of the capital flow to developing nations and that "private sector investments * * * have catalyzed more balanced, inclusive, sustainable growth");[5] Sec. of State Hillary Clinton, Remarks at the Business Forum Promoting Commercial Opportunities in Iraq, July 3, 2011 (to ensure prosperity and stability for Iraq, "we need to work to make sure that the investments are there that will help Iraq chart that kind of future.").[6] Again, the Solicitor General has agreed in the past, pointing out that "the prospect of costly litigation under Section 1350 * * * may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most impact on economic and political conditions," U.S. Sosa Br., 2004 WL 182581, at *44, and that deterring foreign investment in this way "could have significant, if not disastrous, effects on international commerce." U.S. Ntsebeza Brief, 2008 WL 408389, at *3 (citation omitted). That was indeed part of the reason the Solicitor General argued in past cases that the ATS has no extraterritorial effect. *See id.* at *12. The Solicitor General reverses course here without ex-

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[5] *Available at* http://www.state.gov/secretary/rm/2012/06/193910.htm.

[6] *Available at* http://www.state.gov/secretary/rm/2011/06/164954.htm.

plaining why the harmful consequences it identified in past cases would not now materialize.

The Chamber's prior brief demonstrated that the current ATS regime creates unique and disproportionate risks for *all* corporations: The filing of an ATS case—no matter how tenuous its allegations—can topple corporate stock values and debt ratings, damage a company's reputation, produce massive litigation expenses, and coerce the company into settling even dubious claims at substantial cost to shareholders. Chamber Br. 14-21. The Solicitor General's approach would leave all of these risks in place for U.S. companies—and in fact, it likely would make them worse. Under the Solicitor General's theory, *American* companies may be proper defendants in cases involving torts abroad, but *foreign* companies would not. American companies thus would bear the risks and costs alone. That, in turn, likely would mean *more* total ATS litigation for U.S. companies; plaintiffs would have no one else to target. It also would "plac[e] U.S.-based firms at a competitive disadvantage in world markets." E. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 155 (2003). After all, costly regulation applicable only to one nation's corporations operating abroad, and not to those corporations' competitors, "puts th[ose] corporations at a competitive disadvantage with other countries' corporations." S. Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *Liability of Multinational Corporations under Int'l Law* 75, 82 (M. Kamminga & S. Zia-Zarifi eds., Kluwer Law Int'l 2000). Congress has been sensitive to that concern. *See, e.g.*, *Carpet Group Int'l* v. *Oriental Rug Imps. Ass'n*, 227

F.3d 62, 71 (3d Cir. 2000) ("Congress enacted [a foreign trade statute] for the purpose of * * * relieving exporters from a competitive disadvantage in foreign trade."). The Solicitor General's approach ignores it altogether.

Finally, the Solicitor General's approach needlessly creates a new risk: that U.S. corporations will create foreign subsidiaries to run their overseas investments, thus costing the U.S. economy jobs. Faithfully interpreting the ATS to lack extraterritorial effect avoids this risk.

It is inherent in the concept of private business that they will seek to minimize avoidable costs—whether imposed by taxation, litigation, or otherwise—where lawful to do so. And one way to do so is to relocate operations to avoid expensive regulatory regimes. That sort of relocation has been a feature of the interplay between regulation and business for decades. *See, e.g.*, T. Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161, 192 (2007) ("The costs of complying with the Act are arguably very high. That is why * * * some corporations 'go private' or relocate abroad, and some foreign corporations avoid the United States."). And studies suggest that such capital flight is triggered by potential ATS liability. *See* A. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis* 11 (draft Apr. 13, 2012; forthcoming, Geo. L.J.) (ATS liability "gives multinationals still further reasons to try and structure themselves so that any agents who commit wrongs will be deemed the responsibility of an impecunious foreign subsidiary or a subsidiary not subject to jurisdiction in the United States").

And yet that is the precise incentive the Solicitor General's approach offers to U.S. companies. Faced with the knowledge that *American* companies operating abroad would face the risk of costly ATS litigation while *foreign* companies would not, *see* U.S. Supp. Br. 21, an American company might well choose to create a foreign subsidiary to run its overseas operations. That would cost the U.S. economy jobs. For this reason, too, the Solicitor General's proposed approach is not just legally flawed but practically unwise.

* * *

The Court, in sum, should reject the invitation to leave the ATS picture muddled, with questions about extraterritorial application left to plague companies and courts down the road. Instead, the Court should hold that the ATS has no extraterritorial application, full stop. That simple, clear approach would well serve businesses and the judiciary by removing the uncertainty that, for too many years, has hampered investment and driven endless legal battles.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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August 8, 2012

TAB 2B

No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *et al.*,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, AND THE FEDERATION OF GERMAN INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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This is Exhibit B referred to in the affidavit of Lily Fu Claffee sworn before me, this 28th day of July 20 14

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QUESTION PRESENTED

Does it violate due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state?

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Amici Curiae, the Chamber of Commerce of the United States of America ("Chamber"), the National Foreign Trade Council ("NFTC") and the Federation of German Industries (*Bundesverband der Deutschen Industrie* or "BDI") respectfully submit this brief in support of the petition for a writ of *certiorari*.[1]

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their counsel or their members made any monetary contribution toward preparation or submission of this brief. Letters indicating the parties'

INTEREST OF *AMICI CURIAE*

Amici Curiae are business associations representing companies doing business across state lines and international boundaries:

- The Chamber is the world's largest business federation. It represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million 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 its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community.
- The NFTC is the premier business organization advocating a rules-based economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies. It represents its members' interests before all branches of Government, including this Court.
- The BDI serves as the umbrella organization for associations of industrial business and industry-related service providers in Germany and speaks for more than 100,000

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consent to the filing of this brief have been submitted to the Clerk. Counsel of record provided the required notice to the parties more than ten days before the filing deadline for this brief.

enterprises in Germany. It represents businesses that employ millions of people worldwide and has regularly sought to vindicate their interests in the courts of the United States.

Amici and their members have a keen interest in the law governing the jurisdiction of the United States courts, including the rules governing the imputation of jurisdictional contacts. Those rules directly affect *amici*'s members in several ways. As in this case, they may serve as the basis for asserting jurisdiction over the foreign parent – direct or indirect – of a United States subsidiary. Those same rules can be used by courts in one state to assert jurisdiction over a small business located in another state. They may permit jurisdiction over companies entering into distribution relationships, agency relationships, joint ventures, franchises or other forms through which different companies cooperate. Finally, those rules play a critical role on the international stage, affecting the enforceability of judgments rendered by United States courts, the extent to which foreign courts will assert jurisdiction over United States companies, and the prospects for greater legal harmonization between the United States and its important trading partners. *Amici* file this brief to vindicate these important interests.

INTRODUCTION

For more than a century, the Due Process Clause has served as an essential bulwark against assertions of personal jurisdiction over out-of-state defendants. *See Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Since this Court's decision in

International Shoe, the Clause has fulfilled this objective through the two-fold requirement that (1) the defendant have the necessary "contacts" with the forum state and (2) any exercise of jurisdiction comport with traditional notions of fair play and substantial justice. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court has consistently applied these requirements to cases involving all types of defendants, whether individual or corporate and whether foreign or domestic. *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Hanson v. Denckla*, 357 U.S. 235 (1958).

Central to this constitutional framework is the command that these requirements "must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added). Expounding on this principle in the corporate context, this Court has explained that "each [corporation's] contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). In cases where, as here, all parties admit that the out-of-state defendant's own contacts are constitutionally insufficient, *see* Pet. App. 20a, jurisdiction can be proper only if the Constitution permits imputation of another entity's contacts with the forum state to that defendant.

In *Cannon Manufacturing Company v. Cudahy Packing Company*, this Court considered whether a North Carolina court could exercise jurisdiction over a Maine corporation based upon service of the in-state agent of an Alabama corporation that was wholly owned by the Maine-based defendant. 267

U.S. 333 (1925). Such service, in the Court's view, was insufficient to establish personal jurisdiction over the Maine defendant. Acknowledging the commercial and financial control exercised by the Maine defendant over its Alabama subsidiary, the Court nonetheless concluded that the two entities were "distinct" and that the corporate separateness "though perhaps merely formal" was "real."

In *United States v. Scophony Corporation of America*, the Court considered whether the Clayton Act authorized jurisdiction over a foreign defendant based on its relationship with its subsidiaries. 333 U.S. 795 (1948). The Court stressed that it was "deal[ing] here with a problem of statutory construction, not one of constitutional import." *Id.* at 804. The Court interpreted the Clayton Act to permit jurisdiction and emphasized the "complex working arrangements ... with [American subsidiaries that required] constant supervision and intervention beyond the normal exercise of shareholders' rights by the [foreign parent]." *Id.* at 816. The Court only made passing reference to *Cannon*'s constitutional holding. *Id.* at 813 n. 23.

Since *Cannon* and *Scophony*, this Court has not squarely addressed the propriety of – or standards governing – establishing personal jurisdiction by imputing one entity's contacts to another entity. *See Keeton*, 465 U.S. at 781 n. 13 ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."); *Rush*, 444 U.S. at 332 (declining to impute insurance company's contacts to insured). These sixty plus years of silence have spawned a variety of approaches in the lower courts. As to the controlling precedent, some lower courts follow *Canon*, others extend *Scophony*,

and yet others refuse to decide whether this Court has supplied a governing rule. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 178-80, 190-91 (5th ed. 2011) (discussing the competing approaches). Precedent aside, some courts such as the one below have suggested that two independent theories – labeled *alter ego* and agency – can support jurisdiction over parent corporations even though, as several other courts have recognized, neither *Cannon* nor *Scophony* offers any support for this binary approach. *See* Pet. 10-19. Even among those courts endorsing both theories, they disagree over the relevant standards, the applicable law and whether both theories are available in the parent-subsidiary context. *See id.* The result has been utter pandemonium in the case law.

This case offers an extreme example of the havoc wrought by this confusion in the case law. The Ninth Circuit has permitted plaintiffs to assert *general* jurisdiction over a foreign parent company based on the contacts of its indirectly held subsidiary and then try to hold that foreign parent accountable in United States court for the alleged conduct of an entirely different subsidiary that took place in a foreign country. The petition ably demonstrates why this case presents an especially good vehicle for resolving the above-described confusion among the lower courts. *See* Pet. at 10-20. *Amici* endorse those arguments but do not repeat them here. Instead, in this brief, *amici* explain why petition should be granted in light of the important issues presented by this case.

REASONS FOR GRANTING THE PETITION

Beyond the conflicts among the lower courts identified by Petitioner, *certiorari* should be granted for three additional reasons.

First, the imputation of jurisdictional contacts presents an important issue to the business community, both here and abroad. Businesses need clear and predictable jurisdictional rules. Such rules enable companies to manage risks, control liabilities and raise capital. Unclear and diluted standards for the imputation of jurisdictional contacts – whether in a parent/subsidiary relationship, manufacturer/distributor relationship or some other arrangement – deprive companies of that much-needed clarity and chill economic investment. These effects are especially harsh in cases such as this one where the imputation of contacts to support general jurisdiction potentially permits a company to be sued for conduct taking place anywhere around the world, even where that conduct is committed by a separate business entity.

Second, the imputation of jurisdictional contacts affects the commercial and foreign relations interests of the United States. Sweeping assertions of jurisdiction such as those countenanced by Judge Reinhardt's panel opinion discourage foreign direct investment in the United States. They also place the United States at odds with the rest of the world. Such conflicts invite retaliatory assertions of jurisdiction and frustrate any efforts at achieving international consensus toward a jurisdiction and judgments convention.

Third, certiorari should be granted to resolve conflicts exacerbated by Judge Reinhardt's panel opinion

about when an exercise of personal jurisdiction "comports with traditional notions of fair play and substantial justice." The panel's emphasis on "the existence of an alternative forum" conflicts with this Court's pronouncements (consistently heeded by other circuits) and erroneously collapses a constitutional inquiry about personal jurisdiction into a non-constitutional one about *forum non conveniens*. Moreover, the panel's treatment of the sovereign interests likewise cannot be reconciled with this Court's decisions. The panel's opinion grossly exaggerates California's interest in hearing a case between entirely foreign parties concerning conduct on foreign soil and inexcusably discounts Germany's interest in ensuring that its companies are not unfairly dragged into foreign forums for claims having nothing to do with their contacts with those forums.

I. Murky Standards Governing The Imputation Of Jurisdictional Contacts Discourage Commercial Activity.

The issues in this case lie at the intersection of civil procedure and corporate law. In both areas, businesses need clear and predictable rules. "Predictability," this Court recently explained in a unanimous opinion, "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). In the context of jurisdiction, clear and predictable rules enable parties "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. In the context of corporate law, clear and predictable rules about the separate juridical status of different business entities enable those entities to manage their liabilities, predict risks, raise

capital and enter into mutually beneficial business relationships. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *Anderson v. Abbott*, 321 U.S. 349 (1944); *United Elec. Radio & Machine Workers of Amer. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992) (Selya, J., joined by Breyer, C.J., and Cyr, J.). *See generally* Phillip I. Blumberg, *The Law of Corporate Groups*: Procedural Problems in the Law of Parent and Subsidiary Corporations §1.01.1 (1983). By contrast, "[c]omplex 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." *Hertz*, 130 S. Ct. at 1193.

The decision below represents an especially egregious example of a "complex jurisdictional test." Judge Reinhardt's panel opinion trains on Daimler AG's alleged "right to control" the indirectly held subsidiary that functioned as its distributor. Pet. App. 25a-29a.[2] To support its conclusion that Daimler AG exercises this "right to control," it relies principally on the distribution agreement between the two companies. Yet Judge Reinhardt's panel opinion fails to explain what features of a given distribution agreement will subject any out-of-state manufacturer to general jurisdiction in its distributor's courts. Indeed, Judge Reinhardt's panel opinion expressly disavows any attempt to articulate a bright-line test, favoring instead a murky "case-by-case common law method for refining" the test in the future. Pet. App. 23a n. 12.

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[2] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the initial panel opinion that correctly held the Constitution did not permit the exercise of personal jurisdiction.

This foggy standard set by the panel opinion threatens an important instrument of international and interstate exchange. Distribution agreements are a routine part of international business transactions. *See, e.g., Rasmussen v. General Motors Corp.*, 803 N.W.2d 623 (Wis. 2011); *Estate of Thompson v. Toyota Motor Corp. Worldwide*, 535 F.3d 357 (6th Cir. 2008); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985). In such relationships, as in this case, both title and risk pass from the manufacturer to the downstream distributor. *See* Pet. App. 49a (noting that Daimler AG "sells its vehicles ... to MBUSA in Germany, where title passes" to MBUSA). The distributor then passes the good on to either further regional distributors or end-use customers. The entire point of such an arrangement is to enable all parties to manage their risks and potential liabilities. The "case-by-case common law method" utilized in Judge Reinhardt's panel opinion throws the predictability of those risk-allocation relationships into doubt by subjecting manufacturers to the threat of general jurisdiction wherever they maintain distribution relationships.

The impact is not limited to distributorships. Courts may impute jurisdictional contacts in a variety of business relationships. *See, e.g., Stripling v. Jordan Production Co.*, 234 F.3d 863 (5th Cir. 2000) (upholding jurisdiction over out-of-state defendant based on its intent to purchase stake in another defendant's business venture); *Richard Knorr Intern. Ltd. v. Geostar, Inc.*, 2010 WL 1325641 (N.D. Ill. 2010) (upholding personal jurisdiction over out-of-state defendant based on activities of its independent contractor); *Murphy v. Cuomo*, 913 F. Supp. 671 (N.D.N.Y. 1996) (upholding jurisdiction over out-of-state defendant

based on its relationship with separate company that marketed its products). Until this Court clarifies the law in this area, these decisions leave companies in a haze about what commercial relationships, whether with a subsidiary, distributor or other business partner, will result in the imputation of one entity's jurisdictional contacts to another entity.

Nor is the impact limited to international business relationships. Putting to one side the facts of the case, at bottom Judge Reinhardt's panel opinion held that the contacts of a corporation may be imputed to its indirect owner on the basis of the importance of the company's activities and the shareholder's right to control the company's operations. Nothing in Judge Reinhardt's panel opinion confines its holding to the foreign parent/domestic subsidiary context, and courts have relied upon theories of jurisdiction by imputation in purely domestic settings as well. *See, e.g., Alderson v. Southern Co.*, 747 N.E.2d 926, 944 (Ill. App. Ct. 2001) (relying on agency principles to pierce from local power plant through four layers of ownership to domestic, out-of-state defendant); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) (exercising personal jurisdiction over affiliated Nevada and California businesses based on use of an independent contractor in New York).

This extension of general personal jurisdiction can be especially devastating for small businesses. Small businesses represent the lifeblood of the United States economy. U.S. Small Business Administration, Office of Advocacy, The Small Business Economy: A Report to the President (2009). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real

gross domestic product (GDP), as well as a significant share of innovations." *Id.* at 1. The lax standard announced in Judge Reinhardt's panel opinion could equally be applied to assert jurisdiction over small businesses based on the contacts of their distributors or agents. Alternatively, it could be used to assert jurisdiction over their individual owners who obviously exert a great deal of "control" over the business. Several federal courts have done just that – considering, and in some cases relying upon, theories of jurisdictional imputation in cases against individual owners of such small businesses. *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 523-24 (9th Cir. 1989); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1459-60 (Fed. Cir. 1997); *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 652-54 (5th Cir. 2002). Unless promptly corrected, the expansive assertion of judicial jurisdiction represented by Judge Reinhardt's panel opinion could exacerbate this trend and force small business owners to choose between abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states.

II. The Imputation Of Contacts To Support General Jurisdiction Over Foreign Corporations Discourages Foreign Investment In The United States And Undermines United States Foreign Relations.

Just recently, the Solicitor General explained how exotic theories of general jurisdiction over foreign defendants can interfere with the foreign commercial and diplomatic relations of the United States. Assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full

benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tire Operations, S.A. v. Brown, No. 10-76, at 12. Such assertions also have prompted "foreign governments' objections" and "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* The watered-down standards articulated by Judge Reinhardt's panel opinion revive the very dangers against which the Solicitor General warned.

A. Foreign Investment

Foreign direct investment plays a vital role in the health of the United States economy. *See* U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 2 (2008) ("Litigation Environment"). Such investment, as President Obama recently explained, "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities." Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy. The litigation environment critically influences a foreign company's decision to invest in the United States. Litigation Environment at 7. Allowing personal jurisdiction on the basis of a subsidiary's contacts enhances the costs of the United States litigation environment and encourages foreign companies to invest their capital elsewhere.

The disincentive on foreign direct investment is especially pernicious where a court, like the one below, has determined that a foreign defendant is

subject to *general* jurisdiction based on its relationship with a subsidiary or distributor. Under the logic of Judge Reinhardt's panel opinion, any party anywhere in the world could conceivably attempt to assert jurisdiction over Daimler AG (or any other foreign corporation similarly organized) based on claims that have absolutely nothing to do with the United States or California. Regrettably, this is not an isolated instance. Several foreign companies now labor under findings of general jurisdiction based not on their own contacts but, instead, on their alleged relationship with some domestic business partner. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (upholding general personal jurisdiction over foreign corporation based on activities of separate New York Investor Relations Office); *King County v. IKB Deutsche Industriebank AG*, 712 F. Supp. 2d 104 (S.D.N.Y. 2010) (upholding general personal jurisdiction over German bank based on relationship with its wholly owned New York subsidiary); *In re Chocolate Confectionary Antitrust Litig.*, 641 F. Supp. 2d 367 (M.D. Pa. 2009) (upholding general personal jurisdiction over British companies based on contacts of domestic subsidiary); *Synopsis, Inc. v. Ricoh Co.*, 343 F. Supp. 2d 883 (N.D. Cal. 2003) (upholding general jurisdiction over Japanese company based on in-forum activities of its sales and marketing units); *Japax, Inc. v. Sodick*, 542 N.E.2d 792 (Ill. App. Ct. 1989) (same); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 376 (S.D.N.Y. 2002) (upholding general jurisdiction over German company based on its relationship with its wholly owned domestic subsidiary); *Newport Components, Inc. v. NEC Home Electronics, Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987) (finding *prima facie* evidence to support general jurisdiction over Japanese

corporation based on its relationship with California subsidiary).

Theories of imputation are not limited to the assertions of jurisdiction by the state where the subsidiary or agent is incorporated. Other states, where the agent or subsidiary does business, may assert jurisdiction over the foreign principal or parent through theories of imputation. *See, e.g., In re Phenylpropanolamine (PPA) Products Liability Litig.*, 344 F. Supp. 2d 686 (W.D. Wash. 2003) (upholding personal jurisdiction under Oregon law over Swiss corporation based on the conduct of its Delaware subsidiary headquartered in New Jersey); *Gantzert v. Holz-Her U.S., Inc.*, 1994 WL 532134 (N.D. Ill. 1994) (upholding personal jurisdiction in Illinois over a German corporation based on the conduct of its North Carolina subsidiary); *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wisc. 1983) (upholding personal jurisdiction in Wisconsin over Japanese company based on the conduct of its California subsidiary); *Cascade Steel Rolling Mills Inc. v. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980) (upholding personal jurisdiction in Oregon over Japanese company based on conduct of its New York subsidiary). Thus, not only are foreign corporations at risk of personal jurisdiction in the "home" of their subsidiaries, they ultimately might be answerable in any state where their subsidiaries do business. These potentially boundless extensions of jurisdiction by imputation further threaten to chill foreign direct investment in the United States.

B. Foreign Relations

The United States largely stands alone in permitting theories of jurisdiction by imputation. *See* Brian Pearce, Note, *The Comity Doctrine as a Barrier to*

Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 Stan. J. Int'l L. 525, 534 (1994). The aggressive expansion of those theories, exemplified by Judge Reinhardt's panel opinion, consequently places the United States further at odds with the views of other nations, including its important trading partners. Unless corrected, these views invite retaliation by foreign nations and frustrate important efforts at harmonization in the area of jurisdiction and judgment enforcement.

As the judges dissenting from rehearing *en banc* correctly recognized, sweeping notions of jurisdiction by imputation threaten United States companies with retaliatory assertions of judicial jurisdiction by foreign courts. Pet. App. 144a. In most foreign countries, the notion of jurisdiction by imputation would be unfathomable. *See, e.g.*, European Council Regulation 44/2001; Jose Engracia Antunes, Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law 240-41 (1994). Despite the unfamiliarity of the principle, several countries have enacted "retaliatory jurisdictional laws." Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). 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." *Id.* Applied to the rule announced by Judge Reinhardt's panel opinion, these laws would allow foreign courts to assert jurisdiction over United States companies – and only United States companies – based simply on the availability of jurisdiction over their subsidiaries or other agents. Moreover, because Judge Reinhardt's panel opinion permits jurisdiction over claims completely unrelated

to a party's relationship with the forum, such punitive assertions of judicial jurisdictions by foreign courts would be virtually boundless. Such an outcome would undermine the export of United States products and undercut the foreign commercial interests of the United States.

Such risks of retaliatory jurisdiction are more than hypothetical. Other nations, including close trading partners of the United States, have engaged in similar retaliation in response to aggressive assertions of prescriptive jurisdiction (such as in the antitrust context). Perhaps most famously, the United Kingdom enacted clawback statutes entitling United Kingdom citizens to recover damages equivalent to the amounts recovered by plaintiffs in suits before United States courts. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 679-83. Similarly, in the discovery context, nations such as France have enacted statutes that punish compliance with discovery orders of United States courts. *Id.* at 969-73. Unless corrected, aggressive assertions of jurisdiction by imputation invite similar retaliation in the context of judicial jurisdiction.

Not only do theories of jurisdiction by imputation invite retaliation, they also frustrate more general efforts to achieve any harmonization between the United States and its trading partners in this area of the law. The United States presently is not a party to any bilateral or multilateral convention governing jurisdiction or judgment enforcement. *Id.* at 1081-85. Though diplomats spent the better part of the last decade attempting to achieve some degree of consensus, lack of agreement on common principles of jurisdiction presented a central stumbling block. *See* Brief for the United States as *Amicus Curiae* Sup-

porting Petitioners in *Goodyear Dunlop Tire Operations, S.A. v. Brown*, No. 10-76, at 12. Sweeping theories of jurisdiction by imputation, such as that approved by Judge Reinhardt's panel opinion, do not help matters. They widen the chasm between the United States and its trading partners, further complicating any effort to achieve consensus in this area of the law. *See Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 115 (1987) (instructing courts to consider the "Federal interest in Government's foreign relations policies."); *Howe v. Goldcorp, Inc.,* 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.) ("The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes.").

III. The Ninth Circuit's Standard For Determining Whether An Exercise Of Jurisdiction Comports With "Traditional Notions Of Fair Play And Substantial Justice" Conflicts With The Decisions Of This Court And Other Circuits.

After concluding that Daimler AG, through its subsidiary, had constitutionally sufficient minimum contacts with California, Judge Reinhardt's panel opinion assessed the reasonableness of that assertion of jurisdiction under the Due Process Clause by reference to a seven-factor "balancing" test. That test, especially as applied in Judge Reinhardt's panel opinion, conflicts both with clear Supreme Court

precedent and the views of other federal appellate courts.

Judge Reinhardt's panel opinion instructs courts to "weigh seven factors" including

> the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiffs; and the existence of an alternative forum. Pet. App. 31a.

The problem with this seven-factor test is that it contradicts this Court's commands. The critical opinion here is *Asahi*. There, this Court explained the proper test for reasonableness:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiffs' interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

480 U.S. at 113 (citation and internal quotations omitted). Consistent with this clear guidance, courts in other circuits have found that the exercise of jurisdiction over a nonresident parent based on the activities of its subsidiary would be unreasonable. *See, e.g., Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990). Judge Reinhardt's panel opinion deviates from this consistent line of precedent in two respects – (1) its

emphasis on the existence of an adequate alternative forum and (2) its weighing of the respective sovereign interests.

A. Adequate Alternative Forum

The roots of the panel's flawed approach lie in the Ninth Circuit's continued adherence to stale precedents. The seven-factor test articulated by Judge Reinhardt traces to the Ninth Circuit's 1981 decision in *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). Tellingly, while *Marina Salina* cited supporting authority for most of the factors in its seven-factor test, it cited absolutely no authority for the proposition that the "existence of an alternative forum" was relevant to the personal jurisdiction analysis. *See Marina Salina*, 649 F.2d at 1270. That decision obviously predated this Court's decision in *Asahi*. Yet no decision of the Ninth Circuit, including those immediately after *Asahi*, appeared to consider explicitly whether *Asahi*'s formulation of the "reasonableness" test required reconsideration of the *Marina Salina* formulation. *See, e.g., Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988). While a few hew more closely to the *Asahi* formulation, *see, e.g., CARIB v. Dillon*, 976 F.2d 596, 599 (9th Cir. 1992), most decisions, such as Judge Reinhardt's panel opinion, simply parrot the *Marina Salina* formulation. As this case exemplifies, that flaw in the Ninth Circuit precedent compounds the impact of its flawed theory of jurisdiction by imputation and enhances the risk that a court will assert personal jurisdiction in a manner inconsistent with the Constitution.

The panel's emphasis on "the existence of an alternative forum" collapses two distinct inquiries – personal jurisdiction and *forum non conveniens*. *See*

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1175 n. 5 (9th Cir. 2006) (acknowledging that the "alternative forum" factor of the Ninth Circuit's reasonableness analysis "is at the heart of the *forum non conveniens* analysis"). Personal jurisdiction is a constitutional doctrine concerned with limits on a state's sovereign power and considerations of fairness to a nonresident defendant. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). By contrast, *forum non conveniens* is a prudential doctrine of federal common law concerned with identifying the most convenient forum for resolving a dispute. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). By allowing the "existence of an alternative forum" to influence the jurisdictional inquiry, Judge Reinhardt's panel opinion allows a constitutional determination to turn on the answer to a nonconstitutional question.

This case illustrates the pitfalls of collapsing the two inquiries. Judge Reinhardt's panel opinion stresses the "conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed." Pet. App. 40a. Under the *forum non conveniens* doctrine, those concerns could easily be allayed by conditioning dismissal on the defendant's waiver of any limitations defense. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 428, 449-52. By contrast, the personal jurisdiction doctrine does not permit the same degree of flexibility. Consequently, any consideration of the "availability of an alternative forum" at the jurisdictional stage of a case necessarily focuses on the most pessimistic view about the foreign forum and skews the inquiry in favor of retaining jurisdiction.

B. Interest Balancing

Apart from the Ninth Circuit's flawed grafting of *forum non conveniens* principles onto personal jurisdiction law, the panel's treatment of the respective sovereign interests in this case conflicts irreconcilably with this Court's decision in *Asahi*.

First, Judge Reinhardt's panel opinion overstates the forum state interest. In *Asahi*, this Court found that, after the plaintiff had settled his claims, California had a minimal interest in adjudicating the leftover impleader action between a Taiwanese and Japanese company. 480 U.S. at 115. Here, as the lower court acknowledged, "the events at issue did not take place in California ... [and] the plaintiffs are not California residents." Pet. App. 35a. Nonetheless, Judge Reinhardt's panel opinion found that California had "a strong interest in adjudicating and redressing international human rights abuses." Pet. App. 36a. That argument cannot survive *Asahi*. If a state lacks a constitutionally sufficient interest to adjudicate a products liability case predicated on injury to its *own* resident once that resident has settled the matter, then it can hardly have a weightier interest in resolving disputes over alleged injuries to foreign parties based on conduct that never occurred in the state.

Second, Judge Reinhardt's panel opinion understates the interests of foreign states, particularly Germany. *Asahi* highlighted the importance of foreign states' interests in cases like this one involving assertions of personal jurisdiction over foreign defendants. 480 U.S. at 115. Those interests should weigh especially heavily in a case such as this one where (unlike *Asahi*) the basis for jurisdiction bears absolutely no relationship to the alleged conduct giving rise to the

claim. Instead of treating Germany's interests with "great care," Judge Reinhardt's panel opinion gave them short shrift. While acknowledging that "German courts have expressed some concern that this case may impinge upon Germany sovereignty," Pet. App. 34a, the panel opinion promptly discounts those same concerns. The panel found that Germany's sovereignty interests "weighed less heavily" in light of the alleged benefits that Daimler AG derived from the United States market. *Id.* This analysis does not respect the balance conducted by this Court in *Asahi*. In *Asahi*, the Japanese corporation also derived benefits from the California market, yet this Court concluded that those benefits did not outweigh the "procedural and substantive interests" of Japan. Proper consideration of the *Asahi* factors, rather than the Ninth Circuit's stale pre-*Asahi* methodology, compels the same result here.

At bottom, Judge Reinhardt's panel opinion represents the culmination of a circuit precedent that has drifted too far from the standards set forth by this Court. Its confused treatment of *forum non conveniens* principles and flawed weighing of sovereign interests unfairly tilts the scales against defendants.

CONCLUSION

For the foregoing reasons, in addition to those offered by Petitioner, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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No. 11-965

IN THE

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Petitioner,
v.
BARBARA BAUMAN, *et al.*,
Respondents.

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

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INTEREST OF *AMICI CURIAE* [1]

Amici represent a diverse array of companies doing business across state lines and international bound-

[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 *amici curiae*, their members or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

aries. Due to this interstate and international commercial activity, *amici*'s members, both domestic and foreign, have a keen interest in the rules governing when businesses can be subject to adjudicatory jurisdiction in the United States.

Amici's members have a special interest in the rules governing whether, and to what extent, non-resident companies can be subject to jurisdiction in a forum based on the contacts of other entities such as wholly owned subsidiaries. Some members, both foreign and domestic, maintain one or more subsidiaries that are directly affected by the Ninth Circuit's ruling. Others are small, family-owned businesses. Under the logic of the Ninth Circuit's decision, individual owners of these businesses, by virtue of their "right to control" those businesses, might be subject to general jurisdiction *in their individual capacities* in states other than where their businesses are incorporated or operate.

The Ninth Circuit's expansive approach to adjudicatory jurisdiction, coupled with its lenient standards for disregarding the separateness of corporate entities, threatens to disrupt the flow of goods and services across interstate and international boundaries; it also exposes *amici*'s members to unfair burdens in unfamiliar forums. *Amici* file this brief to explain the harm wrought by the Ninth Circuit's decision and to explain why it is irreconcilable with this Court's prior decisions on this important issue.

SUMMARY OF THE ARGUMENT

The Due Process Clause does not permit the exercise of general jurisdiction over a parent corporation, whether foreign or domestic, based on the in-forum contacts of its wholly owned subsidiary. In addition

to the reasons given in Petitioner's brief, which *amici* fully support, two additional ones justify this outcome.

First, general jurisdiction is available only in forums where a defendant is "at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). Corporations, whether foreign or domestic, are "at home" only in the forums where they are incorporated or maintain their principal place of business. This rule flows directly from this Court's prior decisions charting the constitutional limits of general jurisdiction over nonresident corporations. It comports with the historical approach to those limits, which originally confined adjudicatory jurisdiction only to the forums where the corporation was chartered. This categorical rule advances the twin purposes underpinning those constitutional limits—namely the avoidance of conflict among sovereigns and the protection of defendants from unwarranted assertions of authority by sovereigns where they are not "at home." Finally, several practical considerations of special importance to foreign and domestic companies—including the ease of application, the promotion of foreign commerce, and the avoidance of tensions with foreign governments—support this rule.

Second, the Ninth Circuit's "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction. Those decisions, especially *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), set an extraordinarily high bar before a nonresident corporation will be deemed amenable to adjudicatory jurisdiction in a forum based on the activities of its subsidiaries there. This high bar

reflects the commonsense principle that each defendant's due process right to be free from unwarranted assertions of sovereign authority, like all constitutional rights, must be individually assessed. It also reflects the presumption of corporate separateness—a principle of great importance to companies, both foreign and domestic, that promotes, among other salutary goals, capital formation, credit extension, and regulatory compliance. The Ninth Circuit's "agency" test thwarts these principles. It upsets the reasonably settled expectations of foreign companies by placing ordinary relations with their American subsidiaries on a collision course with the lower court's diluted "right to control" test. It also exposes owners of this country's small businesses, the engine of job production today, to an unjustifiable risk that they will be haled into faraway forums.

ARGUMENT

For over a century, the Due Process Clause has constrained assertions of adjudicatory jurisdiction over nonresident defendants. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878).[2] The due process limitations on a court's adjudicatory authority do not depend on

[2] This concept is sometimes also referred to as "personal jurisdiction" or "judicial jurisdiction." This distinguishes it from other conflicts principles like *prescriptive jurisdiction* (also known as legislative jurisdiction), which concerns a legislature's ability to issue substantive rules regulating conduct, or *enforcement jurisdiction*, which concerns the rules governing the ability of a judgment creditor to satisfy a judgment. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (prescriptive jurisdiction); *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) (enforcement jurisdiction).

whether the defendant is an individual or a juridical entity; nor do they depend on the nationality of the defendant. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-89, 299 (1980).

Since *International Shoe*, those constitutional constraints are ordinarily measured in terms of "contacts" between the defendant and the forum state. 326 U.S. at 316. The constitutionally required quantum of contacts varies with the nature of jurisdiction being asserted. When the plaintiff's claims relate to the defendant's forum contacts, specific jurisdiction may lie. *See Goodyear*, 131 S. Ct. at 2855. Here, the parties agree that the plaintiffs' claims lack any relation to the contacts of Daimler AG, a German Aktiengesellschaft ("stock company"), with California. Pet. App. 20a.

When the plaintiff's claims are unrelated to the defendant's forum contacts, adjudicatory jurisdiction can lie only "when there are sufficient contacts between the [forum] and the foreign corporation" to satisfy the requirements of general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Here, Judge Reinhardt's panel opinion held that general jurisdiction would lie based on the contacts of Mercedes-Benz USA, LLC ("MBUSA"), an indirectly held subsidiary of Daimler AG.[3] In Judge Reinhardt's panel opinion, those contacts could properly be treated as Daimler AG's own because MBUSA was its "agent."

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[3] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the original panel opinion that correctly held the Constitution prohibited the exercise of adjudicatory jurisdiction in this case. *See* Pet. App. 46a-61a.

That holding is incorrect—both for the reasons stated by Daimler AG and for two additional reasons explained in this brief. First, it exceeds the constitutional limits on general jurisdiction over corporations, which restrict such jurisdiction to an entity's state of incorporation or principal place of business. Second, and alternatively, the "right to control" test articulated in Judge Reinhardt's panel opinion flouts the constitutional limits of adjudicatory jurisdiction set forth in this Court's prior opinions and is inconsistent with the purposes underlying those limits.

I. Corporations Are Subject To General Jurisdiction Only In Their States Of Incorporation And Principal Place Of Business.

Under this Court's precedents, general jurisdiction over corporations lies only in forums where they are incorporated or maintain their principal place of business. This rule comports with the history of the due process limits on adjudicatory jurisdiction and promotes the functions served by those limits. Finally, several practical considerations support this rule.

A. This Court's prior decisions narrowly define the forums that may exercise general jurisdiction over corporate defendants.

International Shoe highlighted the constitutional significance of the relationship between a plaintiff's claims and a defendant's activities in the forum state. Though not employing the phrase "general jurisdiction," *International Shoe* did speak in terms of "instances in which the continuous corporate operations within a state were thought so substantial

and of such a nature as to justify suit against it on cause of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. Subsequent academic research[4] described these "instances" as "general jurisdiction," a term this Court later formally incorporated into the doctrine. *See Helicopteros*, 466 U.S. at 416.

Since *International Shoe*, this Court has surveyed the constitutional boundaries of general jurisdiction over corporations three times. Most recently, in *Goodyear*, this Court unanimously held that general jurisdiction could not lie based upon the nonresident defendants' sales of goods to the forum state (North Carolina). Central to this conclusion was the Court's belief that such sales did not render these corporations "essentially at home in the forum State." 131 S. Ct. at 2851. In the Court's view, corporations were "at home" in places equivalent to the domicile of an individual. *Id.* at 2853; *see also Milliken v. Meyer*, 311 U.S. 457, 462 (1940). These consisted of the corporation's place of incorporation and principal place of business. *Goodyear*, 131 S. Ct. at 2853 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988)); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (describing the states of "incorporation or principal place of business" as analogous to individual citizenship or domicile and "indicat[ing] general submission to a State's powers"). Under this standard, the corporate defendants in *Goodyear* were not "at home" in North Carolina because they

[4] *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

were incorporated and had their principal places of business elsewhere—namely, Turkey, France, and Luxembourg. *Id.* at 2850. *See also Nicastro*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (A foreign corporation is "not subject to general (all purpose) jurisdiction in [forum courts], for that foreign-country corporation is hardly 'at home' in [the forum]."). While their sales of goods to North Carolina might have supported specific jurisdiction in an action related to those sales, *see Goodyear*, 131 S. Ct. at 2855, they were insufficient to support general jurisdiction.

The "at home" standard announced in *Goodyear* fits comfortably with the Court's two earlier post-*Shoe* decisions addressing general jurisdiction over nonresident corporations. A quarter-century before *Goodyear*, this Court held that general jurisdiction would not lie over nonresident corporations based on their purchases from the forum state. *See Helicopteros*, 466 U.S. at 415-19. Like the non-resident defendants in *Goodyear*, the corporate defendant in *Helicopteros* was incorporated and had its principal place of business in a foreign country—Colombia. *Id.* at 409. And while its purchases from the forum state would perhaps be relevant to a specific jurisdiction claim, *see id.* at 425-26 (Brennan, J., dissenting), they were insufficient to render it "at home" in the forum (Texas) and thus could not support general jurisdiction.

In contrast to *Goodyear* and *Helicopteros*, this Court upheld an assertion of general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*, 343 U.S. 437 (1952). *Perkins* involved a shareholder's claims for nonpayment of dividends and failure to issue shares against a "sociedad anonima" organized under the laws of the Philippines and conducting mining

operations in that country. *Id.* at 439. Despite the company's foreign seat, the shareholder filed suit in Ohio where its president (who was also its general manager and principal stockholder) had relocated during the wartime hostilities in the Philippines. *Id.* at 447-48. Although the shareholder's claims were unrelated to the company's contacts with Ohio, *id.* at 447, the Court held that the Ohio court's assertion of adjudicatory jurisdiction comported with the Due Process Clause, *id.* at 448-49. The Court rested this conclusion on several facts—the company's president maintained an office there, carried on correspondence there relating to the company, maintained company bank accounts there, used an Ohio-based bank as a transfer agent, hosted board meetings, and directed corporate operations from there. *Id.* at 447-48. As this Court later explained, "[i]n those circumstances, Ohio was the corporation's *principal, if temporary, place of business.*" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984) (emphasis added); *cf. Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (describing principal place of business for purposes of federal diversity statute as "referring to the place where a corporation's officers direct, control and coordinate the corporation's activities").

Read together, *Goodyear*, *Helicopteros*, and *Perkins* establish a clear and predictable rule: Corporations are subject to general jurisdiction only in their state of incorporation and principal place of business. *See also Nicastro*, 131 S. Ct. at 2787 (plurality opinion) ("[T]hose who live or operate primarily outside a State have a due process right not to be subject to judgment in its courts as a general matter."). This rule comports with the history underpinning the due process limits on adjudicatory jurisdiction, as ex-

plained in Section I.B. It advances the purposes underpinning those limits, as explained in Section I.C. Finally, it is supported by several additional practical considerations, discussed in Section I.D.

B. Limiting general jurisdiction to the forums where corporate defendants are "at home" comports with the history underlying the due process limitations on adjudicatory jurisdiction.

Before *International Shoe*, "[t]he foundation of jurisdiction [wa]s physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Courts authenticated their physical power over defendants by effecting proper service of process. Corporations, as initially conceived, were "artificial persons" that existed only within the territorial borders of the sovereign that created them; thus, they could not reside beyond the territorial borders of their place of incorporation. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839). Because corporations act through their agents, service was originally possible only on their principal corporate officers in their state of incorporation. Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 Harv. L. Rev. 871, 878 (1919). This was because the functions and authority of corporate officers were thought to cease at the territorial border of the state of incorporation. *E.g., McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819). Consequently, corporations were subject to general jurisdiction only in their state of domicile—their state of incorporation. Justice Field summarized this point in *St. Clair v. Cox*:

> Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which

> it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice TANEY [in *Bank of Augusta v. Earle*], migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

106 U.S. 350, 354 (1882).

This restrictive view of adjudicatory authority began to wither during the late nineteenth century as interstate commerce began to bloom. Corporations, through their agents, increasingly transacted business beyond the borders of their state of incorporation. 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1066 (3d ed. 2002). The Court, moreover, recognized that such transactions were possible only with the express or implied consent of the other state. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855). In exchange for that consent, states could impose conditions on nonresident corporations so long as they were not "repugnant to the [C]onstitution or the laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." *Id., quoted with approval in St. Clair*, 106 U.S. at 359.

As a result, both before and after the Fourteenth Amendment's ratification, states sometimes required nonresident corporations "doing business" within their borders to appoint an agent for service or deemed service proper when it was made on a designated public official or an in-state agent of the corporation. *See e.g.*, *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 605 & n.1 (1899) (discussing 1877 Tennessee statute permitting in-state service on any agent of a nonresident corporation "doing business in the state" for suits arising from its in-state business transactions); *French*, 59 U.S. at 406 (discussing 1851 Ohio statute permitting in-state service on most in-state agents of nonresident insurance corporations); *see also* Restatement (First) of Judgments § 29 & cmt. a (1942); Restatement (First) of Conflict of Laws § 91 & cmt. b (1934). These statutes aided states in asserting jurisdiction over nonresident corporations. So while they could not "reside" outside of their state of incorporation, they could be sued in another state in limited circumstances. *French*, 59 U.S. at 407.

Even during this period of expanding adjudicatory jurisdiction, a state's authority over nonresident corporations did not extend to every possible claim against them. This point was made plain in Justice Harlan's unanimous opinion in *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907). There, the Court reiterated that states could condition a nonresident corporation's ability to transact business within their borders upon filing a statement with a state public official (in that case, an insurance commissioner) attesting that service on the public official could be treated as personal service on the nonresident corporation. *Id.* at 21. Importantly, however, should the nonresident corporation fail to do so and yet transact business within the state, its lack of

compliance would not constitute a defense but rather an implicit acceptance of the state's service statute. *Id.* at 21-22.

Yet the Court was equally clear that, under these circumstances, states did not have unlimited adjudicatory jurisdiction over nonresident corporations. Instead, their jurisdiction extended only to claims related to the corporation's business transactions within the state. *See id.* at 21 ("But even if it be assumed that the [nonresident corporation] was engaged in some business in [the forum state] at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the [public official] of that [state] would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of [the forum state]."). In the Court's view, public policy considerations warranted the inference that the nonresident corporation implicitly assented to the forum state's jurisdiction "as to business there transacted by it." *Id.* at 23. But "it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although the citizens of the former state may be interested in such business." *Id.* In other words, absent explicit consent, nonresident corporations could not be subject to general jurisdiction outside of their state of incorporation, no matter how much business they transacted there. *See Louisville & Nashville R.R. Co. v. Chatters*, 279 U.S. 320, 325 (1929) ("Even when present and amenable to suit [a nonresident corporation] may not, *unless it has consented*, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction."

(emphasis added) (citations omitted)).[5] *See generally* Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 681-84 (2012).

In sum, then, the history of adjudicatory jurisdiction before *International Shoe* establishes that the Due Process Clause limited general jurisdiction over nonresident corporations, absent their prior consent, to only those forums where they were deemed to be legally "at home."

C. Limiting general jurisdiction to the forums where corporate defendants are "at home" advances the purposes underlying the due process limitations on adjudicatory jurisdiction.

The due process limits on adjudicatory jurisdiction traditionally have served "two related, but distinguishable functions." *Woodson*, 444 U.S. at 292. First, they reduce clashes among sovereign states (whether domestic or foreign). *See id.*; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Assertions of jurisdiction over nonresident defendants necessarily implicate the interests of two sovereigns—the sovereign asserting adjudicatory jurisdiction and the sovereign where the defendant is "at home." Second,

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[5] Under the Restatement, general jurisdiction might lie where nonresident corporations explicitly consented—by filing the applicable paperwork either appointing an agent for service or assenting to service upon a public official and then expressly empowering the designated agent or public official to accept service on its behalf for any cause of action. *See* Restatement (First) of Conflict of Laws § 91 & cmt. c (1934). In no case could the state's adjudicatory jurisdiction exceed the scope of authority that the agent or official possessed to accept service. *Id.* cmt. b.

the constitutional limits avoid unfairness to the defendants. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 465 U.S. 694, 702-03 n.10 (1982). Permitting jurisdiction over corporations with a few forum contacts unrelated to the claims "lays too great and unreasonable a burden on the[m] to comport with due process." *Int'l Shoe*, 326 U.S. at 317. These twin functions influence the different doctrinal approaches governing specific and general jurisdiction.

Specific jurisdiction inquiries require a complex analysis of the competing sovereign interests and the burdens on the defendant. Consequently, specific jurisdiction entails a fact-intensive, two-step inquiry: (1) whether the defendant has undertaken "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253, and (2) whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316. *Woodson*, a specific jurisdiction case, explained that the second step of this inquiry turns on an array of factors, such as the burden on the defendant and the forum state's interest, to guide the determination whether an exercise of jurisdiction accords with "traditional notions of fair play and substantial justice." 444 U.S. at 292; *see also Asahi*, 480 U.S. at 113-16 (majority opinion) (holding, in a specific jurisdiction case, that *Woodson*'s factors do not support exercise of adjudicatory jurisdiction).

General jurisdiction inquiries look different. The balance of sovereign interests is more one-sided, and the unfairness to the defendant is more easily

assessed. Consequently, general jurisdiction rules tend to be categorical. *Goodyear*, *Helicopteros*, and *Perkins* all resolved their respective questions of adjudicatory authority without considering whether the exercise of general jurisdiction comported with "traditional notions of fair play and substantial justice." Strictly limiting general jurisdiction over corporations to the forums where they are incorporated or maintain their principal place of business avoids needless "uncertainty and litigation over the preliminary issue of the forum's competence," *Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 626 (1990) (plurality opinion), and reflects the categorical approach previously employed in this Court's general jurisdiction decisions. Any assertion of general jurisdiction outside of those forums would be, as Petitioner puts it, *per se* unreasonable. *See* Brief for Petitioner at 37-38.

D. Carefully drawn limits on the forums that can assert general jurisdiction provide predictability, promote foreign commerce, and minimize interference with the foreign relations of the United States.

Goodyear's "at home" rule is not only compatible with doctrine, history, and purposes, it also is supported by several additional practical considerations.

First, the rule offers predictability for businesses and easy application for courts. "Predictability," as this Court recently explained, "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94. In the context of adjudicatory jurisdiction, clear and predictable jurisdictional rules enable companies "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. By contrast, "[c]omplex 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." *Hertz*, 559 U.S. at 94.

The benefits of a clear and predictable rule governing general jurisdiction over nonresident corporations resonate equally with foreign and domestic companies. Domestic companies, like foreign ones, routinely use subsidiaries or other juridical entities to conduct business across state lines, *see* Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 Yale L.J. 1413, 1427 & n.76 (1998), and lower courts sometimes rely on the activities of those entities to exercise general jurisdiction over the nonresident domestic company.[6] Unfortunately, the standards employed in those cases are hardly clear. Confirming that corporations are subject to general jurisdiction only in the forums where they are incorporated and maintain their principal place of business avoids that uncertainty and unpredictability. The forum of incorporation is easily identified by reference to the company's founding documents. And although the forum where the company maintains its principal place of business might be debatable in borderline cases, this Court can develop clear standards to guide that inquiry, perhaps by reference to comparable tests in other jurisdictional contexts. *See Hertz*, 559 U.S. at 94 (explaining how the "nerve center" test for principal place of business in subject-

[6] *See, e.g., Alderson v. S. Co.*, 747 N.E.2d 926, 944-45 (Ill. App. Ct. 2001); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967) (applying New York law).

matter jurisdiction is easily applied in mine-run cases).

Second, holding that corporations are amenable to general jurisdiction only in forums where they are "at home" has salutary effects on foreign commerce. Foreign direct investment plays a vital role in the health of the United States Economy. *See* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 2 (2008). Such investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity and support[s] American communities." Statement by President Barack Obama on the United States Commitment to Open Investment Policy (June 20, 2011).

Extraordinary assertions of jurisdiction can frustrate this commerce-promotion objective. "Overseas firms . . . could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008); *cf. Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979). While such concerns often are articulated in the context of prescriptive jurisdiction, the commerce-frustrating effects of the capacious approach to general adjudicatory jurisdiction exemplified by Judge Reinhardt's panel opinion are potentially far worse. Whereas prescriptive jurisdiction rules subject foreign companies to account for specific claims, general jurisdiction rules make them answerable in the forum's courts for *all* claims regardless of where they occurred. This makes the foreign company a tempting target for plaintiffs, who may simply join the foreign company in litigation as a part of an effort to obtain settlement leverage. Even if a lower court

eventually dismisses the foreign company from the case, such relief may come only after costly and burdensome jurisdictional discovery, as this case well illustrates, *see* Pet. App. 80a. Thus, as the United States Government has acknowledged, extraordinary assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10-76 ("*Goodyear Brief*") at 12.

The threat to foreign-commerce promotion affects domestic companies too. As the judges dissenting from rehearing en banc correctly recognized, sweeping assertions of jurisdiction over foreign companies threaten U.S. companies with retaliatory assertions by foreign courts. Pet. App. 144a. Concern about retaliation against American companies has prompted this Court to proceed cautiously when permitting the exercise of prescriptive jurisdiction over foreign companies. *See, e.g., Japan Line*, 441 U.S. at 450; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). Those same concerns should animate the rules governing adjudicatory jurisdiction. European officials recently revised the rules governing the adjudicatory jurisdiction of member-state courts and considered changes to the rules governing jurisdiction over companies, like those in the United States, not organized in member states. *See* Council Regulation 2012/1215, art. 6, 2012 O.J. (L351) 1, 7 (EU); Commission of the European Communities, *Green Paper on the Review of Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* at 3-4 (Apr. 21,

2009). Foreign jurisdictional rules are far less likely to reflect a hostile approach toward U.S. companies if our own rules regarding adjudicatory jurisdiction over foreign companies are similarly measured.

Third, a carefully cabined approach to general jurisdiction reduces any unintended impact on the foreign relations of the United States. Assertions of authority over foreign corporations can easily raise tensions between the United States and other nations. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Just like assertions of prescriptive jurisdiction, assertions of adjudicatory jurisdiction carry these risks, so any analysis of the constitutional limits of that authority likewise must take into account the "[f]ederal interest in [the] Government's foreign relations policies." *Asahi*, 480 U.S. at 115 (majority opinion).

The United States' brief in *Goodyear* explained how extraordinary assertions of general jurisdiction interfered with that "federal interest." It noted that such assertions had prompted "foreign governments' objections." *Goodyear Brief* at 33. This case well illustrates that point. The German Government identified this case as exemplifying an unwarranted intrusion by a U.S. court into the activities of a German company that, in Germany's view, should be "tried in German courts." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, at 10 & n. 3. And German courts, as Judge Reinhardt's panel opinion acknowledges, "have expressed some concern that this suit may impinge on German sovereignty." Pet.

App. 34a. Yet unless the available forums for general jurisdiction are clearly cabined, the "concern[s]" must be assessed by the Article III courts—which are not only thrust into the position of weighing them but may simply choose to reject them, as Judge Reinhardt's panel opinion did in this case, Pet. App. 34a. *Cf. McCulloch*, 372 U.S. at 19 (observing that an "ad hoc weighing of contacts" in the context of prescriptive jurisdiction "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice").

The United States' brief in *Goodyear* also noted that extraordinary assertions of general jurisdiction "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Goodyear Brief* at 33. The United States presently is not a party to any bilateral or multilateral convention governing adjudicatory jurisdiction or judgment enforcement. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1081-85 (5th ed. 2011). Though diplomats spent the better part of the last decade trying to achieve some degree of consensus, a lack of agreement on common principles of general jurisdiction presented a central stumbling block. *See* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319, 338-39 (2002); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Leg. F. 141, 161-63. The lower court's expansive theory of general jurisdiction based on a foreign parent's "right to control" a subsidiary simply widens the chasm between the law of the United States and the laws of its major trading partners. By contrast, limiting general jurisdiction to the state of the defendant's

domicile is a well-recognized principle of European law. *See* Council Regulation 2012/1215, art. 4. Anchoring the United States law of general jurisdiction in similar reference points facilitates "efforts to help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Invs., Inc.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.); *cf. Nicastro*, 131 S. Ct. at 2803-04 (Ginsburg, J., dissenting) (comparing American and European law on adjudicatory jurisdiction).

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This extensive historical, purposive, and practical support for *Goodyear*'s rule demonstrates the wisdom in this Court's limiting assertions of general jurisdiction over corporate defendants to forums where they are incorporated or have their principal place of business. Any objection to that rule based on alleged hardships it may cause plaintiffs is unwarranted. In all cases, *specific* jurisdiction may be available to ameliorate any hardship so long as the plaintiffs' claims are sufficiently related to the defendants' forum contacts. Only when *specific* jurisdiction is not available—that is, when a plaintiff's claims arise from a defendant's purposeful contacts outside the forum state—will *Goodyear*'s *general* jurisdiction rule be implicated. Hardship objections in such cases ring especially hollow when, as in this case, the plaintiffs are not even forum residents. But even if plaintiffs were forum residents, limiting general jurisdiction to forums where the nonresident defendant is "at home" is entirely appropriate. In cases against domestic companies, the plaintiffs would have at least one, if not two, states where general jurisdiction unquestionably would lie. And while such a forum might not exist with respect to a foreign company, Congress can

attempt to craft mechanisms designed to facilitate an available forum where specific jurisdiction might otherwise be unavailable.[7] Courts should not expand general jurisdiction out of a belief that they need to fill some gap in the jurisdictional architecture designed by Congress. Those gaps do not always reflect mere legislative oversight. Instead, as Judge Friendly observed in a related context a half-century ago, jurisdictional rules "represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing [sic] resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations." *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963) (en banc). In this context, the "balancing of various considerations"—including forum availability and commerce promotion—is one that Congress, not the courts, must undertake.

II. A Parent Corporation's Right To Control A Subsidiary Does Not Supply A Basis For Equating The Two Entities For Purposes Of Adjudicatory Jurisdiction.

Even if the Court does not rely on a categorical rule cabining the forums where general jurisdiction over corporations will lie, the Ninth Circuit's decision still must be reversed. Its "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction.

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[7] For certain cases arising under federal law, Rule 4(k) already alters the range of contacts relevant to the jurisdictional analysis. *See* Fed. R. Civ. P. 4(k)(1)(c); 4(k)(2). Those rules are not at issue here for the simple reason that Respondent has waived any reliance on them. *See* Brief for Petitioner at 7.

A. This Court's decision in *Cannon* creates a strong presumption that parents and subsidiaries will be treated separately in any jurisdictional inquiry.

The starting point for analyzing adjudicatory jurisdiction based on the relationship between a parent and subsidiary corporation is this Court's decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). Decided before *International Shoe*, *Cannon* involved a simple breach of contract action brought by a North Carolina company (Cannon) against a Maine company (Cudahy Packing) in a North Carolina court. Following removal, the Maine company sought dismissal for lack of jurisdiction; service had been effected only on the agent of a third company (Cudahy of Alabama) whose entire capital stock was owned by Cudahy Packing. The Alabama-based subsidiary maintained an office in North Carolina for the purpose of marketing Cudahy products there, so the question arose whether Cudahy Packing was "doing business" or "present" in North Carolina by dint of the activities of its wholly owned subsidiary. The Court unanimously held that, under such circumstances, jurisdiction did not lie.[8] Despite

[8] Some critics of *Cannon* have argued that the case did not even involve the constitutional limits of adjudicatory jurisdiction and cite its statement that "no question of the constitutional powers of the state, or of the federal government is directly presented." 267 U.S. at 336. That statement is better understood as referring to lack of a constitutional challenge to the state's regulatory power rather than a constitutional challenge to the state's adjudicatory power. But even if *Cannon*'s critics are correct, they cannot avoid the cases upon which *Cannon* rests its rule of corporate separateness, all of which rest firmly on constitutional principles of adjudicatory

the Maine parent company's exercise of "control both commercially and financially" over its Alabama subsidiary, "[t]he existence of the Alabama company as a distinct corporate entity [wa]s, however, in all respects observed." 267 U.S. at 335. *Cannon*'s emphasis on the observance of corporate formalities sets a high bar to deeming nonresident corporations present in a state based on the activities of their subsidiaries there.

Some have suggested that *International Shoe* superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.194 (collecting authorities). That argument misreads *International Shoe*. While *International Shoe* perhaps sought to replace the lexicon of "consent, presence and doing business" with one stressing "contacts," it did not magically wipe clean the constitutional slate and discard all prior decisions that, since *Pennoyer*, had charted the due process limits on the exercise of adjudicatory jurisdiction.[9] Subsequent

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jurisdiction. *See Cannon*, 267 U.S. at 336 (citing *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 409-11 (1903); *Peterson v. Chi., Rock Island & Pac. Ry. Co.*, 205 U.S. 364 (1907); and *People's Tobacco Co., Ltd., v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918)).

[9] Others have suggested that this Court's decision in *United States v. Scophony Corp. of Am.*, 333 U.S. 795 (1948), superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.199 (collecting authorities). That argument is incorrect. *Scophony* did not concern the constitutional constraints on adjudicatory jurisdiction but instead addressed questions of venue and statutory authorization for service. *See* 333 U.S. at 804 ("We deal here with a problem of statutory construction, not one of constitutional import." (footnote omitted)). Given this Court's admonition that it does not overrule or dramatically limit prior precedents *sub silentio*, *see, e.g., Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), it would be strange to conclude that the Court overruled *Cannon* in an opinion that

decisions of this Court have relied extensively on post-*Pennoyer*/pre-*Shoe* precedents. In the area of general jurisdiction, this Court's decision in *Helicopteros* drew heavily on the pre-*Shoe* precedent in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), to conclude that the assertion of adjudicatory jurisdiction in that case did not comport with the limits imposed by the Due Process Clause. 466 U.S. at 417-418. And this Court's decision in *Keeton* settled any doubt specifically about *Cannon*'s continuing vitality when it cited *Cannon* for the proposition that "jurisdiction over a parent corporation does [not] automatically establish jurisdiction over a wholly owned subsidiary." 465 U.S. at 781 n.13. Thus, *Cannon* remains the seminal decision in this area.

B. Principles of individualized consideration and corporate separateness should frame the jurisdictional inquiry.

While *International Shoe* may have changed the vocabulary of the constitutional analysis, it did not alter the underlying principles. Two principles, reflected in *Cannon*, are relevant in this case.

The first is the principle of individualized consideration. This principle flows from the very nature of the Due Process Clause itself, which protects each person from "the power of a sovereign to resolve disputes through judicial process." *Nicastro*, 131 S. Ct. at 2786-87 (plurality opinion). Consistent with this principle the "unilateral activity of another party or a third person is not an appropriate consideration

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adverted to it, *see Scophony*, 333 U.S. at 813 n.23, but did not otherwise discuss it.

when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 417; *see also Hanson*, 357 U.S. at 253; *Woodson*, 444 U.S. at 298; *Kulko v. Superior Ct. of Cal., City & Cnty. of S.F.*, 436 U.S. 84, 93-94 (1978). It would be "plainly unconstitutional" to rest an assertion of adjudicatory jurisdiction over a nonresident defendant based on another's contacts. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Instead, consistent with this principle of individualized consideration, "[t]he requirements of *International Shoe* . . . must be met as to each defendant." *Id.* at 332; *see also Keeton*, 465 U.S. at 781 n.13.

The second is the principle of corporate separateness. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see also Burnet v. Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."). This principle extends to situations where parent companies own some or all of the capital stock of a subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Treating parent and subsidiary corporations as distinct entities serves several salutary purposes by supporting, *inter alia*, the formation of capital, the extension of credit, the optimal allocation of risk, the efficient use of assets, and the compliance with local laws (such as investment and tax laws). *See Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 626 (1983); *see generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039-41 (1991) (describing the purposes

behind the principle of corporate separateness); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 Yale L.J. 1363, 1389-91 (1998) (describing the purposes of subsidiaries). To be sure, the principle of corporate separateness is not absolute and may be overridden "in the case of fraud or some other exceptional circumstances." *Dole Food*, 538 U.S. at 476; *see also Bancec*, 462 U.S. at 629; *Bestfoods*, 524 U.S. at 62. Nonetheless, such disregard of the corporate form remains the very "rare exception," not the norm. *Dole Food*, 538 U.S. at 475; *cf. Bancec*, 462 U.S. at 627; *Anderson*, 321 U.S. at 362.[10]

Taken together, these two principles—individualized consideration and corporate separateness—might

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[10] Some courts have held that because questions of adjudicatory jurisdiction are preliminary and do not determine ultimate liability, the showing necessary to disregard corporate separateness for jurisdictional purposes should be less taxing than the showing necessary to pierce the corporate veil for liability purposes. *See* Born & Rutledge, *supra*, at 184-85, 191 (collecting cases). That proposition should be rejected. Litigation is costly and burdensome, so forcing a nonresident corporation to defend itself in a foreign forum imposes costs on that corporation no less tangible or real than a liability determination. Moreover, most cases never reach a verdict, *see* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. Leg. Stud. 459 (2004), so the exercise of personal jurisdiction effectively can drive the parties' settlement leverage. Finally, a finding of jurisdiction, particularly general jurisdiction, can have a lasting impact on the nonresident company. It amounts to a determination that the company is answerable in the forum on any claim arising anywhere in the world regardless of its contacts with the forum. Thus, the standards governing the disregard of corporate separateness should be no less taxing in the context of a jurisdictional inquiry than in the context of a substantive veil-piercing inquiry.

suggest that it is never appropriate to disregard the corporate form for purposes of evaluating adjudicatory jurisdiction. *See* Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023 (2004). But this Court need not announce such a broad holding here to reverse the judgment below. Instead, it suffices if this Court identifies a set of safe-harbor factors, thereby providing courts and corporations clear guidance about the sorts of activities that will not result in treating a subsidiary's contacts as the parent's own.

Decisions of this Court, drawing on the principles of individualized consideration and corporate separateness, help to chart those safe-harbor factors. They include:

- The parent's stock ownership of the subsidiary, *see Cannon*, 267 U.S. at 335; *cf. Shaffer*, 433 U.S. at 214; *see generally* Restatement (Second) of Conflict of Laws § 52 cmt. b (1971);
- The parent's right to elect the subsidiary's directors who, in turn, select the corporate officers, *see Bestfoods*, 524 U.S. at 62; *Peterson v. Chi., Rock Island & Pac. R.R. Co.*, 205 U.S. 364, 391 (1907);
- Duplication of some or all of the directors or officers of the parent and the subsidiary, *see Bestfoods*, 524 U.S. at 62; *see generally* William M. Fletcher, *Cyclopedia of the Law of Corporations* § 8674 (rev. ed. 2012);
- The parent's role in drafting the subsidiary's by-laws, *see id.*;

- Arms-length distribution arrangements between the parent and the subsidiary, *see Cannon*, 267 U.S. at 335;
- The subsidiary's financial dependence on the parent, *see id.*

These sorts of arrangements, standing alone or in combination, do not justify treating the subsidiary's contacts as the parent's own for purposes of establishing personal jurisdiction.[11]

Measured against these safe-harbor factors, this should be an easy case. Daimler AG and its indirectly held subsidiary maintain separate directors, officers, and employees. They have separate books and records. And the companies have separate responsibility for day-to-day decisionmaking. Thus, there is simply no basis for treating the contacts of MBUSA as Daimler AG's own. *See* Brief for Petitioner at 23.

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[11] Heeding this Court's instruction on these points, numerous lower courts have declined to disregard the corporate form when presented with arrangements of this sort. *See, e.g., Rasmussen v. Gen. Motors Corp.*, 803 N.W.2d 623 (Wis. 2011) (distribution arrangement); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008) (distribution arrangement); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 650 (8th Cir. 2003) (share ownership); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) (collecting cases for the proposition that stock ownership in or affiliation with a corporation, without more, does not justify the assertion of adjudicatory jurisdiction); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998) (overlapping directors and officers); *Miller v. Honda Motor Corp. Ltd.*, 779 F.2d 769 (1st Cir. 1985) (distribution arrangement with overlapping directors and officers).

Judge Reinhardt's panel opinion complicates this easy case with a sweeping "agency" test.[12] Under that test, the contacts of a subsidiary (or any other entity) can be attributed to a parent (or any other entity) wherever two conditions are met—(1) the services provided by the subsidiary are "sufficiently important" to the parent and (2) the parent has the "right to control" the subsidiary's operations. Pet. App. 23a-30a.

This test erodes any meaningful limits set by the principles of individualized consideration and corporate separateness. The emphasis on "sufficient importance" is tautological. If an activity were not sufficiently important, then no party would engage in it. The very fact that a subsidiary company (or any entity) engages in activity supplies some sign of its importance to the company. As the Ninth Circuit judges dissenting from plenary review explained, "[a]nything a corporation does through an independent contractor, subsidiary, or distribution is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." Pet. App. 140a.

The emphasis on "right to control" is similarly flawed. It turns the jurisdictional inquiry on hypothetical acts rather than a party's actual contacts contrary to this Court's clear commands. "[A]n individual's contract with an out-of-state party alone" cannot establish minimum contacts. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 478 (1985); *cf. id.* at 479 n.22 (suggesting in dicta that an agency relation-

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[12] Judge Reinhardt's panel opinion purports to draw support for that test from various authorities under New York law. *See Frummer v. Hilton Hotels Int'l*, 281 N.Y.S.2d 41 (1967); *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

ship might exist for purposes of specific jurisdiction where the defendant was the "primary participan[t] in the enterprise and has *acted* purposefully in directing" the agent's activities) (emphasis added) (citation and internal quotations omitted). A "right to control," which in this case allegedly resides with the General Distribution Agreement between Daimler AG and MBUSA, J.A. 149a-215a, amounts to nothing more than the very sort of bare contract that *Burger King* held did not suffice to establish specific jurisdiction, much less general jurisdiction.

This diluted standard upsets the reasonable expectations of foreign parent companies with United States subsidiaries. Foreign companies like a German AG are organized under another country's law. *See generally* Peter Muchlinski, *The Development of German Corporate Law*, 14 German L.J. 339 (2013). Those foreign laws set forth the legal rights and responsibilities on matters of corporation governance; in some cases, those laws may affirmatively obligate the foreign parent to exercise a degree of control or oversight of its subsidiaries. *See* Born & Rutledge, *supra*, at 187; José Engrácia Antunes, *The Liability of Polycorporate Enterprises*, 13 Conn. J. Int'l L. 197, 222 (1999). The test articulated in Judge Reinhardt's panel opinion puts the discharge of those foreign legal duties on a collision course with domestic law: A company discharging its duties under foreign law may find that conduct subjects it to general jurisdiction in the United States; alternatively, the foreign company may seek to avoid general jurisdiction but only by violating the very duties imposed on it by the law of its seat. Such collision courses should be avoided in order to ensure "the potentially conflicting laws of different nations

work together in harmony." *F. Hoffman La Roche Ltd. v. Empagran S.A.*. 542 U.S. 155, 164 (2004).

Domestic companies, especially small businesses, also suffer under the "right to control" standard. The Court's jurisdictional rules must take into account not only the interests of the company in the case before it but also the needs of small domestic concerns that must operate under the same general jurisdictional standards. *Nicastro*, 131 S. Ct. at 2790 (plurality opinion); *id.* at 2794 (Breyer, J., concurring in the judgment and joined by Alito, J.). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., Office of Advocacy, *The Small Business Economy: A Report to the President* 1 (2009). Those small businesses often will be completely owned by a single family or individual, who not only has the "right to control" the corporation but "controls" it completely. *See* Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185, 1192 (2013). One could easily imagine a court applying the lax standard articulated in Judge Reinhardt's panel opinion to those individual owners of small businesses based on their right to control their company. *Cf.* Thompson, *supra*, at 1054-57 (noting that courts are more likely to pierce substantively the veil of closely held corporations with few individual shareholders). Such an approach could "force" small business owners "to choose between" abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). "Jurisdictional rules

should avoid these costs whenever possible." *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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TAB 2C

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 Extra-territorial 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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TAB 2D

GLOBAL FORUM SHOPPING LITIGATION RESOURCE PAGE

The U.S. Chamber, through the U.S. Chamber Litigation Center and Institute for Legal Reform, is leading the business community's efforts in the courts, on the Hill, and in the media to fight back against "global forum shopping," the plaintiffs' bar's opportunistic filing of lawsuits in foreign jurisdictions where they do not belong.

The Plaintiffs' Bar's Quest For Expansive U.S. Court Jurisdiction Over Foreign Companies and Foreign Conduct

The plaintiffs bar has attempted to expand the jurisdictional reach of U.S. courts in order to take advantage of U.S. class action laws, discovery rules, and punitive damages, among other features of the U.S. legal system. The U.S. Supreme Court has played a key role in reining in some of the most egregious forum shopping abuses, such as *DaimlerChrysler v. Bauman*, where the U.S. Supreme Court reversed the ruling of the Ninth Circuit that had permitted plaintiffs to assert general jurisdiction over a foreign parent company based on the contacts of its indirectly held subsidiary for the alleged conduct, in a foreign country, of an entirely different foreign subsidiary. The Court rooted its decision in the Constitution's Due Process Clause, and cited the U.S. Chamber's brief.

The Court's decision in *Bauman* followed on the heels of a decision in 2011, *Goodyear Luxembourg Tires, S.A. v. Brown*, where the U.S. Supreme Court reversed a decision of a North Carolina appeals court that had exercised jurisdiction over a foreign tire manufacturer, for injuries that occurred in France, related to a tire made in Turkey and sold in Europe.

The Alien Tort Statute ("ATS") as a Global Forum Shopping Device

One of the highest profile examples of global forum shopping in recent decades has been the plaintiff bar's aggressive misuse of the Alien Tort Statute ("ATS"), a 200-year-old federal statute that allows non-citizens to bring in U.S. courts claims for some violations of international law. On April 17, 2013, the U.S. Supreme Court handed down *Kiobel v. Royal Dutch Petroleum*, an important decision reining in rampant ATS litigation. Over the last two decades, plaintiffs have contorted the ATS to use as a policymaking tool to compel both U.S. and foreign companies to stop doing business in certain developing and post-conflict countries with poor human rights records, even where U.S. foreign policy has encouraged economic engagement with those countries.

Many companies have been the targets of ATS litigation merely because they did routine business in countries where alleged human rights abuses occurred. Although the Chamber takes no position on the underlying factual allegations in the ATS cases referred to on this resource page, the Chamber unequivocally condemns human rights abuses, and has repeatedly and resoundingly supported voluntary measures to respect human rights and to strengthen international corporate responsibility. However, the ATS is neither an appropriate or effective tool for addressing plaintiffs' human rights concerns.

The *Kiobel* decision has ramifications for companies that face pending or impending ATS claims. This page will be updated periodically to provide information to those businesses that are affected by the ATS decision, as well as other global forum shopping issues. Companies or attorneys that are aware of cases or developments that should be added to this page are encouraged to contact the U.S. Chamber Litigation Center, LitigationCenter@uschamber.com.

U.S. Chamber *Amicus* Briefs in ATS Cases

The U.S. Chamber has led the business community's efforts to rein in the aggressive misuse of the Alien Tort Statute, including its *amicus curiae* ("friend of the court") brief in the very first Supreme Court case interpreting the ATS, *Sosa v. Alvarez-Machain*, the Chamber has filed 26 briefs on the ATS in the following cases:

- *American Isuzu Motors, Inc., et al. v. Ntsebeza, et al.*
- *Balintulo, et al. v. Daimler AG, et al*
- *Corrie, et al. v. Caterpillar Inc.*
- *Doe I, et al. v. Nestle, S.A., et al.*
- *Doe VII, et al. v. Exxon Mobil Corp., et al.*
- *Doe, et al. v. Wal-Mart Stores, Inc.*
- *Flomo, et al. v. Firestone Natural Rubber Co., et al.*
- *Kiobel, et al. v. Royal Dutch Petroleum, Lend II*
- *Pfizer Inc. v. Abdullahi, et al.*
- *Sarei, et al. v. Rio Tinto*
- *Sinaltrainal, et al. v. The Coca-Cola Company, et al.*
- *Sosa v. Alvarez-Machain*
- *The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., et al.*
- *Vietnam Association for Victims of Agent Orange, et al. v. Dow Chemical Company, et al.*

This is Exhibit.....D.....referred to in the affidavit of.....Lily Fu Claffee..... sworn before me, this.....28th..... day of.....July.....2014.....

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

U.S. Chamber Informational Letters Regarding *Kiobel* Sent to Federal Government Officials

- Letter from Thomas J. Donohue to Solicitor General Donald Verrilli, Justice Department
- Letter from Thomas J. Donohue to Chief of Staff William Daley, White House
- Letter from Thomas J. Donohue to Secretary Hillary Clinton, State Department
- Letter from Thomas J. Donohue to Secretary John Bryson, Commerce Department

- Letter from Thomas J. Donohue to Secretary Tim Geithner, Treasury Department
- Letter from Thomas J. Donohue to Secretary Leon Panetta, Defense Department

Recent ATS Cases Involving Foreign and Domestic Companies (by Circuit)

The following is a non-comprehensive list of recent ATS cases where corporations are defendants. It is important to note that many of these cases raise claims under other statutes or doctrines in addition to the ATS. Moreover, in addition to extraterritorial defenses, these cases may present other defenses such as preclusion of U.S. court review under the act of state doctrine; availability of aiding and abetting claims under international law; whether corporations may be sued under international law; exhaustion of remedies; foreign immunity; forum non conveniens; insufficient pleading; political question doctrine; etc. Relevant post-*Kiobel* court orders and briefing may be downloaded below. Last updated: 5/28/13.

U.S. Court of Appeals for the Second Circuit

- *Balintulo, et al. v. Daimler AG, et al.*, No. 09-2778-cv (lead S. African apartheid case) -- Order Requesting Supplement Briefing Regarding Impact of *Kiobel*, 4/19/13; Plaintiff-Appellee Letter on Impact of *Kiobel*, 5/24/13; Daimler AG Letter on Impact of *Kiobel*, 5/24/13; Ford & IBM Letter on Impact of Kiobel, 5/24/13. Decided 8/21/13.
- *Tymoshenko v. Firtash*, No. 11-cv-2794, 2011 WL 5059180 (S.D.N.Y. Oct. 19, 2011) -- Order Requiring Defendants to File Brief Regarding Impact of *Kiobel*, 4/22/13; Defendant's Supplemental Brief in Support of Motion to Dismiss, 4/29/13; Plaintiffs' Supplemental Memorandum of Law in Opposition to Motion to Dismiss, 5/6/13.

U.S. Court of Appeals for the Fourth Circuit

- *Al Shimari v. CACI Int'l, Inc.*, No. 08-cv-827, 658 F.3d 413 (4th Cir. 2011) -- Order Requiring Defendant to File Brief Regarding Impact of *Kiobel*, 4/19/13; Defendant's Motion for Reconsideration of Order Reinstating ATS Claims/Motion to Dismiss ATS Claims, 4/24/13; Plaintiffs' Opposition to Reconsideration/Motion to Dismiss ATS Claims, 5/3/13; Defendant's Reply in Support of Motion to Dismiss, 5/8/13.
- *Al-Quraishi v. L-3 Services, Inc.*, No. 08-cv-1696, 657 F.3d 201 (4th Cir. 2011) -- no *Kiobel*-related activity as of 5/28/13.

U.S. Court of Appeals for the Fifth Circuit

- *Abecassis v. Wyatt*, No. 09-cv-3884, 704 F. Supp. 2d 623 (S.D. Tex. 2010) -- no *Kiobel*-related activity as of 5/28/13.
- *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 697 F. Supp. 2d 674 (S.D. Tex. 2009) -- no *Kiobel*-related activity as of 5/28/13.

U.S. Court of Appeals for the Seventh Circuit

- *Abelesz v. Magyar Nemzeti Bank*, No. 10-cv-1884, 692 F.3d 661 (7th Cir. 2012) -- no *Kiobel*-related activity as of 5/28/13.

U.S. Court of Appeals for the Ninth Circuit

- *Sarei v. Rio Tinto PLC*, No. 00-cv-11695, 671 F.3d 736 (9th Cir. 2011) (en banc) -- U.S. Supreme Court Grants, Vacates, and Remands In Light of *Kiobel*, 4/22/13; Ninth Circuit Order Directing Supplemental Briefs Regarding *Kiobel*, 4/24/13; Defendants-Appellees Brief Regarding Impact of *Kiobel*, 5/31/13. En Banc Court Order affirming District Court's judgement issued 6/28/2013.
- *Mujica v. Occidental Petroleum Corp.*, No. 03-cv-2860, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), rev'd and remanded 564 F.3d 1190 (9th Cir. 2009) -- no *Kiobel*-related activity as of 5/28/13.
- *Doe I v. Nestle S.A.*, No. 05-cv-5133, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) -- Plaintiff-Appellants Letter Brief (9th Cir.) Regarding Impact of *Kiobel*, 6/21/13; Defendants-Appellees Letter Brief (9th Cir.) Regarding Impact of *Kiobel*, 7/3/13.
- *Dacer v. Estrada*, No. 10-cv-4165, 2011 WL 6099381 (N.D. Cal. Dec. 7, 2011) -- no *Kiobel*-related activity as of 5/28/13.
- *Bauman v. DaimlerChrysler Corp.*, No. 04-cv-194, 644 F.3d 909 (9th Cir. 2011) -- U.S. Supreme Court writ of certiorari granted, 4/22/13. Decision on jurisdiction, 1/14/14.

U.S. Court of Appeals for the Eleventh Circuit

- *Baloco ex rel Tapia v. Drummond Co., Inc.*, No. 09-cv-557, 640 F.3d 1338 (11th Cir. 2011) -- no *Kiobel*-related activity as of 5/28/13.
- *In re Chiquita Brands Int'l Inc. Alien Tort Statute and Shareholder Derivative Litig.*, No. 08-md-1916, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) -- no *Kiobel*-related activity as of 5/28/13.

U.S. Court of Appeals for the D.C. Circuit

- *Artas v. Dyncorp*, No. 01-cv-1908, 517 F. Supp. 2d 221 (D.D.C. 2007); *Quinteros v. Dyncorp*, No. 07-cv-1042 (D.D.C. filed June 12, 2007) -- no *Kiobel*-related activity as of 5/28/13.
- *Doe VIII v. Exxon Mobil Corp.*, No. 07-cv-1022, 654 F.3d 11 (D.C. Cir. 2011), petition for reh'g en banc filed (D.C. Cir. Aug. 9, 2011) -- D.C. Circuit to determine how to proceed with post-*Kiobel* briefing.
- *Simon v. Republic of Hungary*, No. 10-cv-1770 (D.D.C. filed Oct. 20, 2010) -- Order Directing Parties to File Supplemental Briefs Regarding the Impact of Kiobel, 4/18/13; Defendants' Supplemental Memorandum of Law Concerning the Effect of *Kiobel*, 5/8/13.
- *Turkcell Iletism Hizmetleri A.S. v. MTN Group Ltd.*, No. 12-cv-479 (D.D.C. filed Mar. 28, 2012) -- Joint Motion to Lift Stay and Dismiss Without Prejudice In Light of *Kiobel*, 5/1/13.

U.S. Chamber Amicus Briefs in Notable Global Forum Shopping Cases

- U.S. courts' "general jurisdiction" over foreign companies: *DaimlerChrysler AG v. Bauman, et al.* (U.S. Supreme Court), decided 1/14/14.
- U.S. courts' "general jurisdiction" over foreign companies: *Goodyear Luxembourg Tires, S.A., et al. v. Brown, et al.* (U.S. Supreme Court), decided 6/27/11.
- Efforts to block U.S. enforcement of illegitimate foreign judgment: *Chevron Corp. v. Naranjo, Payaguaje, Donziger, et al.* (U.S. Supreme Court, certiorari), cert. denied 10/9/12. See also:
  - Attempts to re-assign judge in Ecuador "tort tourism" case: *In re Naranjo, et al. v. Chevron Corp.* (Second Circuit), decided 9/26/13; and *Chevron Corp. v. Donziger, et al.* (Second Circuit), decided 9/19/11.
  - Arbitration of international investment suit related to Ecuador "tort tourism" case: *Ecuador v. Chevron Corp., et al.* (Second Circuit), decided 3/17/11.
- Extraterritorial reach of U.S. securities laws: City of Pontiac Policemen's & Firemen's Retirement System, et al. v. UBS AG, et al. (Second Circuit), decided 5/7/14.
- Extraterritorial reach of U.S. securities laws: *Viking Global Equities, LP et al. v. Porsche Ag Wendelin Wiedeking* (Second Circuit), voluntarily dismissed 6/6/13.
- Extraterritorial reach of U.S. securities laws: *Morrison, et al. v. National Australia Bank* (U.S. Supreme Court), decided 10/23/08.
- Extraterritorial reach of Dodd-Frank whistleblower provisions: *Villanueva v. Department of Labor* (Fifth Circuit), decided 2/12/14.
- Extraterritorial reach of U.S. discovery laws: *Quinn v. Altrie Group, Inc., et al.* (U.S. Dist. Ct. SDNY), decided 12/4/09.

- Extraterritorial reach of U.S. securities laws: *In re: Infineon Technologies AG Securities Litigation* (Ninth Circuit), decided 8/23/10.
- Extraterritorial reach of U.S. environmental law, CERCLA: *Pakootas, et al. v. Teck Cominco Metals, Ltd.* (Ninth Circuit), decided 10/3/06.

U.S. Chamber Statements and Blog Posts on Global Forum Shopping and ATS

- Press Statement, "U.S. Chamber Commends Supreme Court for Reining in Abuses of Alien Tort Statute," 4/17/13.
- Press Statement, "Federal Government 'Friend of the Court' But Not of American Business," 12/22/11.
- Press Statement, "U.S. Chamber Applauds Eleventh Circuit's Dismissal of Alien Tort Statute Lawsuit," 8/25/09.
- ILR Fact Sheet, "Global Forum Shopping Fact Sheet."
- Thomas J. Donohue, "U.S. Firms Prone to 'Tort Tourism' in Foreign Courts," Investors.com (7/11/12).
- Lisa A. Rickard, "Next Steps in the Fight Against "Tort Tourism" and a Fraudulent $18 Billion Judgment," FreeEnterprise.com (10/15/12).
- Sean Hackbarth, "'Tort Tourism' Is Just Another Name for 'Shakedown,'" FreeEnterprise.com (7/12/12).

Analysis, Reports, and Media Coverage on Global Forum Shopping and ATS

- U.S. Chamber Institute for Legal Reform, "Taming Tort Tourism," www.InstituteForLegalReform.org (9/13)
- John Bellinger, "Justice Department Urges Supreme Court to Reverse Ninth Circuit in Bauman v. DaimlerChrysler," *Lawfareblog.com* (7/12/13).
- Andy Pincus, "Is the Alien Tort a Zombie Doctrine?," *American Lawyer* (4/29/13).
- John Bellinger, "Reflections on Kiobel," *Lawfareblog.com* (4/22/13).
- Eugene Kontorovich, "A Supreme Rebuke to Global Forum-Shopping," *Wall Street Journal* (4/22/13).
- Andy Pincus and Kevin Ranlett, "Supreme Court Holds That Alien Tort Statute Doesn't Apply Extraterritorially," *ClassDefenseBlog.com* (4/17/13).
- Miscellaneous authors, "Kiobel Insta-Symposium," *OpinioJuris.org* (4/18/13).
- Jonathan C. Drimmer and Sarah R. Lamoree, "Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions," *29 Berkeley J. Int'lLaw. 456* (2011).
- Jonathan C. Drimmer, "Think Globally, Sue Locally: The plaintiffs bar goes international and focuses on trashing a corporation's image," *Wall Street Journal* (6/19/10).

TAB 2E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 2014 Decided June 27, 2014

No. 14-5055

IN RE: KELLOGG BROWN & ROOT, INC., ET AL.,
PETITIONERS

On Petition for Writ of Mandamus
(No. 1:05-cv-1276)

John P. Elwood argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were *John M. Faust*, *Craig D. Margolis*, *Jeremy C. Marwell*, and *Joshua S. Johnson*.

Rachel L. Brand, *Steven P. Lehotsky*, *Quentin Riegel*, *Carl Nichols*, *Elisebeth C. Cook*, *Adam I. Klein*, *Amar Sarwal*, and *Wendy E. Ackerman* were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

Stephen M. Kohn argued the cause for respondent. With him on the response to the petition for writ of mandamus were *David K. Colapinto* and *Michael Kohn*.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, *Circuit Judges*.

This is Exhibit E referred to in the affidavit of Lily Eu Claffee sworn before me, this 28th day of July 2014

William Casey Lacy

A COMMISSIONER FOR TAKING AFFIDAVITS

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

I

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that

the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents *in camera*, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3.

KBR vehemently opposed the ruling. The company asked the District Court to certify the privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014). KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). We address those questions in turn.

II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law – as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn*, the Supreme Court held that the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations

was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (internal quotation marks and citation omitted). The Court stated, moreover, that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. That is so, the Court said, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id.* at 392; *see id.* at 394. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

First, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*, 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

Second, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387 (Upjohn's managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014).

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice

was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See id.* at *2; *see also In re Sealed Case*, 737 F.2d at 98-99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3; *see id.* at *3 n.28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under

the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a

given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation – "one of the significant purposes" – as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation – although required by law – does not transform quintessentially legal advice into business advice.").

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal

advice, the District Court applied the wrong legal test and clearly erred.

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error justifies a writ of mandamus. *See* 28 U.S.C. § 1651. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (quoting and citing *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976)). We conclude that all three conditions are satisfied in this case.

A

First, a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380. That initial requirement will often be met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will

come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that an interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009); *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. *See* 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014). It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See In re Sealed Case*, 151 F.3d 1059, 1064-65 (D.C. Cir. 1998); *see also In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.*; *see also In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) ("a remedy after final judgment cannot unsay the confidential

information that has been revealed") (quoting *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987)).

For those reasons, the first condition for mandamus – no other adequate means to obtain relief – will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk*, although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that *Mohawk* held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* – as opposed to the collateral order doctrine – remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id.* at 110-12 (internal quotation marks and alteration omitted). It would make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010); *In re Whirlpool Corp.*, 597 F.3d 858, 860 (7th Cir. 2010); *see also In re Perez*, 749 F.3d 849 (9th Cir. 2014) (granting mandamus after *Mohawk* on informants privilege ruling); *City of New York*, 607 F.3d at 933 (same on law enforcement privilege ruling).

B

Second, a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn*, the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn*

on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors are subject to regulatory requirements of the sort cited by the District Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See* 48 C.F.R. § 52.203-13 (2010). And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.*, 15 U.S.C. §§ 78m(b)(2), 7262; 41 U.S.C. § 8703. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n.1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) (assessing broad impact of ruling on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the

privilege context, for the Supreme Court has told us that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). More generally, this Court has long recognized that mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). Other courts have granted mandamus based on similar considerations. *See In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) (granting mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; 28 U.S.C. § 2106. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain

documents as particularly important for this Court's review. *See* KBR Reply Br. App. 142. KBR claims that the letter violated Federal Rule of Appellate Procedure 21(b)(4), which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York*, 736 F.3d 118, 129 & n.31 (2d Cir. 2013) (collecting cases), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (en banc). Nothing in the District Court's decisions or subsequent letter reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will render fair judgment in further proceedings. We will not reassign the case.

* * *

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United*

States, 449 U.S. 383, 395 (1981). Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*, 449 U.S. at 389).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

So ordered.

TAB 2F

This is Exhibit..... F .....referred to in the affidavit of.....Lily Fu Claffee..... sworn before me, this.....28th..... day of.....July.....2014.....

William Casey Perry

U.S. CHAMBER
Institute for Legal Reform

Taming Tort Tourism

The Case for a Federal Solution to Foreign Judgment Recognition

SEPTEMBER 2013

U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

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Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition

When is a multi-million dollar foreign-country judgment not worth the paper it's printed on? Surprisingly, the answer depends in large part on where the judgment is enforced in the United States.

The current law on recognition and enforcement of foreign judgments in this country is governed by a patchwork of state statutes and common law principles. Despite the clear federal interest in regulating how U.S. courts treat judgments issued outside the United States, no federal law or treaty governs the conditions under which U.S. courts should—and should not—give full effect to foreign judgments, outside of the narrow category of foreign defamation judgments.[1]

The time has come to rethink our country's fractured approach to foreign judgment recognition. In an increasingly globalized world where billions of dollars of foreign investment flow across borders daily, individuals and multinational businesses deserve consistency and predictability under a unified and modernized federal law. The past few decades have seen a significant increase in the number of actions seeking recognition and enforcement of foreign judgments in the United States.[2] As explained in this paper, the present patchwork of state laws creates unnecessary challenges for U.S. citizens and businesses seeking recognition of foreign judgments and facing litigation abroad,

1 The federal SPEECH Act, passed by Congress in 2010, is the notable exception to the state-law recognition regime. *See* Pub. L. 111-223 (Aug. 10, 2010), codified at 28 U.S.C. §§ 4101-05. The SPEECH Act provides that "[n]otwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that" the foreign country "provided at least as much protection for freedom of speech and press ... as would be provided by the first amendment to the Constitution of the United States" or that the judgment debtor "would have been found liable for defamation by a domestic court applying the first amendment." 28 U.S.C. § 4102(a)(1). The SPEECH Act, discussed *infra*, applies only to foreign defamation judgments.

2 William E. Thomson & Perlette Michèle Jura, U.S. Chamber of Commerce Inst. for Legal Reform, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments 6 (Oct. 2011).

including a real risk of forum shopping among states and an inability to contest abusive foreign judgments before they are automatically recognized in the United States. Legal uncertainty also harms judgment creditors, who deserve prompt and dependable recognition of their legitimate foreign judgments. Those who have secured appropriate foreign judgments should be able to enforce those judgments promptly in the United States under federal law. But individuals and businesses that have been subjected to fraudulent or legally suspect judgments abroad should be able to contest enforcement vigorously under federal law.

Foreign plaintiffs and their counsel have begun to exploit the current system of foreign judgment recognition to circumvent legal limitations that would otherwise preclude recovery under U.S. law. Plaintiffs' lawyers have devised an explicit strategy to pursue tort lawsuits abroad in weak or corruptible foreign courts in order to secure large awards against defendant companies. They then seek to collect those judgments in countries with liberal rules favoring

"Foreign plaintiffs and their counsel have begun to exploit the current system of foreign judgment recognition to circumvent legal limitations that would otherwise preclude recovery under U.S. law."

recognition of foreign judgments—"effectively launder[ing] a foreign judgment by ... enforcing it in another state that would have rejected it in the first place."[3] This form of "tort tourism" makes the lack of uniformity among state laws even more problematic and underscores the need for prompt congressional action.[4] For decades, numerous legal scholars, joined by the respected American Law Institute ("ALI"), have called for a federal law to govern foreign judgment recognition.[5] The time has come for Congress to act on these recommendations. This paper explains why a federal statute to govern recognition of foreign judgments is needed and outlines potential elements of a new federal law.

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3 Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 459 (2013).

4 Thomas J. Donohue, *U.S. Firms Prone to 'Tort Tourism' in Foreign Courts*, Investors Bus. Daily, July 11, 2012, http://news.investors.com/ibd-editorials-viewpoint/071112-617811-us-firms-prone-to-legal-extortion-overseas.htm.

5 *See, e.g.*, Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIV. INT'L L. 287, 309 (2006); Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 253-54 (2003); Brian Richard Paige, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE U. L. REV. 591, 606 (2003) ("[A]bsent a single national process ... , the American scheme cannot hope to be either uniform or efficient."); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121 (1998); William C. Honey & Marc Hall, *Bases for Recognition of Foreign*

The Patchwork

The United States has long been among the most receptive countries in the world to recognizing and enforcing foreign judgments. In general, a money judgment obtained in a foreign court will be recognized and enforced in state or federal courts of the United States if the judgment was rendered by a tribunal with competent jurisdiction and if the proceedings and system rendering the judgment were fundamentally fair. This solicitous attitude contrasts with the law and practice in other countries, many of which do not recognize certain kinds of judgments by U.S. courts.[6]

To be sure, recognition and respect for foreign judgments serves our own national interests, as well. When U.S. citizens prevail in litigation abroad, recognition and enforcement helps to ensure that they do not have to waste resources re-litigating their claim to obtain relief in this country. Moreover, when our courts recognize and enforce foreign judgments, foreign courts are more likely to recognize and enforce U.S. judgments out of reciprocity. We cannot reasonably expect the courts of other countries to recognize and enforce the judgments of U.S. courts if our courts do not recognize and enforce the judgments of foreign courts. Recognition and enforcement of foreign judgments thus helps to resolve transnational legal disputes efficiently, which serves the interests of plaintiffs, defendants, and taxpayers alike.

"Recognition and enforcement of foreign judgments thus helps to resolve transnational legal disputes efficiently, which serves the interests of plaintiffs, defendants, and taxpayers alike."

Nation Money Judgments in the U.S. and Need for Federal Intervention, 16 SUFFOLK TRANSNAT'L L. REV. 405, 415-16 (1993); Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 300 (1991); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 79 (1984).

6 *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 173 (2008) (concluding that "on average, U.S. judgments face more obstacles in Europe than do European judgments in the United States"). Germany, Japan, and Italy have refused to enforce U.S. judgments for large punitive damages. *See* Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, XVII ANNUAL SURVEY OF INT'L & COMP. L. 185 (2011). Switzerland, England, and France are very reluctant to enforce U.S. judgments against their respective citizens where those citizens did not voluntarily submit to U.S. jurisdiction. Baumgartner, *supra*, at 189-90. And the Nordic countries and the Netherlands generally do not recognize a foreign judgment absent a recognition treaty between the "rendering" and the "recognizing" jurisdictions. *Id.* at 184.

The historical foundation of the U.S. approach to recognizing foreign judgments dates to the Supreme Court's decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), which involved a French judgment rendered against an American citizen. Relying on principles of international comity—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"[7]—and due process, the Court held that federal courts generally should recognize and enforce foreign judgments as a matter of federal common law. The Court explained that a foreign court's judgment should be recognized as "conclusive upon the merits" if:

- "the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties";
- the foreign proceedings rested upon "due allegations and proofs";
- the judgment debtor had an "opportunity to defend against" the allegations;
- the foreign proceedings were conducted "according to the course of a civilized jurisprudence";
- the foreign proceedings were "stated in a clear and formal record";
- the foreign judgment was not "affected by fraud or prejudice"; and
- recognition of the foreign judgment is consistent with comity and "the principles of international law," e.g., reciprocity in recognition.[8]

Applying these factors, the Court in *Hilton* refused to recognize the French judgment on reciprocity grounds because the Court determined that a French court would not recognize a similar U.S. judgment without first re-examining the evidence.[9] Nevertheless, the *Hilton* decision's lasting influence lies in its strong rhetorical stance in favor of validating foreign judgments.

The national uniformity established by the federal standard in *Hilton*, however, was short-lived. State courts soon began to apply their own laws when deciding whether to recognize and enforce foreign

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7 *Hilton*, 159 U.S. at 164.

8 *Id.* at 205-06; *see also id.* at 202-03 ("[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh ... .").

9 *Id.* at 210-11, 227-28. In a second foreign judgments case decided the same day as *Hilton*, the Court held in *Ritchie v. McMullen*, 159 U.S. 235 (1895), that an Ontario judgment was conclusive on the merits because English courts (and by extension Canadian courts) would reciprocally enforce a comparable U.S. judgment.

judgments.[10] Then, in 1938, the Supreme Court in *Erie Railroad Co. v. Tompkins* abolished federal general common law (and arguably with it, *Hilton*).[11] Thus, for the last 75 years, federal courts exercising diversity jurisdiction have looked to state law on questions regarding the recognition or enforcement of a foreign judgment.[12] Although state decisions generally continued to rely on the *Hilton* factors (with the exception that nearly all state and federal courts have abandoned *Hilton*'s requirement of reciprocity), the U.S. system became a patchwork of state common law.[13]

Over the last 50 years, the Uniform Law Commission ("ULC") has attempted to codify and harmonize the various state law decisions governing recognition and has achieved partial success. In 1962, the ULC proposed the Uniform Foreign Money-Judgments Recognition Act (the "1962 Act"), which remains in effect in 15

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10 *See, e.g., Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926) (relying on New York common law, which preceded *Hilton*, to give preclusive and final effect to a French judgment involving the international transport of goods). The New York Court of Appeals (the state's highest court) observed, "It is argued with some force that questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States; that there is no such thing as comity of nations between the State of New York and the Republic of France and that the decision in *Hilton v. Guyot* is controlling as a statement of the law." *Id.* at 386-87. The New York court concluded, however, that "the question is one of private rather than public international law, of private right rather than public relations and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights." *Id.* at 387. Accordingly, the court held that state courts are "not bound to follow the *Hilton* case," but rather may decide questions of foreign judgment recognition based on state law. *Id.*

11 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

12 *E.g., Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448, 451 (D. Mass. 1966) (relying on Erie to conclude that "Massachusetts rather than federal law" governed effort to recover on Swedish judgment entered against defendant). Whether *Hilton* survives *Erie* in cases arising under federal question jurisdiction is less clear. The Restatement (Second) of Conflict of Laws raises (but does not answer) this question in recognizing the need for a unifying federal standard for foreign judgment recognition in cases affecting foreign relations. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c ("The Supreme Court of the United States has never passed upon the question whether federal or State law governs the recognition of foreign nation judgments. The consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit. It can be anticipated, however, that in due course some exceptions will be engrafted upon the general principle. So it seems probable that federal law would be applied to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States. *Cf. Zschernig v. Miller*, 389 U.S. 429 (1968)."). The uncertainty on this point further supports the need for a federal statute on foreign judgment recognition.

13 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. d, Reporter's Note 1 (1987).

states and the U.S. Virgin Islands.[14] Largely based on *Hilton*, the 1962 Act starts from a general presumption that foreign judgments should be conclusive, and it includes a limited set of mandatory and discretionary exceptions to recognition. Under the 1962 Act, a judgment *must not* be recognized if:

- the foreign judgment was rendered under a system that does not provide "impartial tribunals or procedures that are compatible with the requirements of due process";[15]
- the foreign court "did not have personal jurisdiction over the defendant";[16] or
- the foreign court did not have subject matter jurisdiction.[17]

The 1962 Act also provides that a foreign judgment *need not* be recognized if:

- the defendant did not receive notice of the proceedings "in sufficient time to enable him to defend";[18]
- the judgment was obtained by fraud;[19]
- the cause of action is "repugnant to the public policy of this state";[20]
- the judgment "conflicts with another final and conclusive judgment";[21]
- the parties had agreed to resolve disputes in a forum inconsistent with the judgment;[22] or
- if jurisdiction was based on personal service, the foreign court "was a seriously inconvenient forum" to litigate the dispute.[23]

If the foreign judgment does not meet any of these invalidating criteria, the U.S. court must recognize and domesticate the judgment, which becomes an enforceable U.S. judgment.

In order to clarify and update the 1962 Act, the ULC proposed a revised version in 2005 called the Uniform Foreign-Country Money Judgments Recognition Act (the "2005 Act"), which now is applied in 18 states

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14 Some form of the 1962 Act remains in effect in Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, the U.S. Virgin Islands, and Virginia. *See* Uniform Law Commission, "Foreign Money Judgments Recognition Act," http://uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act.

15 1962 Act § 4(a)(1).

16 *Id.* § 4(a)(2).

17 *Id.* § 4(a)(3)

18 *Id.* § 4(b)(1).

19 *Id.* § 4(b)(2).

20 *Id.* § 4(b)(3).

21 *Id.* § 4(b)(4).

22 *Id.* § 4(b)(5).

23 *Id.* § 4(b)(6). Mirroring the post-*Hilton* trend, the 1962 Act does not consider reciprocity to be relevant to recognition of foreign judgments.

and the District of Columbia.[24] The 2005 Act maintained the general structure of the 1962 Act, but adds two discretionary grounds for non-recognition. First, a U.S. court need not enforce a judgment "rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment."[25] Second, a U.S. court need not enforce a judgment when the specific proceeding in the foreign court was not compatible with due process of law.[26] In addition, the 2005 Act requires judgment creditors to seek recognition in the context of a formal civil action.[27] This requirement precludes the practice in some states that have allowed the recognition of foreign judgments simply be registering the foreign decision with a court clerk—a troubling procedure discussed in detail below. The 2005 Act also expands the scope of the public policy exception by providing that recognition may be denied if either the cause of action or the judgment itself violates public policy "of this state or of the United States."[28]

Despite the ULC's efforts to achieve uniformity among state laws, the landscape remains anything but uniform. Variances between the 1962 and 2005 Acts result in the application of different procedural requirements and substantive standards in different states. Even those states that have adopted the same uniform Act have not done so uniformly, modifying requirements to suit local interests.[29] And, of course, many states have enacted neither Act. Presently, about one-third of the states are governed by the 1962 Act, another one-third are governed by the 2005 Act, and the remaining one-third rely on a body of substantive common law precedent.

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24 Alabama, California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington. *See* Uniform Law Commission, "Foreign-Country Money Judgments Recognition Act," http://uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%2Recognition%20Act.

25 *Id.* § 4(c)(7).

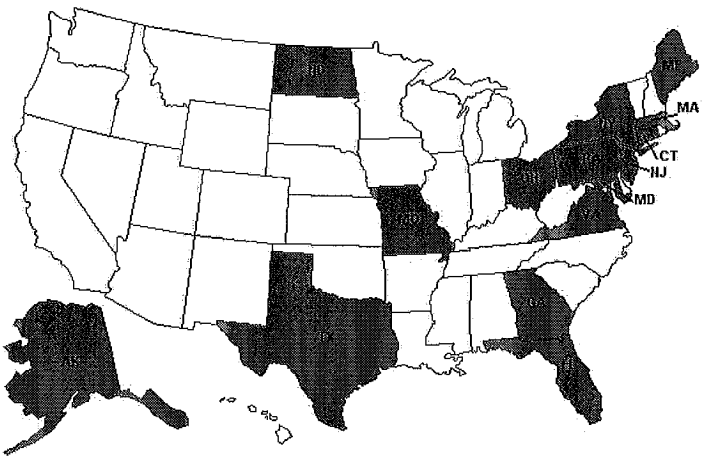
26 *Id.* § 4(c)(8).

27 *Id.* § 6.

28 *Id.* § 4(c)(3).

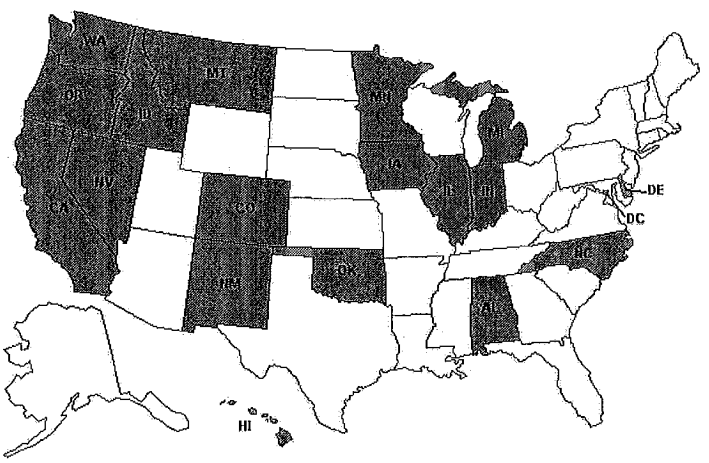
29 For example, New York's codification of the 1962 Act, known as "Article 53," generally tracks the 1962 Act, but includes some material differences. Article 53 does not permit judgment creditors to register foreign money judgments. *See generally* N.Y. CPLR §§ 5301-5309. Under Article 53, foreign judgments can only be recognized by filing a traditional lawsuit, summary lawsuit, or by raising the issue as a defendant in pending litigation. *Id.* § 5303 (providing that foreign money judgments are "enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense"); *see also id.* § 3213 (permitting judgment creditor to serve summons with motion papers for summary judgment). Article 53 also deviates from the 1962 Act by providing that a foreign court's lack of subject matter jurisdiction is only a discretionary, not a mandatory, basis for denying recognition. *Compare id.* § 5304(b)(1) ("A foreign country judgment *need not be recognized if* ... the foreign court did not have jurisdiction over the subject matter" (emphasis added)), *with* 1962 Recognition Act § 4(a)(3) ("A foreign judgment is *not conclusive* if ... the foreign court did not have jurisdiction over the subject matter." (emphasis added)).

> *"Despite the ULC's efforts to achieve uniformity among state laws, the landscape remains anything but uniform."*



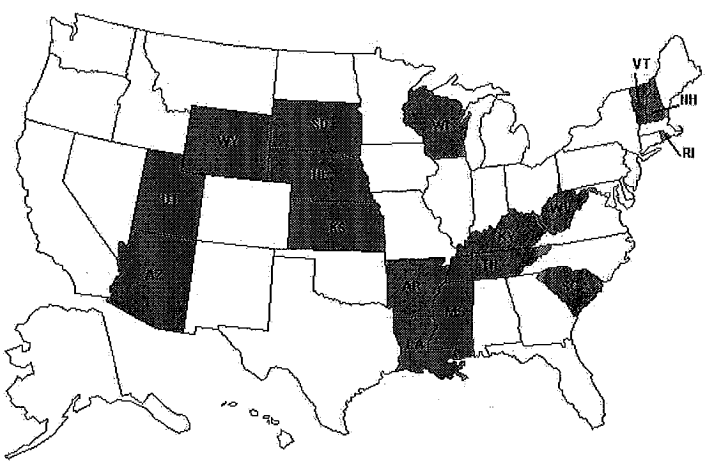
1962 Recognition Act

15 States and the
U.S. Virgin Islands



2005 Recognition Act

18 States and the
District of Columbia



No Uniform Act

17 States

The Patchwork Problem

This patchwork of state laws creates problems for the U.S. business community by jeopardizing the procedural rights of judgment debtors, encouraging forum shopping both here and abroad, and enabling plaintiffs to circumvent legal limitations that would otherwise preclude recovery under U.S. law. These legal problems fall into three categories: procedural, substantive, and structural.

Procedurally, some state and federal courts have permitted judgment creditors to enforce automatically a foreign-country money judgment by simply "registering" the foreign judgment with a court clerk, without filing a civil action in a U.S. court. In those cases, the defendant is not provided an opportunity to be heard in a U.S. court prior to recognition and enforcement. This problem stems from a misinterpretation of the interaction between the 1962 Act and the Uniform Enforcement of Foreign Judgments Act (the "Enforcement Act"), enacted by 47 states.[30] By its terms, the Enforcement Act was intended to facilitate swift enforcement of judgments by sister states of the United States under the Full Faith and Credit Clause,[31] not foreign-country judgments,[32] but some courts nevertheless have erred in holding that it applies to foreign-country judgments.[33]

In states governed by the 1962 Act and the Enforcement Act, a judgment creditor may be able to attach or otherwise encumber a judgment debtor's assets to satisfy a foreign judgment before the judgment debtor has an opportunity to argue in court that the judgment should not be recognized. The 1962 Act did not include any procedures for applying the specified grounds for non-recognition. Rather, the 1962 Act simply provides that foreign judgments are enforceable generally in the same manner as sister-state judgments. And under the Enforcement Act, a judgment creditor need only file an authenticated copy of a sister-state

30 Sensing that state court dockets were becoming congested by routine lawsuits seeking to give full faith and credit to sister-state judgments, the ULC proposed the Enforcement Act in 1948 (amended in 1964) to streamline the recognition of judgments between U.S. states. The Enforcement Act facilitates speedy and economical resolution of recognition cases governed by the Full Faith and Credit Clause of the U.S. Constitution by permitting judgment creditors to domesticate a sister-state judgment by filing a certified copy of the judgment with a court clerk in the receiving state, rather than instituting a second civil action. Only California, Massachusetts, and Vermont have not enacted the Enforcement Act.

31 U.S. CONST. art. IV, § 1.

32 Enforcement Act § 1 ("In this Act 'foreign judgment' means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.").

33 *See Society of Lloyd's v. Ashenden*, 233 F.3d 473, 481 (7th Cir. 2000) (interpreting Illinois law). Since this decision, Illinois has enacted the 2005 Recognition Act, which explicitly eliminates the Enforcement Act's application to foreign-country judgments. *See infra* note 38.

judgment with the clerk of an appropriate court in order to make that judgment enforceable in the same manner as a judgment of a local court.[34] As the Seventh Circuit has explained, "[t]he clerk does not investigate to see whether the judgment is truly enforceable. The issue of the judgment's enforceability is raised by way of defense to compliance with, not commencement of, the [enforcement] proceeding... ."[35] The debtor's only opportunity for a hearing is limited to arguments for "reopening, vacating, or staying" the now-enforceable judgment.[36]

Accordingly, in states that are governed by the 1962 Act, there is a risk that a judgment creditor can obtain "instant recognition" of a foreign-country judgment simply by presenting it to the clerk of the court, and then can enforce the recognized judgment through seizure of assets—all before the judgment debtor has an opportunity to assert any defenses to recognition. In our opinion, "instant recognition" is not only bad policy, it also is constitutionally suspect.[37] Indeed, this procedure was not the intent of the drafters of the 1962 Act, and the 2005 revision was proposed in part to prevent such instantaneous recognition and enforcement.[38] However, only 18 states and the District of Columbia have enacted the 2005 Act, leaving roughly a dozen jurisdictions in which this procedure may remain viable.

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34 Enforcement Act § 2 ("A copy of any [authenticated] foreign judgment ... may be filed in the office of the Clerk of any [District Court of any city or county] of this state... . A judgment so filed has the same effect ... as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner." (alternation in original)).

35 *Ashenden*, 233 F.3d at 481.

36 Enforcement Act § 2 ("A judgment so filed ... is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state ... ."). The ULC deemed the 1948 Enforcement Act's summary process provisions "superfluous" in light of the subsequent widespread adoption of federal and state judicial rules for general summary judgment procedures. *See id.*, Prefatory Note. In an effort to "relieve[] creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment," the ULC sought to mirror the newer federal practice under 28 U.S.C. § 1963, which permitted one district court's judgment to be registered and enforced in another district court, with the same effect as any other judgment of that second court. *Id.* In some states, the foreign judgment could become enforceable immediately upon registration. *See, e.g.*, 42 PA. CONS. STAT. § 4306(b) (a judgment filed with the clerk of court constitutes "a lien as of the date of filing").

37 Courts do not appear to have addressed the extent to which *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), constrains the registration process of foreign-country judgments under the Uniform Enforcement Act. In *Mullane*, the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Registration, which affords notice and an opportunity to be heard only after-the-fact, raises serious questions under *Mullane* and the Due Process Clause.

38 *See* 2005 Act § 6(a) ("If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment."). The official comment to Section 6 clarifies that this provision was added to expressly

> *If a defendant does not know where a judgment may be enforced, the decision whether to defend on the merits is that much more difficult.*

The existing patchwork of state laws also raises a host of substantive concerns, including issues of personal jurisdiction, reciprocity, and federal public policy, which are discussed below. Additional substantive concerns are addressed in the discussion of federal law elements at the end of this paper.

Personal Jurisdiction

In states governed by either uniform recognition act, a defendant that contests the merits of a lawsuit abroad may not challenge recognition of a subsequent judgment on the ground that the rendering court lacked personal jurisdiction over the defendant.[39] Thus, whenever a defendant in a foreign suit believes that the foreign court is asserting jurisdiction improperly, U.S. state laws place the defendant in a dilemma. If the defendant mounts a defense on the merits, he waives his ability to contest jurisdiction as a defense to recognition and enforcement. But if the defendant chooses instead to preserve his jurisdictional defense, he risks a large default judgment abroad, which can create bad press, negative market reactions (in the case of a corporate defendant), and greater liability if the judgment is later recognized and enforced in the United States. This problem is exacerbated by differing laws across states regarding the right to contest personal jurisdiction. If a defendant does not know where a judgment may be enforced, the decision whether to defend on the merits is that much more difficult.[40]

"reject[] decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment." *Id.* cmt. 1 (citing the Seventh Circuit's decision in *Ashenden*). The ULC explains that "differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under [the 2005 Act] is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding." *Id.*

39 *See* 1962 Act § 5(a)(2) ("The foreign judgment shall not be refused recognition for lack of personal jurisdiction if ... the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."); *accord* 2005 Act § 5(a)(2).

40 This jurisdictional dilemma is further complicated by the fact that some foreign courts may reserve jurisdictional determinations until *after* resolution of the merits. In those cases, a defendant in a foreign court cannot make a limited appearance to contest jurisdiction only and then make a strategic determination thereafter on whether to defend the merits of the claim.

Reciprocity

Most states, but not all, agree to recognize foreign judgments regardless of whether the foreign country would recognize a comparable U.S. judgment.[41] Many experts believe that our current state laws are overly generous to other nations; without the leverage of a uniform reciprocity requirement in state law, it has been difficult not only for individual and corporate judgment creditors to gain recognition of their judgments in foreign countries but also for the State Department to secure international cooperation in the negotiation of a treaty to govern recognition of foreign judgments.[42] Between 1992 and 2005, the United States tried to persuade other countries to agree to a broad multilateral treaty on recognition of judgments, but those efforts were unsuccessful in large part because the United States did not have the bargaining chip of withholding recognition of foreign judgments.[43] Most other countries prefer the status quo, in which they know our state courts will treat foreign judgments generously, while foreign courts can reserve decision on how generously to treat U.S. judgments depending upon the circumstances.

Federal Interests and Public Policy

The current state law system ignores important and uniquely federal interests. As a threshold matter, it is indisputable that the recognition *vel non* of a foreign country's judgment in the United States is an aspect of the foreign relations between nations and part of the foreign policy of the United States. The Supreme Court has explained, in the context of recognizing official acts of foreign sovereigns, that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated *exclusively as an aspect of federal law.*"[44] Both practically and strategically, then, it makes considerable sense for the federal government to control this aspect of foreign relations. Yet the patchwork of state laws allows judges in

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41 Neither the 1962 Act nor the 2005 Act includes a reciprocity requirement, but six states—Florida, Georgia, Massachusetts, Maine, Ohio, and Texas—have deviated from the uniform acts and included reciprocity as a relevant consideration. *See* FLA. STAT. § 55.605(2); GA. CODE ANN. § 9-12-114; MASS. GEN. LAWS ch. 235, § 23A; ME. REV. STAT. TIT. 14, § 8505(2); OHIO REV. CODE § 2329.92(B); TEX. CIV. PRAC. & REM. CODE § 36.005(B).

42 *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 138-39 (1994) ("The problem with unilateral generosity is that it may weaken U.S. bargaining power when, other countries having chosen not to follow our example, it attempts to work out mutually acceptable agreements. That looms as a difficulty for the United States in pursuing a multilateral convention on the recognition and enforcement of foreign judgments."); SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS 6-9 (2003).

43 Burbank, *Federalism and Private Int'l Law, supra* note 5, at 288 ("The effort to conclude a global jurisdiction and judgments convention foundered, in part, on the lack of a credible *quid pro quo*. Negotiators from the rest of the world perceived that they had little to gain in the area of judgment recognition and enforcement as a result of unilateral American generosity.").

44 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (emphasis added).

> *"This unbridled latitude to make foreign policy 'findings' has sometimes led courts to reach conflicting conclusions about the judicial systems of the same foreign country."*

different states to determine—without any consultation with the federal government or reference to federal standards—whether foreign judicial systems or specific judicial proceedings are corrupt or lacking in due process. This unbridled latitude to make foreign policy "findings" has sometimes led courts to reach conflicting conclusions about the judicial systems of the same foreign country.[45]

State laws also fail to account for a unified federal public policy. Under general principles of international law, any nation may deny recognition and enforcement of a foreign judgment in circumstances where recognition would be contrary to that nation's public policy. Some nations apply this exception broadly, but courts in the United States construe it narrowly, applying it only to violations of "fundamental principle[s] of justice."[46] The Uniform Acts do not define the term "public policy,"[47] and federal and state courts have adopted interpretations of public policy that vary from state to state rather than according to any national interest.

The narrowness of the public policy exception as interpreted by U.S. courts constrains the ability of U.S. courts to reject judgments based on foreign suits that would not prevail if brought originally in the United States, that raise U.S. constitutional concerns, or that undermine U.S. national interests. For example, a defendant entitled

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45 *Compare Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (denying recognition to foreign judgment on the grounds that the Nicaraguan judicial system was not fundamentally fair), with *Callasso v. Morton & Co.*, 324 F. Supp. 2d 1320 (S.D. Fla. 2004) (dismissing case on forum non conveniens grounds because the parties could get a fundamentally fair trial in Nicaragua). Federal guidance would be especially welcome to judges already skeptical of their role in such foreign policy determinations. *See, e.g., Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1992) ("it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation"); *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 832 (C.D. Cal. 2008) (similar); *Warter v. Boston Sec., S.A.*, 380 F. Supp. 2d 1299, 1310-11 (S.D. Fla. 2004) (court would not sit "in judgment upon the integrity of the entire Argentine judiciary" (internal quotation marks and citations omitted)).

46 In the United States, under both state statutes and common law, courts generally will uphold a foreign judgment unless to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

47 The 2005 Act expanded the public policy exception in two ways. Whereas the 1962 Act allows a court to deny recognition if the cause of action is repugnant to the public policy of the receiving state, the 2005 Act permits non-recognition if the cause of action *or the judgment* is incompatible with the public policy of the receiving state *or of the United States. See* 2005 Act § 4(c)(3).

to immunity under U.S. law (e.g., under the government contractor defense[48]) might not enjoy that status under foreign laws. Thus, a plaintiff could circumvent U.S. law simply by bringing the suit abroad, and the judgment debtor might not be entitled to raise its immunity defense in a subsequent recognition proceeding in the United States.

Finally, variation in state laws invites structural problems, including forum shopping among states. A judgment creditor can choose to seek recognition and enforcement in the jurisdiction where the law is most favorable to its interests—usually the state with the narrowest grounds for non-recognition. Then, with a recognized U.S. judgment in hand, the creditor can enforce it nationwide pursuant to the Enforcement Act as a "sister-state" judgment under the Full Faith and Credit Clause. Practically, this means that the most permissive state-law recognition regime *de facto* governs the whole country.[49] Judgment recognition at present is, therefore, a race to the bottom.

"Practically, this means that the most permissive state-law recognition regime de facto *governs the whole country."*

48 *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

49 *See generally* Shill, *supra* note 3, at 459 (positing that the "system's structural problems are even more serious than its critics have charged"). A confidential memo detailing an international strategy to enforce a multi-billion dollar Ecuadorian judgment against Chevron, which is described in more detail below, recognized that "[i]f an Ecuadoran judgment is converted to a domestic judgment by one U.S. Court, that judgment may be enforced throughout the country. Thus, Plaintiffs' Team will not look to enforce the judgment in the jurisdiction housing the most Chevron assets, but rather, will bring an enforcement proceeding in a suitable jurisdiction that offers the strongest chance for recognition of the judgment." Invictus Memo, *infra* note 66, at 13.

The Rise of Tort Tourism

These problems show that although the U.S. system of foreign judgment recognition is not necessarily broken, it does have cracks that can be exploited through transnational forum shopping.[50] In recent years, plaintiffs in several high-profile cases have secured questionable high-dollar judgments against U.S. companies in foreign jurisdictions with favorable laws (sometimes written with assistance from foreign plaintiffs' lawyers) and then have attempted or threatened to enforce the foreign judgments in the United States under liberal U.S. recognition laws. In the most egregious cases of tort tourism, transnational plaintiffs find a jurisdiction in which corruption or political dysfunction virtually guarantees a favorable verdict. Plaintiffs then bring recognition and enforcement actions where corporate assets are located—typically in the United States—without having to overcome the barriers to judgment in a merits-based U.S. litigation.[51]

Two recent cases illustrate this trend. In Nicaragua, thousands of banana plantation workers sued several U.S. companies, including Dole Food Company, The Dow Chemical Company, and Shell Oil, for alleged exposure to the pesticide dibromochloropropane ("DBCP"). The basis for the suit was Nicaragua's "Special Law 364," which reportedly was drafted in part by U.S. plaintiffs' lawyers in 2000 to create an irrefutable presumption of causation and to impose minimum damages far in excess of existing law for specific foreign companies facing litigation in Nicaragua.[52] Among its more onerous provisions, Special Law 364 requires a defendant to deposit approximately $15 million simply to appear and defend itself, mandates a special summary proceeding that totals 14 days from complaint to judgment, and retroactively strips protections afforded to

> *"In all, more than **10,000** Nicaraguan plaintiffs obtained over $2 billion in judgments against U.S. companies under this law, which they then sought to enforce in the United States."*

50 *See* Br. of Geoffrey C. Hazard, Jr. & Michael Traynor as *Amici Curiae* at 13, *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) (describing how the deficiencies in U.S. recognition laws are "amplified by the increasing globalization of litigation and aggressive assertion in some countries of subject matter and personal jurisdiction over U.S. defendants").

51 "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State *where the defendant has property*, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter." *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) (emphasis added).

52 *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1312, 1314-15 (S.D. Fla. 2009).

defendants by applicable statutes of limitations. In all, more than 10,000 Nicaraguan plaintiffs obtained over $2 billion in judgments against U.S. companies under this law, which they then sought to enforce in the United States.[53] U.S. plaintiffs' lawyers argued that U.S. courts were obligated to recognize the foreign judgments, and that U.S. courts could not consider whether defendants were deprived "of any meaningful opportunity to contest the essential allegation against them," because, they asserted, doing so would offend principles of "comity."[54]

Every U.S. court that has considered the Nicaraguan judgments has acknowledged the unfair and abusive processes underlying the judgments.[55] In *Franco v. Dow Chemical Co.*, Nicaraguan plaintiffs sought recognition of a $489 million Nicaraguan judgment predicated on a "suspect" notary affidavit from Nicaragua, which was later proven to be falsified.[56] The court dismissed the case, finding that two of the defendants were not parties to the judgment in Nicaragua, and that the Nicaragua court lacked personal jurisdiction over the third defendant.[57] In *Osorio v. Dole Food Co.*, a Florida court refused to enforce another Nicaraguan judgment, concluding that enforcement would "undermine public confidence in the tribunals of this state, in the rule of law, in the administration of justice, and in the security of individuals' rights to a fair judicial process."[58] The court warned that "a judicial safety valve is needed for cases such as [*Osorio*], in which a foreign judgment violates international due process, 'works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens.'"[59]

"Every U.S. court that has considered the Nicaraguan judgments has acknowledged the unfair and abusive processes underlying the judgments."

Given the pro-recognition posture of U.S. law, the decisions to deny recognition to the Nicaraguan judgments were not foregone conclusions. Although the court in *Osorio* ultimately refused to recognize the Nicaraguan award because, among other reasons, the Nicaraguan "system" did not provide adequate due process to the

53 *See* ABUSIVE FOREIGN JUDGMENTS, *supra* note 2, at 3.

54 *Osorio*, 665 F. Supp. 2d at 1332.

55 *See, e.g., id.* at 1352 ("This Court holds that the Defendants have established multiple, independent grounds under the Florida Recognition Act that the compel non-recognition," including lack of impartial tribunals and due process of law and finding that enforcement of the judgment would be repugnant to public policy.).

56 *Franco v. Dow Chemical Co.*, No. 03-cv-5094, 2003 WL 24288299, at *2-4 (C.D. Cal. Oct. 20, 2003).

57 *Id.* at *7-8.

58 *Osorio*, 665 F. Supp. 2d at 1347.

59 Order on Motion for Reconsideration at 7, *Osorio*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693).

defendants,[60] a different court might applying a different state's law have taken a broader conception of the appropriate "system" and reached a contrary conclusion, so as not to impugn the entire judiciary of another country.[61] In contrast, if the court were directed to look not just at the foreign judicial "system," but more directly at the specific legal proceeding leading to the *Osorio* judgment, it is hard to imagine that any U.S. court would have recognized the judgment given the egregiousness of the discriminatory proceeding against the U.S. companies.[62] However, under current laws, many states do not allow a court to refuse recognition of a foreign judgment on the basis that the defendant was denied due process in the specific foreign proceeding leading to the judgment. When the stakes are high, as in *Osorio*, these minor differences can matter significantly.

A second example of tort tourism is the ongoing public legal battle between Chevron Corporation and a group of Ecuadorian farmers. In 2003, inhabitants of the Ecuadoran rainforest village of Lago Agrio sued Chevron in Ecuador for environmental damage allegedly caused by Texaco's oil operations a decade earlier, even though Texaco—which Chevron acquired in 2001—had ceased operations in Ecuador in 1992 and had settled any outstanding claims for environmental cleanup with the Ecuadorian government in 1994.[63] Nevertheless, in February 2011, an Ecuadorian judge ordered Chevron to pay $8.6 billion in damages.[64] The judge increased that amount to $18.6 billion because the company refused to publicly apologize within 15 days of the judgment.[65] It is the largest award ever by a foreign court against an American company.

Chevron has negligible assets in Ecuador, so the plaintiffs' lawyers devised a plan to collect the judgment wherever Chevron or its subsidiaries had assets. The plaintiffs' lawyers drafted a confidential memo, titled

"A second example of tort tourism is the ongoing public legal battle between Chevron Corporation and a group of Ecuadorian farmers."

60 *Id.*

61 *See* Petition for a Writ of Certiorari at 25, *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) ("state recognition statutes have been interpreted to examine the *substantive* compatibility of a foreign judgment with U.S. law at such a high level of generality as to afford essentially no protection at all in a great many cases").

62 *Id.* at 24 ("Due process is an individual right to actually receive basic procedural protections, not simply the right to a system that *usually* affords the basic requirements of procedural fairness.").

63 *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 598 (S.D.N.Y. 2011) *vacated sub nom. Chevron Corp. v. Naranjo*, No. 11-1150, 2011 WL 4375022 (2d Cir. Sept. 19, 2011) and *rev'd and remanded sub nom. Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

64 *Id.* at 620-21.

65 *Id.* at 621.

> *"...'[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome.'"*

"Invictus," detailing how to leverage the Ecuadorian judgment through worldwide enforcement actions. The memo, which became public in subsequent court filings, detailed a plan to engage "specialized firms" to investigate Chevron's and its subsidiaries' assets in 27 countries around the world and then to select "jurisdictions that offer the path of least resistance to enforcement."[66] In a section of the memo titled "International Enforcement Plan," the lawyers identified the Philippines, Singapore, Australia, Angola, Canada and several other countries where Chevron has significant assets as potential targets,[67] but stated that "[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome."[68] The strategy highlighted the use of multiple enforcement proceedings and asset seizures as a means of quickly achieving a favorable settlement.[69] The memo also included a significant discussion of the U.S. recognition and enforcement framework, including an analysis of "plaintiff-friendly jurisdictions"[70] and the U.S. states most favorable to pre-judgment attachment *prior* to the recognition of a judgment.[71] The Ecuadorean plaintiffs have since initiated enforcement actions in Canada, Argentina, and Brazil.

In anticipation of this plan, Chevron sought an injunction in New York federal court that would have, among other things, prevented collection of the judgment in the United States.[72] Chevron argued that the Ecuadorian legal system lacked impartial tribunals required for due process of law and that the Ecuadorian judgment had been procured by fraud. In granting the injunction against enforcement, the New York federal court cited evidence that the plaintiffs used pressure tactics and political influence to obtain a favorable judgment and that the Ecuadorian courts were notoriously corrupt, concluding that a fair trial in Ecuador was "impossible."[73] The court found "ample evidence of fraud in the Ecuadorian proceedings" and "abundant evidence

66 Invictus: Path Forward: Securing and Enforcing Judgment and Reaching Settlement, p. 12, 22-23, *available at* http://www.earthrights.org/sites/default/files/documents/Invictus-memo.pdf.

67 *Id.* at 19-20.

68 *Id.* at 12.

69 *Id.* at 12, 14, 15.

70 *Id.* at 13-14 (Alabama, California, Louisiana, Mississippi, Nevada, and New Mexico were identified as "especially attractive for enforcement ... [d]ependent upon the peculiarities of the foreign judgment recognition law in these jurisdictions ... .").

71 *Id.* at 14 (identifying Iowa, New York, and Connecticut).

72 *Donziger*, 768 F. Supp. 2d at 594.

73 *Id.* at 607-620. In a motion for summary judgment filed in the District Court in late January 2013, Chevron introduced further evidence that undermined the legitimacy of the Ecuadorian judgment. A one-time presiding judge on the Ecuadorean case, Alberto Guerra, submitted a declaration detailing his

before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this."[74] The court chided the plaintiffs' lawyers for their "global plan of attack" to extract a settlement from Chevron.[75] However, the injunction was overturned by the Second Circuit, which ruled that New York's version of the 1962 Act bars judgment debtors from bringing an affirmative lawsuit to contest the recognition of abusive foreign judgments.[76] The Ecuadorian plaintiffs have not yet sought to enforce their judgment in the United States.

Although U.S. courts have so far refused to recognize both the Nicaraguan and Ecuadorian awards, the cases have been closely watched by the U.S. business community. The transaction costs alone are staggering; news outlets have speculated that Chevron is paying around $400 million annually in legal fees to defend against enforcement of the Ecuadorian judgment.[77] The Invictus memo proves that plaintiffs' lawyers are probing for weaknesses to exploit in the U.S. system of foreign judgment recognition. If the "tort tourism" techniques employed by plaintiffs' lawyers are successful in one instance, the strategy is likely to become a roadmap for future abuse. Such a result would spawn an increase in the number of foreign proceedings against businesses and foreign judgments sought to be enforced in the United States in the coming years—particularly an increase in the number of high-dollar foreign judgments. As judgment enforcement efforts increase in frequency and value, plaintiffs can be expected to exploit any available risk factors that create an environment for recognition of abusive foreign judgments.

"If the 'tort tourism' techniques employed by plaintiffs' lawyers are successful in one instance, the strategy is likely to become a roadmap for future abuse. Such a result would spawn an increase in the number of foreign proceedings against businesses and foreign judgments sought to be enforced in the United States in the coming years—particularly an increase in the number of high-dollar foreign judgments."

role in a $500,000 bribe from the plaintiffs' lawyers to the Ecuadorian judge who ruled against Chevron. Guerra claimed that the plaintiffs actually drafted the 2011 judgment and that he, as a behind-the-scenes ghostwriter, worked with plaintiffs' lawyers to make it seem more like a court ruling. According to his declaration, Guerra had previously received regular payments from the plaintiffs in the Chevron case to ghostwrite other rulings subsequently issued by the presiding judge. *See* Chevron Corp.'s Memo. of Law in Support of Motion for Partial Summary Judgment at 12-17, *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (No. 745).

74 *Donziger*, 768 F. Supp. 2d at 633, 636.

75 *Id.* at 624.

76 *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

77 Michael D. Goldhaber, *A Costly Battle*, The American Lawyer (May 1, 2013).

The Case for a Federal Law

> *A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states.*

A uniform federal law makes considerable sense in light of these challenges. Congress has the clear constitutional authority to enact a federal statute under its powers to regulate foreign commerce and its shared powers with the Executive Branch to manage foreign relations. A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states. Moreover, a federal statute could rectify deficiencies in the current law, including provisions to uphold important national policies. The Supreme Court has declined opportunities in recent years to provide uniformity on this subject and to protect minimal constitutional guarantees implicated in foreign judgment recognition.[78] The Supreme Court's utter silence on the issue since *Hilton* has appropriately been described as "remarkable."[79]

The fact that foreign judgment recognition has been governed by state law for decades is an insufficient justification for maintaining the status quo. Opponents of federalizing foreign judgment recognition do not dispute its federal dimensions. Rather, they defend the status quo on the grounds that the current state-law regime is working well, and that a federal law would upset the current federal-state balance.[80] But the current federal-state balance is a coincidence of legal history, not a conscious decision by the federal government to cede an indisputable aspect of foreign relations to the states. In contrast to the unique federal

78 *See, e.g., Chevron Corp. v. Naranjo*, 133 S. Ct. 423 (2012) (denying certiorari to resolve whether a judgment debtor can bring an anticipatory Declaratory Judgment Act suit for non-recognition of a foreign judgment); *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) (denying certiorari to resolve whether the Uniform Recognition Acts comport with requirements of the Due Process Clause). *See also* Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get A Chance, Please Look at* Hilton v. Guyot; *We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1 (1999).

79 Lowenfeld, *Nationalizing International Law, supra* note 5, at 127.

80 *See, e.g.*, Testimony of H. Kathleen Patchel Before the Subcommittee of Courts, Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, "Recognition and Enforcement of Foreign Judgments" (Nov. 15, 2011), *available at* http://judiciary.house.gov/hearings/pdf/Patchel%2011152011.pdf.

interests and policies at stake when a U.S. court evaluates a foreign country's judgment, there does not appear to be any significant state interest implicated, as there would be in traditional areas of state concern like the police power or family law. And "[e]ven if enforcement of judgments should be determined to be an area otherwise reserved to the states, when the process threatens to impinge on foreign relations, the issue is solely a federal matter to which state law will not apply."[81] As for the sufficiency of current state laws, the discussion above demonstrates that there is room for improvement and coordination.

Accordingly, numerous experts on the subject of foreign judgments have recognized the need for a federal law. For over twenty years, Professor Ronald Brand of Pittsburgh Law School has led the charge advocating for the federalization of foreign judgment recognition. Concerned with the lack of uniformity and clarity in the law governing foreign judgment recognition, Brand called on Congress in 1991 to exercise its "authority to regulate foreign commerce" and for the President to "negotiate in the area of foreign affairs" in order "to further the goals of uniformity among states and within our federal system."[82] Brand determined that the prospect of uniformity was "not promising" if left to state legislatures.[83] A federal statute, Brand concluded, would eliminate "the enigma of determining the source of [the rule of recognition] and the vagaries of its application."[84] "[I]t is the existence of the uncertainty that compels change."[85]

Others have since jumped on the Brand-wagon. NYU law professor and former Deputy Legal Adviser of the State Department Andreas Lowenfeld explained the "oddity" of treating foreign judgment recognition as "a subject of international law yet not ... a matter of national law within the United States," analogizing foreign judgment recognition to the recognition afforded to foreign acts of state.[86] Lowenfeld noted that "when foreign parties deal with the United States or its citizens, they think of a single country," from which they accordingly (and reasonably) expect "a single national posture in international litigation"—"one foreign policy, one legal system, and one place in the international legal order."[87] Professor Linda Silberman of NYU Law School agreed and commented that "a number of important substantive differences remain" among state laws, notwithstanding the ULC's extensive efforts at unification.[88] Silberman explained that federal legislation was the only realistic means to achieve

81 Brand, *supra* note 5, at 299 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

82 *Id.* at 257.

83 *Id.*

84 *Id.* at 264-65.

85 *Id.* at 284.

86 Lowenfeld, *Nationalizing International Law, supra* note 5, at 122.

87 *Id.* at 132, 141.

88 Silberman & Lowenfeld, *A Different Challenge for the ALI, supra* note 5, at 636.

national uniformity because, for example, "even among states of the United States that have adopted the Uniform Act, the jurisdictional grounds on which a foreign judgment will be accepted may well differ."[89] In 2011, Silberman testified at a House Subcommittee hearing that the problem of recognition and enforcement of foreign judgments remains unresolved and urged the adoption of a federal law.[90]

In 2006, the ALI proposed a draft federal statute that would harmonize the recognition and enforcement of foreign judgments in all U.S. courts.[91] The ALI undertook the project in 1999 to complement the efforts of the Hague Conference during negotiations of a multilateral treaty on foreign judgment recognition. When treaty negotiations faltered, the ALI determined that "a coherent federal statute is the best solution" to what had become "a national problem."[92] Among other advantages, the ALI determined that a federal statute would allow the United States to speak with one voice in its foreign relations, it would allow greater leverage for the United States to negotiated reciprocal recognition of U.S. judgments abroad, and a modernized statute "would be consistent with the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation."[93] Unfortunately, there was never a concerted legislative push to advance the ALI's model statute at the national level, and Congress never acted on it.[94]

Nevertheless, there is recent precedent for a federal law on foreign judgment recognition. In 2010, Congress addressed another form of global forum shopping known as "libel tourism"—defamation judgments against U.S. authors rendered by foreign courts. Congress unanimously passed the federal SPEECH Act to allow American defendants to block enforcement of foreign libel judgments that do not comply with the free speech requirements of the First Amendment.[95] The SPEECH Act establishes a good blueprint for Congress to apply to tort tourism, as well.

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89 *Id.* at 637.

90 Statement of Professor Linda J. Silberman, Subcommittee of Courts, Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, "Recognition and Enforcement of Foreign Judgments" (Nov. 15, 2011), *available at* http://judiciary.house.gov/hearings/pdf/Silberman%2011152011.pdf.

91 American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

92 *Id.* at 6.

93 *Id.*

94 White not achieving legislative traction at the federal level, the ALI's proposal had the collateral benefit of precipitating the ULC's 2005 Act, which was largely developed to respond to ALI's criticisms of state law.

95 Pub. L. 111-223 (Aug. 10, 2010), codified at 28 U.S.C. §§ 4101-05.

In endorsing the adoption of a new federal statute, we are careful not to discard the baby with the bathwater. The ALI's model statute and the ULC's 2005 Act provide the general framework and substantive parameters that have governed foreign judgments recognition for over a century. The proposal outlined in the following pages thus borrows those aspects from the ALI and ULC that need no reform. At the same time, some of the following elements are specifically designed to correct deficiencies in the current law that do not adequately address the threat of tort tourism and related challenges in modern transnational litigation—most of which have arisen in the decade since the ALI first proposed its model legislation. With those considerations in mind, this paper recommends that Congress and the President enact a new federal law with the following elements.

"In endorsing the adoption of a new federal statute, we are careful not to discard the baby with the bathwater. The ALI's model statute and the ULC's 2005 Act provide the general framework and substantive parameters that have governed foreign judgments recognition for over a century. The proposal outlined in the following pages thus borrows those aspects from the ALI and ULC that need no reform. At the same time, some of the following elements are specifically designed to correct deficiencies in the current law that do not adequately address the threat of tort tourism and related challenges in modern transnational litigation...."

The Elements

> *"Federal legislation should preserve the right of a judgment debtor to contest recognition based on the fact that the rendering court lacked personal jurisdiction over the defendant, regardless of the procedural history of the foreign suit."*

Recognition Procedure

Federal legislation should clarify that recognition and enforcement of a foreign judgment must be sought through a civil action and that the judgment must not be given effect until an affirmative determination by a judge after the judgment debtor has had an opportunity to be heard. This provision would eliminate the procedure available in some states governed by the 1962 Act permitting judgment creditors to domesticate foreign judgments simply by "registering" a foreign judgment with a court clerk, precipitating instantaneous recognition and nationwide enforcement of foreign judgments.

Right to Contest Personal Jurisdiction

In the 35 states and territories that have adopted the 1962 or 2005 Acts, a judgment debtor that defends the merits of a lawsuit abroad may not contest personal jurisdiction of the foreign court in a subsequent recognition proceeding in the United States. Federal legislation should preserve the right of a judgment debtor to contest recognition based on the fact that the rendering court lacked personal jurisdiction over the defendant, regardless of the procedural history of the foreign suit. Preserving the defendant's due process right to contest personal jurisdiction in a U.S. court eliminates the dilemma described earlier in this paper: If the defendant mounts a defense on the merits, it waives its ability to contest jurisdiction as a defense to recognition. But if the defendant chooses instead to preserve its jurisdictional defense, it risks a large default judgment abroad, which can result in substantial exposure to liability if the judgment is later recognized and enforced.[96]

Public Policy Exception

Under both state statutes and common law, U.S. courts will uphold a foreign judgment unless to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[97] This narrow construction of the public policy exception constrains U.S. courts' authority to reject judgments based on foreign suits that would not prevail if

96 *See* J. Chad Mitchell, *A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Recognition Proceedings*, 4 BYU INT'L L. & MGMT. REV. 123 (2008).

97 *Loucks*, 120 N.E. at 202.

brought in the United States, that raise U.S. constitutional concerns, or that undermine U.S. national interests. Congress should identify specific claims or judgments for which enforcement would undermine U.S. national interests and declare that recognition of such judgments would violate U.S. public policy.[98] Alternatively, Congress could delegate to the Attorney General the responsibility to identify specific categories of claims or judgments that would be subject to presumptive non-recognition in the United States.[99]

Public Policy Scope

Federal legislation should deny recognition when either the claim or judgment at issue violates the public policy of the United States or of the particular state in which recognition is sought. Currently, some states apply the public policy exception only to "claims" that violate public policy, while other states more broadly apply the exception to "claims" and "judgments" that violate public policy.

Non-Recognition Suits

In the Chevron litigation, the Second Circuit held that judgment debtors were precluded under New York law from bringing a declaratory judgment action to block recognition of a foreign judgment.[100] As a consequence, judgment debtors can be forced to wait under the specter of a multi-billion dollar foreign judgment for years until the creditor decides to collect. The Second Circuit's holding inexplicably places judgment debtors and judgment creditors on unequal footing. The appropriate focus of a recognition law should be on the judgment itself, rather than the status of the parties. Federal legislation should provide explicitly that a lawsuit filed under this statute may be brought by a judgment creditor seeking recognition *and* by a judgment debtor defensively seeking a declaration of non-recognition. Judgment debtors should have the right to contest, preemptively, the recognition of a foreign judgment, subject to the ordinary constitutional requirement of ripeness.[101]

Reciprocity

The reciprocity requirement has been hotly debated since the Supreme Court introduced the factor in *Hilton.* On the one hand, recognition of foreign judgments primarily rests on comity principles, or respect for foreign courts. A reciprocity requirement is in tension with comity because our courts' respect for foreign judgments should not be contingent on foreign courts' respect for our laws. Thus, the ULC has not included a reciprocity requirement in its model acts. On the other hand, advocates of a reciprocity requirement

98 Other countries have codified particular legal issues or judgments that will not be recognized or enforced as a matter of law. For example, British Columbia specifically blocks enforcement of foreign judgments relating to asbestos exposure. British Columbia Court Order Enforcement Act, ch. 78, § 40 (1996).

99 *See, e.g.*, Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29, s. 8 (Can.) (authorizing the Attorney General of Canada to declare treble damage awards made in foreign antitrust actions unenforceable in Canada).

100 *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

101 *See Shell Oil Co. v. Franco*, No. 03-cv-8846, 2005 WL 6184247 (C.D. Cal. Nov. 10, 2005) (issuing declaratory judgment regarding non-recognition).

argue that including such a provision will spur foreign countries to lessen their hostility to U.S. judgments in order to have their own judgments recognized here. For this reason, the ALI included a reciprocity requirement in its draft federal statute.

On balance, this paper recommends inclusion of a reciprocity requirement in federal legislation specifying that U.S. courts only will recognize judgments rendered in foreign countries that recognize similar U.S. judgments. This provision will enhance the United States' bargaining position to encourage other countries to become more receptive to U.S. judgments.

Case-Specific Due Process

Under the 2005 Act (but not under the 1962 Act), a court may decline to recognize any judgment wherein "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[102] This inquiry is separate from whether the "judicial system" as a whole of the rendering country does not provide due process, which is a ground for non-recognition in the 1962 and 2005 Acts and the ALI model statute.

The 2005 Act got it right. Federal legislation should include a provision that denies recognition to a foreign judgment where the specific proceeding leading to the judgment was not compatible with due process of law. Recent cases, including the *Osorio* litigation described above, highlight the need for a case-by-case due process inquiry.[103]

"Federal legislation should include a provision that denies recognition to a foreign judgment where the specific proceeding leading to the judgment was not compatible with due process of law."

Due Process Requirements

Currently, foreign judgments may be denied recognition where the foreign judicial system does not provide "due process of law," but the parameters of that requirement remain unclear. U.S. courts have held that foreign courts need not apply procedures strictly compatible with U.S. conceptions of "due process."[104] Less is required for the recognition of foreign judgments. But "how much less" remains open to judicial interpretation.

Federal legislation should codify a non-exhaustive list of "due process" requirements necessary for recognition of a foreign judgment. That list should include, at a minimum: judicial independence and impartiality, a right to the assistance of

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102 2005 Act § 4(c)(8).

103 *See also* Br. of Geoffrey C. Hazard, Jr. & Michael Traynor as *Amici Curiae* at 2, *Tropp v. Corp. of Lloyd's*, 131 S. Ct. 3064 (2011) ("a foreign court's 'system fairness' is insufficient Due Process protection of a specific 'person,' which is the requirement of the Fifth and Fourteenth Amendments"); Douglass Cassel, *Response to Ted Folkman*, LETTERS BLOGATORY (June 4, 2012), http://lettersblogatory.com/2012/06/04/response-to-ted-folkman/ (similar).

104 *See Ashenden*, 233 F.3d at 477-79.

counsel of the party's choice, due notice and a right to be heard, and a fair opportunity and adequate time to present contentions and evidence.[105] Laws specifically designed to burden or prejudice particular litigation or foreign parties might also violate international conceptions of due process.[106]

Foreign Default Judgments

Foreign default judgments presently receive the same scrutiny from U.S. courts as suits fully contested abroad. In contrast to the 1962 and 2005 Acts, which generally place the burden on the judgment debtor to prove grounds for non-recognition, the ALI model statute provides that, for foreign default judgments, the judgment creditor has the burden to prove that the foreign court had personal jurisdiction over the judgment debtor and that the judgment debtor received adequate notice of the suit. This provision reflects that the judgment debtor likely did not have an opportunity to raise these defenses in the foreign proceeding.

Federal legislation should include provisions requiring greater scrutiny of foreign default judgments. At a minimum, courts should place the burden on the judgment creditor to prove that the defendant had adequate notice of the foreign proceeding and that the foreign tribunal had personal jurisdiction over the defendant, as the ALI recommends.

Statute of Limitations

The statute of limitations for seeking recognition of a foreign judgment varies among states and sometimes depends on knotty questions of foreign law. The 1962 Act did not contain a statute of limitations, leaving the issue open to each state's general laws. The 2005 Act added a fifteen-year statute of limitations running from the effective date of the foreign judgment. The ALI recommended a ten-year window.

Federal legislation should include a definite limitations period; the specific number of years is less consequential than the definitiveness itself. A uniform limitations provision would give both judgment debtors and judgment creditors assurance about the applicable statute of limitations.

Statutory Scope

The Uniform Recognition Acts are expressly limited in scope to foreign judgments "granting or denying a sum of money," excluding judgments for taxes, fines, or penalties, and judgments rendered in connection with domestic relations (maintenance, support, etc.). The ALI statute expands the scope of potential recognition to any final judgment or final order of a foreign court "determining a legal controversy," subject to a few exceptions. The ALI proposal thus greatly exceeds the breadth of the Uniform Acts.

105 These elements generally track what some scholars consider to be the minimum international standards of due process. *See generally ALI/UNIDROIT Principles of Transnational Civil Procedure*, 9 UNIF. L. REV. 758 (2004).

106 *See Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

On this point, the ALI may have been too ambitious, at least politically. Federal legislation that regulates only foreign-country money judgments maintains the status quo adopted by the majority of states and may be more palatable to federalist opponents. In addition, adopting a modest scope in federal legislation now allows the United States to consider offering broader recognition of foreign judgments in bilateral treaty negotiations on a country-specific basis.

Choice-of-Court Agreements

Under state law, contracting parties have limited ability to require compliance with a negotiated forum-selection clause that specifies where a dispute will be heard. The 1962 and 2005 Acts provide that a court "may" decline to recognize a judgment when the proceeding in a foreign court was contrary to an agreement between the parties to resolve the dispute in a different forum, but the Acts do not compel that result. Oftentimes, this means that the parties' agreed-upon choice of how to litigate their dispute is not respected.

The 2005 Hague Convention on Choice of Court Agreements ("COCA") honors parties' rights to negotiate and enforce a forum selection clause in an international commercial contract.[107] The Convention sets out three basic rules: (1) the court chosen by the parties in an exclusive choice-of-court agreement has jurisdiction; (2) a court not chosen by the parties does not have jurisdiction and must decline to hear the case; and (3) a judgment resulting from a court selected by the parties must be recognized and enforced in other countries that are parties to the Convention. The COCA is not designed to displace the ability of parties to choose alternative dispute resolutions such as arbitration in lieu of litigation. Rather, the Convention's sole purpose is to give parties greater ability to *enforce* agreements to litigate disputes in a particular forum. A federal statute on foreign judgment recognition should include this important protection for international business dealings by incorporating federal implementing legislation for the treaty.

Federal Jurisdiction

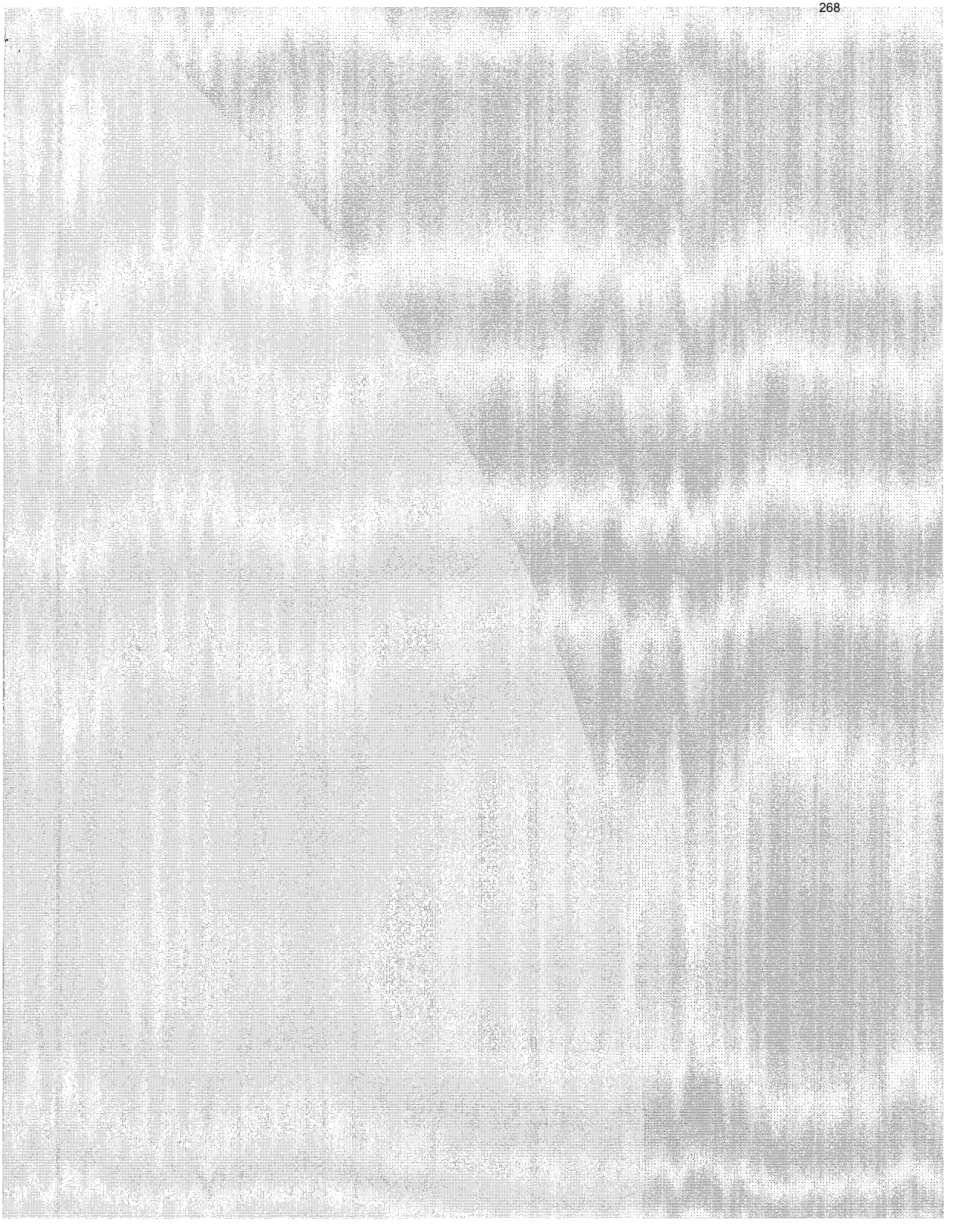
Currently, federal courts can entertain recognition and enforcement suits only when jurisdiction is premised on diversity of citizenship, pendent jurisdiction, or a similar statutory grant. A federal statute would automatically vest federal courts with jurisdiction under 28 U.S.C. § 1331 and would provide judgment debtors the right to remove state-court actions to federal court under 28 U.S.C. § 1441. That jurisdiction should vest concurrently with state courts, especially since recognition of foreign judgments historically has been the province of state courts. No overriding federal interest justifies the creation of exclusive federal jurisdiction over such suits.

107 44 I.L.M. 1294 (June 30, 2005). The COCA was signed on behalf of the United States by the lead author of this article in January 2009, but federal implementing legislation has been stalled by the ULC's objections to federalizing foreign judgment recognition. *See* Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 INT'L L. & POLITICS 237 (2009).

Conclusion

After nearly a century of foreign judgment recognition dictated by state laws, Congress and the President should work together to enact federal legislation to govern recognition and non-recognition of foreign judgments, as they did with the SPEECH Act. The treatment of foreign judgments undoubtedly implicates unique federal interests, and litigants seeking to enforce or challenge foreign judgments in this country should not have to navigate 50 different state laws, especially where no state interest is at stake. The current patchwork of state laws has puzzled scholars and frustrated practitioners for decades. But the present need for legislative attention is spurred by the fact that existing state laws are increasingly ill-equipped to deal with the challenges presented by tort tourism. While U.S. courts should continue to respect and enforce the decisions of foreign courts in appropriate cases, Congress also must ensure that judges have the necessary tools to protect American interests. As the Supreme Court explained in *Hilton*, "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations and the principles of public and national law in the administration of justice."[108] In upholding our end of the international bargain, the United States should speak with one voice.

108 *Hilton*, 159 U.S. at 191 (quoting *Bradstreet v. Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839)).



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TAB 2G

TESTIMONY OF

JOHN B. BELLINGER, III

Partner, Arnold & Porter LLP, and
Adjunct Senior Fellow in International and National Security Law,
Council on Foreign Relations

On behalf of
The U.S. Chamber of Commerce and the U.S. Chamber
Institute for Legal Reform

Before the
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE
LAW

Hearing on
"Recognition and Enforcement of Foreign Judgments"

Rayburn House Office Building, Room 2141
November 15, 2011
1:30PM

This is Exhibit G referred to in the
affidavit of Lily Fu Claffee
sworn before me, this 28th
day of July 2014
William Cuccia Law
A COMMISSIONER FOR TAKING AFFIDAVITS

Submitted by:
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Testimony of John B. Bellinger III
Before the
U.S. House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative law

Hearing on
Recognition and Enforcement of Foreign Judgments

November 15, 2011

Mr. Chairman, Ranking Member Cohen, thank you for inviting me to appear before the Subcommittee today to address the topic of recognition and enforcement of foreign judgments. My testimony today is limited to that subject matter and not on other issues, such as the jurisdiction of U.S. courts to hear original cases against foreign defendants.

I am partner in the international and national security law practices of Arnold & Porter LLP, where, among other things, I advise U.S. and foreign companies on issues in litigation around the world, including the challenges many have faced in dealing with judgments reached overseas and sought to be enforced in the United States. I am also an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations. I previously served as The Legal Adviser for the Department of State from 2005 to 2009 and before that as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005. Particularly in my role as State Department Legal Adviser, I heard frequently from the business community and from governments around the world about the importance they placed on consistency, predictability, and fairness in connection with transnational recognition and enforcement of judgments.

Today, I am pleased to be testifying on behalf of the U.S. Chamber Institute for Legal Reform and the U.S. Chamber of Commerce. The U.S. Chamber Institute for Legal Reform (ILR) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's legal system simpler, fairer, and faster for everyone. Founded by the Chamber in 1998 to address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. Although I am testifying on behalf of the ILR and the U.S. Chamber, the views I am expressing today are my own.

Coincidentally, I spent my last full day in office as Legal Adviser, on January 19, 2009, in The Hague addressing the very issues that are the subject of today's hearing. I was in The Hague to represent the United States before the International Court of Justice, and while I was there I was able to sign the 2005 Convention on Choice of Court Agreements, a treaty specifically designed to advance the business community's need for certainty and predictability in the area of recognition and enforcement of judgments. This Convention was the result of many years of international negotiations during both Democratic and Republican

Administrations, and I was pleased to be able to sign it on behalf of our country as one of my last official acts. I will address the Convention in more detail later in my testimony.

Abusive Foreign Judgments

Today's hearing is timely. In the last few decades, there has been a significant increase in the number of actions seeking recognition and enforcement of foreign judgments in the United States.[1] This increase has been punctuated in the last several years by several high-profile, high-dollar foreign judgments against U.S. companies sought to be enforced in the United States. In *Osorio v. Dole*,[2] for example, plaintiffs sought to enforce a $97 million Nicaraguan judgment against Dole Food Company and The Dow Chemical Company rendered under a special law designed to discriminate against foreign companies. More than ten thousand Nicaraguan plaintiffs obtained over $2 billion in judgments under this law, which they then sought to enforce in the United States.[3] A federal district court refused to enforce the judgment, concluding that enforcement would "undermine public confidence in the tribunals of this state, in the rule of law, in the administration of justice, and in the security of individuals' rights to a fair judicial process."[4]

In *Chevron v. Mendoza*,[5] Ecuadorian plaintiffs recently obtained an $18 billion judgment against Chevron for alleged environmental harms in Ecuador. The judgment was also driven by a special law that limited Chevron's ability to defend the suits. A federal court in New York issued an injunction against enforcement of the judgment in the U.S., but that injunction was recently reversed by a federal appeals court.

Although U.S. courts have so far refused to recognize both the Nicaraguan and Ecuadorian awards, the cases have been closely watched by the U.S. business community. As I will explain more fully, the business community supports recognition and enforcement of appropriate foreign judgments in U.S. courts but wants to avoid abuse of the liberal U.S. legal framework for recognition and enforcement.

Last month, the U.S. Chamber Institute for Legal Reform published a report on the recognition of abusive foreign judgments.[6] The report outlines the risks posed to U.S. businesses by the recent rise in global forum shopping; details multiple cases where foreign plaintiffs have

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[1] WILLIAM E. THOMSON & PERLETTE MICHÈLE JURA, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS (Oct. 2011) ("ABUSIVE FOREIGN JUDGMENTS").

[2] *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom. Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011).

[3] *See* ABUSIVE FOREIGN JUDGMENTS, *supra* note 1, at 3.

[4] 665 F. Supp. 2d at 1347.

[5] *Chevron Corp. v. Mendoza*, No. 11-1150, 11-1264, 11-2259 (2d Cir. Sept. 19, 2011) (vacating preliminary injunction).

[6] ABUSIVE FOREIGN JUDGMENTS, *supra* note 1.

sought and won foreign judgments against U.S. businesses in politicized and even corrupt foreign judicial systems; and explains how U.S. courts must safeguard against recognizing such judgments by ensuring that foreign judgments comport with core U.S. constitutional norms and basic notions of justice and fairness. The report details some of the same deficiencies in the current state of the law that I will address today and explains how the lack of federal guidance in this area "has caused unnecessary variations in standards, burdens of proof, and clear guidance on the intersection between the U.S. Constitution, state constitutions, recognition and enforcement statutes, and common law recognition and enforcement."[7] As a result, "the Supreme Court has long recognized that a guiding federal statute or country-specific treaties on recognition and enforcement would be preferable."[8] Although the Chamber has not yet taken a position on the desirability of federal legislation in this area, the business community is concerned about the potential for abuse in the existing state-law framework.

Recognition and Enforcement of Judgments—General Principles

I would like to begin by summarizing what I believe are the three main goals of the U.S. business community in connection with the transnational recognition and enforcement of judgments, both domestic and foreign.

First, U.S. businesses want to know that if they obtain a money judgment, whether inside or outside the United States, they will be able to enforce that judgment in jurisdictions where the judgment debtor has assets. Sometimes this might mean taking a judgment obtained overseas and filing an action in a U.S. court in a jurisdiction here where a defendant has assets, and on other occasions it could mean obtaining a judgment in U.S. courts and enforcing it through proceedings overseas in foreign courts. In each case, U.S. companies want clear and fair legal principles to govern their efforts to seek relief in litigation in this country and abroad.

Second, and related to the first goal, U.S. businesses need to understand what exceptions to recognition and enforcement might be invoked by judgment debtors that could undermine the success of the U.S. businesses' pursuit of judgments in their favor, and they need to be able to invoke appropriate exceptions themselves as judgment debtors to ensure that unjust or inappropriate judgments by foreign tribunals are not enforced against them. In essence, they want to be treated fairly both in the United States and in other jurisdictions.

And third, U.S. businesses want a predictable international legal regime where courts are obligated to recognize judgments that have been reached in other courts selected by the parties themselves. Where two parties have freely agreed in a contract, for example, that any disputes between them will be resolved in New York courts, and where a New York court has indeed reached a judgment, they would also like to know that such a judgment will be recognized not only by New York's sister states in the United States, but also by the courts of other nations.

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[7] *Id.* at 8 n.47.

[8] *Id.*

Having outlined these basic goals, I now want to review the current legal framework for recognition and enforcement of foreign judgments in the United States.

The United States has traditionally been the most receptive country in the world to recognition and enforcement of judgments rendered by foreign courts. Our recognition of foreign judgments is based in part on principles of comity, that is, respect for foreign states and their legal systems, but recognition and respect for foreign judgments also serves our own interests. Thus, when U.S. citizens and businesses prevail in litigation abroad, recognition and enforcement helps to ensure that they do not have to waste resources re-litigating their claim to obtain relief in this country. Moreover, when our courts recognize and enforce foreign judgments, foreign courts are more likely to recognize and enforce U.S. judgments out of reciprocity. We cannot reasonably expect the courts of other countries to recognize and enforce the judgments of U.S. courts if our courts do not recognize and enforce the judgments of foreign courts. Recognition and enforcement of foreign judgments thus helps to resolve transnational legal disputes efficiently, which serves the interests of plaintiffs, defendants, and taxpayers alike.

State Laws Governing Recognition and Enforcement

U.S. recognition of foreign judgments has evolved from being governed primarily by federal common law to now being largely governed by state statutes. In 1895, the U.S. Supreme Court in *Hilton v. Guyot* explained that recognition and enforcement of a foreign judgment under general federal common law was appropriate as a matter of comity.[9] Following the Supreme Court's decision in *Erie Railway Co. v. Tomkins* in 1938,[10] however, general federal common law on issues like this was abolished, and federal courts sitting in diversity cases now apply state law. In fact, state courts, since at least the 1920s, have applied their own laws when deciding whether to recognize or enforce foreign judgments.[11] As a result, the legal framework that currently governs recognition and enforcement of foreign judgments in the United States is a patchwork governed principally by state law.

The Uniform Law Commission (ULC) has attempted to harmonize the various state laws in this area, and has achieved partial success. In 1962, the ULC proposed the Uniform Foreign Money Judgments Act (1962 Recognition Act), which today governs recognition of foreign-country money judgments in seventeen U.S. states and territories, including the District of Columbia. The 1962 Recognition Act includes a general presumption of recognition of foreign and enforcement judgments but includes a series of exceptions to recognition, including if the foreign proceedings had profound irregularities or if enforcement would be contrary to public policy in the United States.

In order to clarify and update the 1962 Act in light of experience, the ULC proposed a revised version in 2005 (2005 Recognition Act), which to date has been enacted in another seventeen states. The 2005 Recognition Act repeats the same general structure as the 1962

[9] 159 U.S. 113 (1895).

[10] 304 U.S. 64 (1938).

[11] *See Johnson v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926).

Recognition Act but expands the scope of the public policy exception by providing that recognition may be denied if either the cause of action or the judgment itself violates public policy. It also adds two discretionary grounds for non-recognition. The first is that the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment, and the second is that the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

The remaining U.S. states have no statutory provisions in this area and rely instead on common law doctrines. In addition, forty-eight U.S. states have enacted the Uniform Enforcement of Foreign Judgments Act (Enforcement Act). By its terms, this statute was intended to facilitate enforcement of judgments by sister states of the United States, not foreign country judgments, but some courts nevertheless have held it to apply to foreign country judgments.[12]

Problems with the Current State-Law Framework

This patchwork of state laws creates problems for the U.S. business community. The lack of uniformity jeopardizes the procedural rights of judgment debtors, encourages forum shopping both here and abroad, and enables plaintiffs to circumvent legal limitations that would otherwise preclude recovery under U.S. law. Variation in state laws creates three categories of legal problems for U.S. businesses: procedural, substantive, and structural.

Procedurally, some states have permitted judgment creditors to enforce automatically a foreign-country money judgment by simply "registering" the foreign judgment with a state court clerk; the defendant is not provided an opportunity to be heard before enforcement. In states governed by the 1962 Recognition Act and the Enforcement Act, a judgment creditor may be able to attach or otherwise seize a judgment debtor's assets to satisfy a foreign judgment before the judgment debtor has an opportunity to argue in court that the judgment should not be recognized. The 1962 Recognition Act did not specify any procedures for applying the specified grounds for non-recognition. Rather, the 1962 Act simply provides that foreign judgments are enforceable in the same manner as sister-state judgments. And under the Enforcement Act, a judgment creditor need only file an authenticated copy of a sister-state judgment with the clerk of an appropriate court in order to make that judgment enforceable in the same manner as a judgment of a local court. As the Seventh Circuit has explained, "[t]he clerk does not investigate to see whether the judgment is truly enforceable. The issue of the judgment's enforceability is raised by way of defense to compliance with, not commencement of, the [enforcement] proceeding . . . ."[13]

Accordingly, there is a risk that a judgment creditor can obtain "instant recognition" of a foreign judgment simply by presenting it to the clerk of the court, and then can enforce the

[12] *See Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (interpreting Illinois law). Since this decision, Illinois has enacted the 2005 Recognition Act, which eliminates the Enforcement Act's application to foreign country judgments.

[13] *Id.* at 481.

recognized judgment through seizure of assets—all before the judgment debtor has an opportunity to assert any defenses to recognition. This was not the intent of the drafters of the 1962 Recognition Act, and the 2005 revision was proposed in part to prevent such instantaneous recognition and enforcement. However, only seventeen states have enacted the 2005 Recognition Act, leaving roughly a dozen jurisdictions in which this procedure may remain viable.

The existing patchwork of state laws also raises substantive concerns. The grounds for non-recognition of a foreign country money judgment have remained essentially unchanged since 1895 when the Supreme Court decided *Hilton v. Guyot*, and thus reflect nineteenth-century concerns that do not adequately account for recent trends in global litigation.

Businesses today operate globally. As a result, those businesses may be susceptible to suit in many countries. Plaintiffs have capitalized on this fact and begun to file suits in foreign courts when the claims would be barred by substantive U.S. defenses. In effect, this allows plaintiffs to circumvent substantive limitations on recovery under U.S. laws by obtaining judgments in a foreign forum and then seeking enforcement of that foreign judgment in the United States. Currently, judgment debtors must rely on the general "public policy" ground for non-recognition in such situations. However, courts have generally held that the threshold for establishing the public policy exception is high and have shown reluctance to apply the public policy exception beyond the First Amendment context.[14]

The 1962 and 2005 Recognition Acts also limit a judgment debtor's ability to contest recognition on the ground that the rendering foreign court lacked jurisdiction if the defendant contests the foreign suit on the merits.[15] Thus, if a defendant in a foreign suit believes that the foreign court is asserting jurisdiction improperly, the state laws place the defendant in a difficult position facing a Hobson's choice. If the defendant mounts a defense on the merits, it waives the ability to contest jurisdiction as a defense to recognition. But if the defendant chooses instead to preserve its jurisdictional defense, it risks a large default judgment abroad, which can create bad press, negative market reactions, and greater liability if the judgment is later recognized and enforced.

Finally, the current state law framework leads to structural problems that exacerbate the procedural and substantive problems. Because state recognition laws vary, judgment creditors can choose to seek recognition and enforcement in a jurisdiction with the most favorable law so long as the judgment debtor has a presence in that state. Once a judgment creditor obtains recognition of a foreign judgment in one U.S. jurisdiction, the judgment holder can then enforce that recognized judgment nationwide as a "sister-state" judgment under the Full Faith and Credit

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[14] *See, e.g.*, *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918) (Cardozo, J.) (holding that the public policy exception applies only if enforcing the foreign judgment "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.")

[15] 1962 Recognition Act § 5(a)(2); 2005 Recognition Act § 5(a)(2).

Clause. Practically, this means that the most permissive state-law recognition regime *de facto* governs the whole country.

The ALI Proposal and the Need for Federal Legislation

The American Law Institute has been studying the problem of recognition and enforcement of foreign judgments for some time and has drafted a proposed federal statute on the subject. The ALI's proposed statute is considerably broader in scope than the existing uniform state laws, which address only foreign country *money* judgments. In addition to foreign money judgments, the ALI statute also addresses injunctions, dismissals, issue and claim preclusion, and orders in support of foreign judicial proceedings. I am limiting my testimony today to recognition of monetary judgments only.

The ALI proposed statute's provisions on recognition and enforcement of foreign money judgments include several valuable features. First, a federal statute would establish uniform standards in this area and would eliminate the structural issues caused by the patchwork of state laws. Second, the proposed statute makes substantive improvements to the 1962 and 2005 Recognition Acts by allowing judgment debtors to resist recognition on jurisdictional grounds even if they contested the underlying foreign suit on the merits. Third, by providing that a foreign judgment shall not recognized in the United States if the U.S. court finds that a comparable judgment would not be recognized and enforced in the country of the foreign tribunal, the ALI proposal encourages other countries to recognize reciprocally and enforce judgments rendered by U.S. courts. Reciprocity is one of the key reasons for recognizing and enforcing foreign judgments in the first place, and U.S. businesses depend on foreign courts' giving effect to U.S. judgments.

Although valuable, the ALI statute could be significantly improved in some ways. First, the statute's provision that allows a judgment creditor to obtain a lien before the judgment debtor is afforded a chance to contest recognition is problematic and can be abused. Second, the ALI proposal could provide greater clarity to jurisdictional defenses to recognition. Third, the proposal could clarify the public policy exception for non-recognition. The U.S. business community is deeply concerned about global forum shopping and the prospect that plaintiffs will circumvent U.S. laws by obtaining judgments in favorable forums abroad and then seeking enforcement here. Courts must retain the authority to reject judgments based on foreign suits that could not prevail if brought in the United States. The SPEECH Act passed last year represents a welcome first step in specifying what the public policy exception covers. If Congress chooses to legislate in this area, it should consider defining further the basis for non-recognition of judgments that are repugnant to public policy or that could not have been secured inside the United States.

The Hague Choice of Court Convention

The 2005 Convention on Choice of Court Agreements, which I signed on behalf of the United States in 2009 and mentioned at the beginning of my testimony, is likely to be a key part to any Congressional consideration of transnational recognition and enforcement issues.

In brief, the Convention sets out three basic rules:

1) the court chosen by the parties in an exclusive choice of court agreement has jurisdiction;

2) if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case; and

3) a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States (other countries that are parties to the Convention).

The Convention largely parallels the laws of U.S. states by including important exceptions to enforcement, such as where a contract was entered into by fraud or where recognizing a judgment would be inconsistent with the public policy in the place the judgment is sought to be enforced. However, the scope of the Convention is limited to certain commercial agreements between businesses. The Convention does not cover the recognition and enforcement of judgments in which the underlying dispute did not involve an agreement to litigate in a particular court or when the agreement included a natural person acting in a personal capacity. Certain subject matters are also beyond the Convention's scope, including personal injury suits and torts to personal property.

This Convention is in my view a modest but at the same time important advance in the area of recognition of judgments. Under the Convention, U.S. and foreign courts would enforce relevant foreign judgments in much the same way as the U.S. currently enforces relevant foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"). It would help the U.S. business community by enhancing the predictability that is currently lacking in international business transactions and business disputes. And it would necessarily build on existing law. In this respect, in addition to advice and consent by the U.S. Senate, legislation by both houses of Congress will be needed to ensure that the United States is in a position to enforce judgments reached under the terms of the Convention. If and when the President transmits the Choice of Courts Convention to the Senate for advice and consent, and the Congress considers implementing legislation, the Committee might wish to augment this legislation with a broader federal statute governing the recognition and enforcement of all foreign judgments.

Federalization of Recognition and Enforcement

Although greater uniformity in the recognition and enforcement of foreign judgments would be desirable, the Committee should consider whether the subject should be fully federalized, or whether some discretion should be left to the states. I believe that Congress could, consistent with the Constitution, enact a federal statute that supersedes state laws. However, as I have explained, the recognition of foreign judgments has traditionally been left to the states, and I recognize that many states continue to have a strong interest in the subject. Although the U.S. Chamber of Commerce has not yet taken a position on this question, my personal view is that a purely federal statute would have certain advantages.

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Mr. Chairman, Ranking Member Cohen, with that I will conclude my comments. I applaud the work this committee is doing to address these important issues and I would be pleased to address any questions the Committee might have.

TAB 3

File Number: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CHEVRON CORPORATION AND CHEVRON CANADA LIMITED

Appellants
(Respondents/Appellants by Cross-Appeal)

– and –

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMONADO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Respondents
(Appellants/Respondents by Cross-Appeal)

MOTION FOR INTERVENTION
MEMORANDUM OF ARGUMENT
U.S. CHAMBER OF COMMERCE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The U.S. Chamber of Commerce (**U.S. Chamber**) seeks leave to intervene in this appeal. In light of the U.S. Chamber's in-depth knowledge of the U.S. experience with jurisdictional issues similar to those raised in this case, the U.S. Chamber is ideally situated to provide this Court with the significant business context to the matters that may be decided on this appeal.

2. The U.S. Chamber has a demonstrated interest in the subject-matter of this appeal. Among other activities, the U.S. Chamber has been involved in cases involving similar issues in the United States for many years. Most recently, the U.S. Chamber has intervened as *amicus curiae* in two significant and relevant cases before the U.S. Supreme Court. In 2013, the U.S. Chamber filed an *amicus* brief in a case dealing with the issue of whether adjudicative jurisdiction may properly be exercised over a parent corporation based on the in-forum activities of a subsidiary (*DaimlerChrysler AG v Bauman*). The preceding year, the U.S. Chamber filed a brief in a case dealing with the expansive assertion of jurisdiction over claims arising in a foreign jurisdiction under the U.S. Alien Tort Statute (*Kiobel v Royal Dutch Petroleum Co*). The issues in these prior cases overlap with those in the present appeal and are part of a general trend in relation to global forum shopping.

3. Furthermore, the U.S. Chamber has investigated, analyzed and given testimony before the U.S. Congress regarding the issues that have arisen in the United States as a result of the patchwork of varied legislation among the U.S. states dealing with the recognition and enforcement of foreign judgments.

4. The U.S. Chamber intends to focus its submissions on matters that are not significantly developed in the facta filed by the appellants: the policy issues and practical business and political implications arising from an expansive conception of jurisdiction over the recognition and enforcement of foreign judgments. Based on its history of dealing with similar matters on behalf of the business community in the United States, the U.S. Chamber is well-suited to provide that perspective.

B. The U.S. Chamber's Background and Mandate

5. The U.S. Chamber is the world's largest business federation. It represents the interests of more than 3 million businesses of all sizes, sectors and regions in the United States of America, as well as many businesses from other countries.[1]

6. A major purpose of the U.S. Chamber is to develop, implement and influence policy on important issues affecting business. Among other advocacy and informational activities, the U.S. Chamber provides testimony before Congress; disseminates reports and statements to policymakers, the public and the media; sponsors research; and sends comments and letters to elected representatives and government regulators.[2]

7. In addition, the U.S. Chamber regularly advocates on behalf of its members for the fair treatment of business in U.S. courts and before regulatory agencies. These efforts include filing lawsuits that challenge federal regulations or other governmental actions that are believed to be unlawful or that improperly harm business interests and job growth, and filing *amicus curiae* or intervener briefs to provide information on the practical implications of legal decisions to the broader business community.[3]

C. The U.S. Chamber's Activities and Expertise

8. The U.S. Chamber has a well-established history of participating in litigation involving matters of law and public policy that affect business. This is particularly true at the U.S. Supreme Court, where the U.S. Chamber has participated as *amicus curiae* since 1977. At present, the U.S. Chamber is recognized as a significant organization among *amici* in the Supreme Court bar. The U.S. Chamber also intervenes regularly in U.S. federal courts and state courts.[4]

9. The U.S. Chamber's *amicus* briefs are regarded by U.S. courts, legal academics, and the media as helpful to the courts in their decision making.[5]

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[1] Affidavit of Lily Fu Claffee sworn on July 28, 2014 ("Claffee Affidavit") at para. 4: Motion Record, Tab 2, p. 10.

[2] Claffee Affidavit at para. 5: Motion Record, Tab 2, p. 10.

[3] Claffee Affidavit at para. 6: Motion Record, Tab 2, p. 10.

[4] Claffee Affidavit at para. 14: Motion Record, Tab 2, p. 13.

[5] Claffee Affidavit at para. 19: Motion Record, Tab 2, p. 15.

10. At the Supreme Court level, the U.S. Chamber filed 40 *amicus* briefs in 2013. During the last two Supreme Court terms, the significant cases in which the U.S. Chamber was involved have included a wide range of matters significant to the business community.[6]

11. In addition, the U.S. Chamber has recently been involved in a number of high profile cases that are relevant to this appeal:

(a) ***Kiobel v Royal Dutch Petroleum,* 133 S Ct 1659 (2013):** A case involving international commerce and the jurisdiction of U.S. courts. At issue was whether and under what circumstances the Alien Tort Statute allows U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. In the course of its submissions in the case, the U.S. Chamber addressed the foreign policy implications of making the United States a magnet jurisdiction for overseas disputes. It also argued that the significant expense and potential bad publicity enabled by allowing access to U.S. courts for alleged misdeeds in foreign jurisdictions had the potential to force settlements in unmeritorious cases.

(b) ***DaimlerChrysler AG v Bauman,* 134 S Ct 746 (2014):** A case involving the adjudicative jurisdiction of U.S. courts over foreign defendants. At issue was whether general adjudicative jurisdiction could be asserted over a foreign parent company based solely on the contacts of its indirectly-held subsidiary within the United States. The U.S. Chamber argued, among other things, that commerce benefits from clear rules regarding jurisdiction, and that "extraordinary assertions of general jurisdiction 'may dissuade foreign companies from doing business in the United States thereby depriving United States customers of the full benefits of foreign trade.'"

(c) ***Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011):** A further case involving jurisdiction. At issue was whether North Carolina was a proper jurisdiction for a personal injury claim against a foreign defendant, based on an incident that occurred in France with respect to a tire that was made in Turkey and

[6] Claffee Affidavit at para. 15: Motion Record, Tab 2, p. 13.

> sold in Europe. The U.S. Chamber argued that extending the categories of general jurisdiction to include merely placing products into the stream of U.S. commerce would have deleterious effects for U.S. businesses and for foreign commercial relations.[7]

12. The U.S. Chamber views these prior cases and this appeal as significant to the general issue of "global forum shopping", which is a matter of concern to the business community that the U.S. Chamber represents.[8]

13. In addition to the U.S. Chamber's litigation activities and experience, the U.S. Chamber has also been involved in more general research and analysis that may be relevant to a determination of the present appeal. The U.S. Chamber Institute for Legal Reform, a non-profit affiliate of the U.S. Chamber, has published a position paper entitled "Taming Tort Tourism", which sets out a case for legislating a federal solution to foreign judgment recognition in the United States. The paper explains the varied approaches that have been taken to recognition and enforcement of foreign judgments among the various U.S. states.[9]

14. The "Taming Tort Tourism" paper builds upon testimony delivered to the U.S. Congress in 2011 on behalf of the U.S. Chamber and the U.S. Chamber Institute for Legal Reform on the subject of global forum shopping. The research and testimony on these issues describes a wider trend of the pursuit of tort lawsuits in weak or corruptible foreign courts in order to secure large awards, after which the prevailing parties attempt to legitimize the judgments in countries with liberal rules favoring recognition of foreign judgments.[10]

15. The U.S. Chamber's knowledge of the history of this trend, the different jurisprudential approaches to the enforcement of foreign judgments, and the deficiencies that have been noted in more lenient jurisdictions, may assist this Court in evaluating the potential ramifications of its decision in this case.[11]

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[7] Claffee Affidavit at para. 16: Motion Record, Tab 2, p. 14.

[8] Claffee Affidavit at para. 17: Motion Record, Tab 2, p. 15.

[9] Claffee Affidavit at para. 20 and Ex. F: Motion Record Tabs 2 and 2F, pp. 15 and 236-269.

[10] Claffee Affidavit at para. 21: Motion Record, Tab 2, p. 16.

[11] Claffee Affidavit at para. 22: Motion Record, Tab 2, p. 16.

D. Public Interest Nature of the Issues on Appeal

16. The issues to be determined in this appeal are matters of significant concern to the business community. Indeed, the U.S. Chamber believes that a determination in this appeal may affect Canada/U.S. trade, which is the world's largest bilateral trade relationship. These are issues that transcend the immediate interests of the parties.[12]

E. Focus of the Moving Party's Proposed Intervention

17. If granted leave to intervene in this appeal, the U.S. Chamber intends to provide submissions from a policy perspective, and highlight the practical business and political implications that can be expected if actions for recognition and enforcement of foreign judgments are permitted in circumstances where the judgment debtor has no contact with the recognizing forum. Some of these effects are briefly referred to in the facta of the appellants. However, the U.S. Chamber has extensive experience in addressing the very same issue in the United States, and is well-suited to elaborate on those implications for this appeal based on the U.S. experience.[13]

18. In particular, the U.S. Chamber intends to argue that an overly expansive assertion of jurisdiction in the recognition and enforcement context raises similar concerns to the misuse of Alien Tort Statute claims in the United States to exert jurisdiction for non-judicial and often political purposes (a practice that has now been curtailed as a result of the Supreme Court's decision in *Kiobel*). The U.S. Chamber will argue that just as an expansive reading of jurisdiction under the Alien Tort Statute deterred investment in developing countries, an expansive conception of jurisdiction in the recognition and enforcement context would provide a strong disincentive for foreign companies to do business in the recognizing forum, and could cause them to direct their investments to alternate markets with more predictable legal risks. The U.S. Chamber will explain that expansive enforcement jurisdiction would deter companies from establishing subsidiaries in the forum, hiring independent contractors based in the forum, or engaging in transactions with domestic distributors and other business partners. In short, foreign investment and cross-border trade would suffer.[14]

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[12] Claffee Affidavit at paras. 7 and 25-26: Motion Record, Tab 2, pp. 10 and 17.

[13] Claffee Affidavit at para. 29: Motion Record, Tab 2, p. 17.

[14] Claffee Affidavit at para. 30: Motion Record, Tab 2, p. 17.

19. In the U.S. Chamber's view, permitting recognition and enforcement actions without a connection to the forum would not merely subject companies to the needless expense of defending a multiplicity of foreign proceedings that have no legitimate legal purpose for the judgment creditor (since by definition the judgment debtor has no assets there). Such actions often have the design, and the effect, of pressuring the foreign company to settle even meritless claims as a result of the publicity that may attend the imprimatur of a respected court on a foreign judgment that could otherwise lack credibility. For example, the U.S. Chamber will explain that, in the U.S. experience, several suits in respect of allegations of foreign wrongdoing have been timed to coincide with important dates for publicly-traded companies, with the apparent hope that settlement pressure could be exerted through the effect of negative publicity on share prices.[15]

20. Many of the risks of an overly-expansive conception of jurisdiction, and the resulting and related issue of forum shopping, have already materialized in the United States. It is notable that U.S. courts have recently begun to take action against these abuses, and that several states have enacted legislation dealing with recognition and enforcement of foreign judgments (based on draft legislation proposed by the Uniform Law Commission in 2005) to address the risks of an overly-lenient recognition and enforcement regime. The U.S. Chamber can elaborate on this context for the benefit of the present appeal.[16]

PART II: STATEMENT OF THE QUESTION IN ISSUE

21. The question to be determined on this motion is whether to grant the U.S. Chamber leave to intervene in this appeal.

PART III: STATEMENT OF ARGUMENT

A. The Test on a Motion for Intervention

22. This Court has wide discretion in determining whether to grant a motion for intervention. The issues to be determined on this motion are whether the U.S. Chamber has: (a) an interest in the

[15] Claffee Affidavit at para. 31: Motion Record, Tab 2, p. 18.

[16] Claffee Affidavit at para. 32: Motion Record, Tab 2, p. 18.

outcome of the proceedings; and (b) submissions that will be useful to this Court and different from those of the parties.[17]

23. The U.S. Chamber should be granted leave to intervene in this appeal. It has a demonstrated interest in the issues on this appeal and will provide this Court with useful submissions that will be different from those of the other parties.

B. The U.S. Chamber has a Demonstrated Interest

24. This Court should recognize a proposed intervener's interest in an appeal if the moving party: (i) has a stake in "important public law issues" to be considered; (ii) represents an "interest directly affected by the appeal"; or (iii) will assist to correct an "imbalance of representation" on the appeal.[18]

25. The U.S. Chamber has a demonstrated interest in this appeal through its members' direct stake in the public issues it raises. The U.S. Chamber is the largest business federation in the world, and its major purpose is to represent its members' interests in fora such as the proceeding before this Court.[19]

26. Furthermore, the U.S. Chamber has an established practice of acting as *amicus curiae* in proceedings before U.S. courts in cases that are directly relevant to the present appeal. The U.S. Chamber has also been involved in relevant general research and analysis, including by publishing a position paper on the United States' experience with recognition and enforcement of foreign judgments and by giving testimony before Congress with respect to global forum shopping.[20]

C. The U.S. Chamber Will Make Submissions that are Useful and Different

27. This Court should grant intervener status if the moving party will "present argument from a different perspective with respect to some of the issues" raised in the proceedings. Further, an

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[17] *R v Finta*, [1993] 1 SCR 1138 at 1142; *Rules of the Supreme Court of Canada*, SOR/2002-156, rr 55, 57.

[18] *R v Finta*, [1993] 1 SCR 1138 at 1142-1143; *Reference re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335 at 340.

[19] Claffee Affidavit at paras. 4 to 8: Motion Record, Tab 2, pp. 10-11.

[20] Claffee Affidavit at paras. 16 to 23: Motion Record, Tab 2, pp. 14-16.

intervention "is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."[21]

28. The U.S. Chamber proposes to provide submissions from a policy perspective, and highlight the practical business and political implications that can be expected if actions for recognition and enforcement of foreign judgments are permitted in circumstances where the judgment debtor has no contact with the recognizing forum. The facta of the appellants refer to some of these effects. However, the U.S. Chamber has extensive experience in addressing the very same issue in the United States, and is well-suited to elaborate on those implications for this appeal based on the U.S. experience. The specific legal submissions proposed by the U.S. Chamber offer this Court a different and useful perspective on the issues in dispute.[22]

29. If granted leave to intervene, the U.S. Chamber will expand on the positions outlined above in its written and oral submissions.

PART IV: SUBMISSIONS CONCERNING COSTS

30. The U.S. Chamber requests that there be no order as to the costs of this motion.

PART V: ORDER REQUESTED

31. The U.S. Chamber respectfully requests that this Court grant it leave to intervene in this appeal on the following terms and conditions:

(a) the U.S. Chamber shall be entitled to serve and file a factum not to exceed 10 pages in length;

(b) the U.S. Chamber shall be granted permission to present oral argument not to exceed 10 minutes in length at the hearing of this appeal;

(c) the U.S. Chamber shall not be entitled to raise new issues or adduce further evidence or otherwise supplement the record of the parties; and

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[21] *Norberg v* Wynrib, [1992] 2 SCR 224 at 225; *Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 SCR 335 at 340.

[22] Claffee Affidavit at paras. 29 to 32: Motion Record, Tab 2, pp. 17-18.

(d) costs of this motion and the appeal shall not be awarded to or against the U.S. Chamber.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 29TH DAY OF JULY, 2014.

Jeffrey S. Leon
Ranjan K. Agarwal
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Counsel for the moving party,
The U.S. Chamber of Commerce

PART VI: TABLE OF AUTHORITIES

Jurisprudence	**Cited At**
R v Finta, [1993] 1 SCR 1138	¶22, 24
Reference re Workers' Compensation Act, 1983 (Nfld), [1989] 2 SCR 335	¶24, 27
Norberg v Wynrib, [1992] 2 SCR 224	¶27

PART VII: STATUTES AND REGULATIONS

Rules of the Supreme Court of Canada, SOR/2002-156	*Règles de la Cour suprême du Canada*, DORS/2002-156
55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.	**55.** Toute personne ayant un intérêt dans une demande d'autorisation d'appel, un appel ou un renvoi peut, par requête à un juge, demander l'autorisation d'intervenir.
[…]	[…]
57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.	**57.** (1) L'affidavit à l'appui de la requête en intervention doit préciser l'identité de la personne ayant un intérêt dans la procédure et cet intérêt, y compris tout préjudice que subirait cette personne en cas de refus de l'autorisation d'intervenir.
(2) A motion for intervention shall	(2) La requête expose ce qui suit :
(*a*) identify the position the person interested in the proceeding intends to take in the proceeding; and	(*a*) la position que cette personne compte prendre dans la procédure;
(*b*) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.	(*b*) ses arguments, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différents de ceux des autres parties.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)
BETWEEN:

CHEVRON CORPORATION AND CHEVRON CANADA LIMITED
Appellants
(Respondents/Appellants by Cross-Appeal)

– and –

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMONADO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE
Respondents
(Appellants/Respondents by Cross-Appeal)

MOTION FOR INTERVENTION
MEMORANDUM OF ARGUMENT
U.S. CHAMBER OF COMMERCE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

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TAB 3A

Her Majesty The Queen *Appellant*

v.

Imre Finta *Respondent*

and

Canadian Holocaust Remembrance Association *Intervener*

INDEXED AS: R. *v.* FINTA

File Nos.: 23023, 23097.

1993: March 24.

Present: McLachlin J.

MOTIONS FOR LEAVE TO INTERVENE

Practice — Supreme Court of Canada — Applications to intervene — Public interest groups establishing interest in outcome of appeal and offering useful and novel submissions — Groups granted leave to intervene — Private individual having no stake in result of appeal — Individual denied leave to intervene — Rules of the Supreme Court of Canada, SOR/83-74, r. 18.

Cases Cited

Referred to: *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335.

Statutes and Regulations Cited

Rules of the Supreme Court of Canada, SOR/83-74, r. 18 [rep. & sub. SOR/87-292, s. 1; am. SOR/91-347, s. 8; am. SOR/92-674, s. 1].

MOTIONS for leave to intervene in an appeal from a judgment of the Ontario Court of Appeal (1992), 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 92 D.L.R. (4th) 1, 9 C.R.R. (2d) 91. Motions on behalf of the League for Human Rights of B'Nai Brith Canada, the Canadian Jewish Congress and InterAmicus granted; motion on behalf of Kenneth M. Narvey denied.

Sa Majesté la Reine *Appelante*

c.

Imre Finta *Intimé*

et

Canadian Holocaust Remembrance Association *Intervenante*

RÉPERTORIÉ: R. *c.* FINTA

N^os^ du greffe: 23023, 23097.

1993: 24 mars.

Présente: Le juge McLachlin.

REQUÊTES EN AUTORISATION D'INTERVENTION

Pratique — Cour suprême du Canada — Demandes d'intervention — Groupes d'intérêt public démontrant un intérêt dans l'issue du pourvoi et avançant des arguments utiles et nouveaux — Groupes autorisés à intervenir — Particulier n'ayant aucun intérêt dans l'issue du pourvoi — Refus d'autoriser ce particulier à intervenir — Règles de la Cour suprême du Canada, DORS/83-74, art. 18.

Jurisprudence citée

Arrêt mentionné: *Renvoi: Workers' Compensation Act, 1983 (T.-N.)*, [1989] 2 R.C.S. 335.

Lois et règlements cités

Règles de la Cour suprême du Canada, DORS/83-74, art. 18 [abr. & rempl. DORS/87-292, art. 1; mod. DORS/91-347, art. 8; mod. DORS/92-674, art. 1].

REQUÊTES en autorisation d'intervention dans un pourvoi formé contre un arrêt de la Cour d'appel de l'Ontario (1992), 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 92 D.L.R. (4th) 1, 9 C.R.R. (2d) 91. Les requêtes présentées au nom de la Ligue des droits de la personne de B'Nai Brith Canada, du Congrès juif canadien et d'InterAmicus sont accueillies; la requête présentée au nom de Kenneth M. Narvey est rejetée.

Marvin Kurz, for the applicant the League for Human Rights of B'Nai Brith Canada.

Edward M. Morgan, for the applicant the Canadian Jewish Congress.

Joseph R. Nuss, *Q.C.*, *Irwin Cotler* and *Lieba Shell*, for the applicant InterAmicus.

Kenneth M. Narvey, on his own behalf.

Christopher A. Amerasinghe, *Q.C.*, and *Thomas C. Lemon*, for the appellant.

Martin W. Mason, for the respondent.

The following reasons for the order were delivered by

MCLACHLIN J.—These applications to intervene arise in an appeal from the Ontario Court of Appeal. Imre Finta served during the Second World War as commander of the investigative subdivision of the Gendarmerie at Szeged, Hungary. He became a Canadian citizen in 1956. In 1988, he was charged under alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the *Criminal Code*, R.S.C. 1927, c. 36, while the other count was characterized as a war crime or crime against humanity under the predecessor of s. 7(3.71) of the present *Criminal Code*). These allegations arose from the deportation of Jews from Hungary in 1944. In a pre-trial motion, Finta challenged the constitutionality of the war crimes provisions in the *Criminal Code*. The trial judge found that these provisions did not violate the *Canadian Charter of Rights and Freedoms*. The jury subsequently acquitted Finta on all counts. The Crown's appeal of this acquittal was dismissed by a majority of the Ontario Court of Appeal with two dissenting judges in favour of ordering a new trial. The Court of Appeal was unanimous, however, in upholding the constitutional validity of the war crimes provisions in the *Code*.

Marvin Kurz, pour la requérante la Ligue des droits de la personne de B'Nai Brith Canada.

Edward M. Morgan, pour le requérant le Congrès juif canadien.

Joseph R. Nuss, *c.r.*, *Irwin Cotler* et *Lieba Shell*, pour la requérante InterAmicus.

Kenneth M. Narvey, en personne.

Christopher A. Amerasinghe, *c.r.*, et *Thomas C. Lemon*, pour l'appelante.

Martin W. Mason, pour l'intimé.

Version française des motifs de l'ordonnance rendus par

LE JUGE MCLACHLIN—Les demandes d'intervention sont présentées dans le cadre d'un pourvoi contre un arrêt de la Cour d'appel de l'Ontario. Pendant la Seconde Guerre mondiale, Imre Finta a occupé le rang de commandant de la division des enquêtes de la Gendarmerie à Szeged (Hongrie). Il est devenu citoyen canadien en 1956. En 1988, il a été accusé, en vertu de chefs d'accusation subsidiaires, de séquestration, de vol, d'enlèvement et d'homicide involontaire coupable (un chef d'accusation de chaque paire était visé par le *Code criminel*, S.R.C. 1927, ch. 36, alors que l'autre était qualifié de crime de guerre ou de crime contre l'humanité aux termes de la disposition qui a précédé le par. 7(3.71) du *Code criminel* actuel). Ces allégations résultent de la déportation de Juifs de la Hongrie en 1944. Dans une requête préalable au procès, Finta a contesté la constitutionnalité des dispositions du *Code criminel* relatives aux crimes de guerre. Le juge du procès a conclu que ces dispositions ne portaient pas atteinte à la *Charte canadienne des droits et libertés*. Le jury a, par la suite, acquitté Finta relativement à tous les chefs d'accusation. L'appel du ministère public contre cet acquittement a été rejeté par la Cour d'appel de l'Ontario, à la majorité; deux juges dissidents auraient ordonné la tenue d'un nouveau procès. Toutefois, la Cour d'appel a, à l'unanimité, maintenu la validité constitutionnelle des dispositions du *Code* sur les crimes de guerre.

Leave to appeal was granted to the Crown by this Court on the four grounds of law upon which Dubin C.J.O. and Tarnopolsky J.A. dissented, and on three additional grounds:

(1) That the Court of Appeal erred in law in holding that s. 7(3.71) of the *Criminal Code* is not merely jurisdictional in nature, but rather, defines the essential elements of the offences charged, such that it was necessary for the jury to decide beyond a reasonable doubt not only whether the Respondent was guilty of the 1927 *Criminal Code* offences charged, but also, whether his acts constituted war crimes or crimes against humanity as defined in s. 7(3.71) and 7(3.76).

(2) That the Court of Appeal erred in law in holding that the trial judge correctly instructed the jury that it is not sufficient for the Crown to prove beyond a reasonable doubt that the Respondent intended to commit the offences alleged against him, namely unlawful confinement, robbery, kidnapping and manslaughter, but that the Crown must also prove that the Respondent knew that those acts constituted war crimes or crime against humanity as defined in s. 7(3.76), thereby requiring proof of *mens rea* in relation to the jurisdictional preconditions set out in s. 7(3.71) of the *Criminal Code*.

(3) Having found that defence counsel's address was improper and inflammatory on the several grounds enumerated, the Court of Appeal erred in law in holding that the trial judge's instructions to the jury adequately corrected defence counsel's jury address so as to overcome the prejudice to the Crown and did not deprive the Crown of a fair trial.

(4) Having found that the trial judge erred in calling the Dallos statements and the videotaped evidence of the witnesses Kemeny and Ballo as his own evidence, thereby depriving the Crown of its statutory right to address the jury last, the Court of Appeal erred in law in holding that this error resulted in no substantial wrong or miscarriage of justice.

(5) That the Court of Appeal erred in law in holding that the police statement and deposition of Imre Dallos,

Notre Cour a autorisé le ministère public à interjeter appel sur le fondement des quatre moyens de droit invoqués dans la dissidence du juge en chef Dubin de l'Ontario et du juge Tarnopolsky et sur trois moyens supplémentaires:

[TRADUCTION] (1) La Cour d'appel a commis une erreur de droit lorsqu'elle a conclu que le par. 7(3.71) du *Code criminel* ne vise pas simplement la compétence, mais plutôt définit les éléments essentiels des infractions reprochées de manière que le jury devait décider hors de tout doute raisonnable non seulement que l'intimé était coupable des infractions reprochées en vertu du *Code criminel* de 1927, mais également si ses actes constituaient des crimes de guerre ou des crimes contre l'humanité aux termes des par. 7(3.71) et 7(3.76).

(2) La Cour d'appel a commis une erreur de droit lorsqu'elle a conclu que le juge du procès avait correctement exposé au jury qu'il ne suffit pas au ministère public de démontrer hors de tout doute raisonnable que l'intimé avait l'intention de commettre les infractions qui lui sont reprochées, c'est-à-dire la séquestration, le vol, l'enlèvement et l'homicide involontaire coupable, mais qu'il doit également démontrer que l'intimé savait que ces actes constituaient des crimes de guerre ou un crime contre l'humanité aux termes du par. 7(3.76), exigeant ainsi la preuve de l'intention coupable relativement aux conditions préalables en matière de compétence énoncées au par. 7(3.71) du *Code criminel*.

(3) Ayant conclu que le plaidoyer de l'avocat de la défense était incorrect et incendiaire à l'égard des divers moyens invoqués, la Cour d'appel a commis une erreur de droit lorsqu'elle a conclu que les directives du juge du procès au jury avaient adéquatement corrigé le plaidoyer de l'avocat de la défense de manière à réparer le préjudice subi par le ministère public et ne l'a pas privé d'un procès équitable.

(4) Ayant conclu que le juge du procès avait commis une erreur en citant les déclarations de Dallos et les témoignages de Kemeny et de Ballo enregistrés sur bande vidéo comme ses propres éléments de preuve, privant ainsi le ministère public du droit que lui confère la loi de s'adresser au jury le dernier, la Cour d'appel a commis une erreur de droit lorsqu'elle a conclu que cette erreur n'a entraîné aucun tort important ni aucune erreur judiciaire grave.

(5) La Cour d'appel a commis une erreur de droit lorsqu'elle a conclu à la recevabilité de la déclaration à

which were taken from the record of the 1947 investigation and the 1948 *in absentia* trial of the Respondent held in Hungary, were admissible;

(6) That the Court of Appeal erred in law in holding that the trial judge's instructions to the jury pertaining to the evidence relating to the eyewitness identification of the respondent were appropriate in the circumstances of the case and in not finding that he misdirected the jury on the issue of identification; and

(7) That the Court of Appeal erred in law in failing to find that the trial judge erred in putting to the jury the peace officer defence embodied in s. 25 of the *Criminal Code*, the military orders defence and the issue of mistake of fact, and that the trial judge misdirected the jury in the manner in which he defined those defences.

The cross-appellant Finta was granted leave by this Court on the constitutional grounds dismissed below. Chief Justice Lamer ordered that the constitutional questions be stated as follows:

(1) Does s. 7(3.74) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

(2) If the answer to this question is in the affirmative, is s. 7(3.74) of the *Criminal Code* a reasonable limit in a free and democratic society and justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

(3) Does s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

(4) If the answer to this question is in the affirmative, is s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* a reasonable limit in a free and democratic society and justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Four applications are before the Court to intervene in this case pursuant to Rule 18 of the *Rules*

la police et de la déposition de Imre Dallos qui proviennent du dossier de l'enquête de 1947 et du procès de 1948 tenu en l'absence de l'intimé en Hongrie.

(6) La Cour d'appel a commis une erreur de droit lorsqu'elle a conclu que les directives du juge du procès au jury relativement à l'identification de l'intimé par les témoins oculaires étaient appropriées dans les circonstances de l'affaire et lorsqu'elle n'a pas conclu qu'il avait donné des directives erronées au jury sur la question de l'identification.

(7) La Cour d'appel a commis une erreur de droit lorsqu'elle a omis de conclure que le juge du procès avait commis une erreur lorsqu'il a présenté au jury le moyen de défense de l'agent de la paix inscrit à l'art. 25 du *Code criminel*, le moyen de défense fondé sur les ordres militaires et la question de l'erreur de fait et que le juge du procès a donné des directives erronées au jury relativement à la manière dont il a défini ces moyens de défense.

Notre Cour a autorisé le pourvoi incident de Finta sur les moyens d'ordre constitutionnels rejetés par les instances inférieures. Le juge en chef Lamer a ordonné que les questions constitutionnelles soient énoncées de la manière suivante:

(1) Le paragraphe 7(3.74) du *Code criminel* viole-t-il les art. 7, 11*a*), 11*b*), 11*d*), 11*g*), 12 ou 15 de la *Charte canadienne des droits et libertés*?

(2) Si la réponse à cette question est affirmative, le par. 7(3.74) du *Code criminel* est-il une limite qui est raisonnable dans le cadre d'une société libre et démocratique et donc justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

(3) Le paragraphe 7(3.71) interprété conjointement avec le par. 7(3.76) du *Code criminel*, viole-t-il les art. 7, 11*a*), 11*b*), 11*d*), 11*g*), 12 ou 15 de la *Charte canadienne des droits et libertés*?

(4) Si la réponse à cette question est affirmative, le par. 7(3.71) interprété conjointement avec le par. 7(3.76) du *Code criminel*, est-il une limite qui est raisonnable dans le cadre d'une société libre et démocratique et donc justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Quatre demandes d'intervention en l'espèce ont été présentées à la Cour aux termes de l'art. 18 des

of the Supreme Court of Canada, SOR/83-74. Three applicants are public interest groups: the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada, and InterAmicus. One applicant, Mr. Kenneth M. Narvey, is a private individual acting on his own behalf. All of the applicants seek to intervene in favour of the appellant Crown's position. The appellant does not contest the applications of the three interest groups, but does contest the application of Mr. Narvey.

As Sopinka J. held in one of the few reported cases on a motion for intervention, Rule 18 of the *Rules of the Supreme Court of Canada* permits "a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention": *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, at p. 339. The criteria under Rule 18 require that the applicant establish: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

(1) Interest

The three public interest groups have all established an interest in the outcome of this appeal. The Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada and InterAmicus have an interest in ensuring that the interpretation of the *Criminal Code* provisions on appeal is consistent with the preservation of issues within its mandate. Through either the people they represent or the mandate which they seek to uphold, these applicants have a direct stake in Canada's fulfilling its international legal obligations under customary and conventional international law. While the Court is often reluctant to grant intervener status to public interest groups in criminal appeals, exceptions can be made under its broad discretion where important public law issues are considered, as in this appeal. All three parties

Règles de la Cour suprême du Canada, DORS/83-74. Trois requérants sont des groupes d'intérêt public: le Congrès juif canadien, la Ligue des droits de la personne de B'Nai Brith Canada et InterAmicus. Un requérant, M. Kenneth M. Narvey est un particulier qui agit pour son propre compte. Tous les requérants cherchent à intervenir pour appuyer la position du ministère public. L'appelante ne conteste pas les demandes des trois groupes d'intérêt, mais conteste la demande de M. Narvey.

Le juge Sopinka a conclu dans l'un des rares jugements publiés sur une requête en intervention que l'art. 18 des *Règles de la Cour suprême du Canada* confère «un vaste pouvoir discrétionnaire pour décider s'il y a lieu d'autoriser ou non une personne à intervenir ainsi que le pouvoir discrétionnaire de fixer les modalités de l'intervention»: *Renvoi: Workers' Compensation Act, 1983 (T.-N.)*, [1989] 2 R.C.S. 335, à la p. 339. Le critère énoncé à l'art. 18 des Règles exige que le requérant démontre: (1) un intérêt et (2) des allégations qui seront utiles et différentes de celles des autres parties.

(1) L'intérêt

Les trois groupes d'intérêt public ont tous démontré un intérêt dans l'issue du présent pourvoi. Le Congrès juif canadien, la Ligue des droits de la personne de B'Nai Brith Canada et InterAmicus ont un intérêt à veiller à ce que l'interprétation des dispositions du *Code criminel* contestées en l'espèce soit conforme au respect des questions qui s'inscrivent dans le cadre de leur mandat. Par les personnes qu'ils représentent ou par le mandat qu'ils cherchent à faire valoir, ces requérants sont directement intéressés au respect par le Canada de ses obligations juridiques aux termes du droit international coutumier ou conventionnel. Bien que la Cour hésite souvent à accorder le statut d'intervenant à des groupes d'intérêt public dans les pourvois en matière pénale, il peut y avoir des exceptions en vertu de son large pouvoir discrétionnaire lorsqu'il s'agit d'importantes questions de droit public comme en l'espèce. Les trois par-

demonstrated in their submissions to the Court that they satisfy the interest requirement under Rule 18.

The same cannot be said of Mr. Narvey. There is no question that Mr. Narvey is a qualified expert in the subject matter before this Court. But his interest in the outcome of the litigation cannot be established merely by his status as researcher and advocate on public law issues. He must establish a direct stake in the outcome of the appeal. Mr. Narvey does not argue that his status as a Jewish Canadian or occasional association with Jewish organizations forms any basis for his application. He is not currently engaged in litigation which is implicated by the outcome in this case, nor does he purport to represent an interest which is directly affected by the appeal. In short, Mr. Narvey's interest in this appeal is not in the manner of having a stake in the result, but solely of having a serious preoccupation with the subject matter. This type of interest is not the kind referred to in Rule 18(3)(*a*) of the *Rules of the Supreme Court of Canada*. Thus, Mr. Narvey does not meet the first test under Rule 18. I would deny leave to the application of Mr. Narvey.

(2) Useful and Different Submissions

There are a number of issues before the Court. While not seeking to limit the questions before the Court, I will summarize the applicants' submissions under three general headings: (1) jurisdiction over crimes against humanity and war crimes; (2) the requisite *mens rea* of the offences on appeal; and (3) the allegedly inflammatory address by defence counsel. On the first two matters, the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada and InterAmicus all offer useful and novel submissions. In particular, these applicants each have distinctive contributions to make in the area of international law theory, comparative law, the Nuremberg principles, and the criminal justice obligations and position of Canada *vis-à-vis* the victims of war crimes. The arguments discussed in their materials appear to supplement the appellant's submissions in a manner

ties ont démontré dans leurs arguments à la Cour qu'elles satisfont à l'exigence en matière d'intérêt que prévoit l'art. 18 des Règles.

Ce n'est pas le cas de M. Narvey. Il est évident que M. Narvey est un expert sur la question dont notre Cour est saisie. Mais son intérêt dans l'issue du litige ne peut être établi simplement par son statut de chercheur et de défenseur des questions de droit public. Il doit démontrer un intérêt direct dans l'issue du pourvoi. Monsieur Narvey n'allègue pas que son statut de Canadien d'origine juive ou que son association occasionnelle avec des organismes juifs constituent un fondement pour sa demande. À l'heure actuelle, il n'est pas engagé dans un litige visé par l'issue du présent pourvoi et il ne prétend pas représenter un intérêt qui est directement touché par le pourvoi. Bref, l'intérêt de M. Narvey dans le présent pourvoi ne porte pas sur l'issue de celui-ci mais découle seulement d'une préoccupation importante à l'égard de la question en litige. Ce genre d'intérêt n'est pas celui qui est visé à l'al. 18(3)*a*) des *Règles de la Cour suprême du Canada*. Par conséquent, M. Narvey ne satisfait pas le premier critère de l'art. 18 des Règles. Je suis d'avis de refuser la demande de M. Narvey.

(2) Des allégations utiles et différentes

Un certain nombre de questions sont présentées à la Cour. Tout en ne cherchant pas à restreindre les questions posées à la Cour, je résume les argumentations des requérants sous trois rubriques générales: (1) la compétence en matière de crimes contre l'humanité et de crimes de guerre; (2) l'intention coupable requise en ce qui concerne les infractions qui font l'objet du présent pourvoi; et (3) l'exposé prétendument incendiaire de l'avocat de la défense. En ce qui a trait aux deux premières questions, le Congrès juif canadien, la Ligue des droits de la personne de B'Nai Brith Canada et InterAmicus présentent tous des argumentations utiles et nouvelles. En particulier, ces requérants ont chacun des contributions différentes à apporter dans le domaine de la théorie du droit international, du droit comparé, des principes de Nuremberg, des obligations en matière de justice pénale et de la position du Canada à l'égard des victimes de

ner suitable to satisfy the second criterion under Rule 18.

On the other hand, the arguments regarding the inflammatory address to the jury are already covered by the appellant Crown. Indeed, it seems inappropriate for any of the applicants to be permitted to make submissions on the issue of defence counsel's address to the jury. The public interest groups before this Court have an interest in, and are all experts on, the issues of war crimes and human rights in general. But they are not experts on addresses to the jury, and I have not been persuaded that their arguments on this issue will provide a supplemental or useful perspective that is not already argued by the appellant.

In the circumstances of this motion, therefore, I grant leave to the applications of the Canadian Jewish Congress, League for Human Rights of B'Nai Brith Canada, and InterAmicus. These applicants may file factums on the issues which I have indicated. Like the intervener Canadian Holocaust Remembrance Association, they will not be granted the right to oral argument. However, they may appear through counsel at the appeal for the purposes of answering questions the Court may have with respect to their factums.

I would deny leave for the application of Mr. Kenneth M. Narvey.

Judgment accordingly.

Solicitors for the applicant the League for Human Rights of B'Nai Brith Canada: Dale, Streiman & Kurz, Brampton.

Solicitors for the applicant the Canadian Jewish Congress: Davies, Ward & Beck, Toronto.

Solicitors for the applicant InterAmicus: Ahern, Lalonde, Nuss, Drymer, Montréal.

crimes de guerre. Les arguments analysés dans leurs documents paraissent compléter les allégations de l'appelante d'une manière qui satisfait au deuxième critère de l'art. 18 des Règles.

Par ailleurs, les arguments concernant l'exposé incendiaire au jury sont déjà soulevés par le ministère public appelant. En fait, il ne semble pas opportun de permettre aux requérants de présenter des allégations sur la question du plaidoyer de l'avocat de la défense au jury. Les groupes d'intérêt public devant notre Cour ont un intérêt à l'égard des questions relatives aux crimes de guerre et aux droits de la personne en général et sont tous experts dans ces domaines. Toutefois, ils ne sont pas experts en ce qui concerne les exposés au jury et je n'ai pas été convaincue que leurs arguments sur cette question apporteront un point de vue complémentaire et utile qui n'a pas déjà été soulevé par l'appelante.

Par conséquent, dans les circonstances de cette requête, j'autorise les demandes du Congrès juif canadien, de la Ligue des droits de la personne de B'Nai Brith Canada et d'InterAmicus. Ces requérants peuvent présenter des mémoires sur les questions que j'ai indiquées. Comme l'intervenant Canadian Holocaust Remembrance Association, ils n'auront pas le droit d'exposer des arguments oralement. Toutefois, ils peuvent être représentés par avocat au pourvoi pour répondre aux questions de la Cour relativement à leurs mémoires.

Je suis d'avis de refuser la demande de M. Kenneth M. Narvey.

Jugement en conséquence.

Procureurs de la requérante la Ligue des droits de la personne de B'Nai Brith Canada: Dale, Streiman & Kurz, Brampton.

Procureurs du requérant le Congrès juif canadien: Davies, Ward & Beck, Toronto.

Procureurs de la requérante InterAmicus: Ahern, Lalonde, Nuss, Drymer, Montréal.

Solicitor for the appellant: The Attorney General of Canada, Ottawa.

Solicitor for the respondent: Douglas H. Christie, Victoria.

Procureur de l'appelante: Le procureur général du Canada, Ottawa.

Procureur de l'intimé: Douglas H. Christie, Victoria.

TAB 3B

IN THE MATTER s. 13 of Part I of *The Judicature Act, 1986*, c. 42, S.N. 1986;

IN THE MATTER OF ss. 32 and 34 of *The Workers' Compensation Act, 1983*, c. 48, S.N. 1983;

AND IN THE MATTER OF a Reference of the Lieutenant-Governor in Council to the Court of Appeal for its hearing, consideration and opinion on the constitutional validity of ss. 32 and 34 of *The Workers' Compensation Act, 1983*.

INDEXED AS: REFERENCE RE WORKERS' COMPENSATION ACT, 1983 (NFLD.) (APPLICATION TO INTERVENE)

File No.: 20697.

1988: December 7; 1989: February 13.

Present: Sopinka J.

MOTION FOR LEAVE TO INTERVENE

Practice — Application to intervene — Applicant contesting constitutionality of similar provisions in another province — Attorney General of that province intervening as of right — Factors to be considered in according individual right to intervene — Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4) — Rules of the Supreme Court of Canada, SOR/83-74, s. 18(3)(a), (c) — Canadian Charter of Rights and Freedoms, s. 15 — Constitution Act, 1982, s. 52(2) — Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34 — Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.

The Attorney General of Newfoundland presented a reference to the Newfoundland Court of Appeal on the issue of the constitutionality of ss. 32 and 34 of *The Workers' Compensation Act, 1983* which provided that the right of compensation for injuries arising in the course of a worker's employment was limited to that specifically provided for by the Act. An injured worker, who brought a challenge of similar provisions in British Columbia, applied to intervene pursuant to Rule 18 of the *Rules of the Supreme Court of Canada*. At issue is whether this application satisfied the requirements of Rule 18(3)(*a*) and (*c*) that the intervener have an interest and that the intervener's submissions be useful and different from those of the other parties.

DANS L'AFFAIRE de l'art. 13 de la partie I de *The Judicature Act, 1986*, chap. 42, S.N. 1986;

DANS L'AFFAIRE des art. 32 et 34 de *The Workers' Compensation Act, 1983*, chap. 48, S.N. 1983;

ET DANS L'AFFAIRE d'un renvoi adressé par le lieutenant-gouverneur en conseil à la Cour d'appel sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983*.

RÉPERTORIÉ: RENVOI: WORKERS' COMPENSATION ACT, 1983 (T.-N.) (DEMANDE D'INTERVENTION)

N° du greffe: 20697.

1988: 7 décembre; 1989: 13 février.

Présent: Le juge Sopinka.

REQUÊTE EN AUTORISATION D'INTERVENTION

Pratique — Demande d'intervention — Contestation par le requérant de la constitutionnalité de dispositions semblables dans une autre province — Intervention de plein droit du procureur général de cette province — Facteurs à considérer pour accorder à un individu le droit d'intervenir — Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 55(4) — Règles de la Cour suprême du Canada, DORS/83-74, art. 18(3)a), c) — Charte canadienne des droits et libertés, art. 15 — Loi constitutionnelle de 1982, art. 52(2) — Workers' Compensation Act, 1983, S.N. 1983, chap. 48, art. 32, 34 — Workers Compensation Act, R.S.B.C. 1979, chap. 437, art. 10, 11.

Le procureur général de Terre-Neuve a adressé un renvoi à la Cour d'appel de Terre-Neuve sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983*, qui prévoient que le droit à une indemnité pour les blessures subies par un travailleur dans l'exercice de ses fonctions est limité à ce que la Loi prévoit expressément. Une personne qui a subi des blessures et qui conteste des dispositions semblables en Colombie-Britannique a demandé l'autorisation d'intervenir conformément à l'art. 18 des *Règles de la Cour suprême du Canada*. La question est de savoir si cette requête satisfait aux exigences des al. 18(3)*a*) et *c*) des Règles selon lesquelles l'intervenant doit avoir un intérêt et présenter des allégations utiles et différentes de celles des autres parties.

Held: The motion for leave to intervene should be allowed.

Involvement in a similar case may satisfy the criterion that there be an interest in the litigation. "Any interest" extends to an interest in the outcome of an appeal when the determination of a legal issue in that appeal will be binding on other pending litigation to which the applicant is a party. Some courts, however, have declined to exercise their discretion to grant this status on the basis of similar interest alone. Here, the aura of unfairness about a party in litigation, which involved similar issues, facing an opponent who has the right to intervene in this appeal should be remedied by granting the motion to intervene absent other criteria dictating a contrary conclusion.

That other counsel would argue the constitutional issues was not a disqualifying factor. An applicant who has a history of involvement in the issue may have an expertise which can shed fresh light or provide new information on the matter.

Cases Cited

Referred to: *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373; *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665; *Solosky v. The Queen*, [1978] 1 F.C. 609; *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1982, s. 52(2).
Rules of the Supreme Court of Canada, SOR/83-74, s. 18 (*a*), (*c*).
Supreme Court Act, R.S.C. 1970, c. S-19, s. 55(4).
Workers Compensation Act, R.S.B.C. 1979, c. 437, ss. 10, 11.
Workers' Compensation Act, 1983, S.N. 1983, c. 48, ss. 32, 34.

Authors Cited

Crane, Brian. *Practice and Advocacy in the Supreme Court*. Vancouver: Continuing Legal Education Society of British Columbia, 1983.

MOTION for leave to intervene in an appeal from an opinion pronounced by the Newfoundland

Arrêt: La demande d'autorisation d'intervenir est accueillie.

Le fait d'être dans une situation semblable peut satisfaire au critère de l'existence d'un intérêt dans le litige. L'expression «tout intérêt» vise un intérêt dans l'issue d'un pourvoi si la réponse donnée à la question de droit soumise doit s'appliquer à un autre litige en cours auquel le requérant est partie. Certains tribunaux ont cependant refusé d'exercer leur pouvoir discrétionnaire d'accorder ce statut sur le seul fondement d'un intérêt semblable. En l'espèce, il faut dissiper l'impression d'injustice que subirait la partie dont le litige comporte des questions semblables et dont l'adversaire a le droit d'intervenir dans ce pourvoi en accueillant la demande d'intervention, en l'absence d'autres critères dictant une conclusion contraire.

Le fait qu'un autre avocat débattrait les questions constitutionnelles en litige ne contribue pas à faire perdre qualité pour agir. Le requérant qui a fait face à la question peut avoir acquis une connaissance approfondie qui puisse lui permettre d'apporter un point de vue nouveau ou de fournir des renseignements supplémentaires à son sujet.

Jurisprudence

Arrêts mentionnés: *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373; *Norcan Ltd. v. Lebrock*, [1969] R.C.S. 665; *Solosky c. La Reine*, [1978] 1 C.F. 609; *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15.
Loi constitutionnelle de 1982, art. 52(2).
Loi sur la Cour suprême, S.R.C. 1970, chap. S-19, art. 55(4).
Règles de la Cour suprême du Canada, DORS/83-74, art. 18*a*), *c*).
Workers Compensation Act, R.S.B.C. 1979, chap. 437, art. 10, 11.
Workers' Compensation Act, 1983, S.N. 1983, chap. 48, art. 32, 34.

Doctrine citée

Crane, Brian. *Practice and Advocacy in the Supreme Court*. Vancouver: Continuing Legal Education Society of British Columbia, 1983.

REQUÊTE en autorisation d'intervention dans un pourvoi formé contre une opinion prononcée

Court of Appeal[1] (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501, on a reference to determine the constitutional validity of ss. 32 and 34 of *The Workers' Compensation Act, 1983*. Motion granted.

D. Geoffrey Cowper, for the applicant.

W. G. Burke-Robertson, Q.C., for the respondent.

The following are the reasons for the Order delivered by

SOPINKA J.—This application to intervene arises in an appeal from a reference which was directed to the Newfoundland Court of Appeal by the Newfoundland Lieutenant-Governor in Council (*Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.)) The reference has its roots in the case of *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (Nfld. S.C.T.D.) Samuel Piercey was an employee of General Bakeries Ltd. allegedly in the course of his employment, when he was electrocuted. It was alleged by his wife, Mrs. Shirley Piercey, that her husband's death was due to the negligence of his employer, General Bakeries Ltd.

In the Trial Division of the Newfoundland Supreme Court, Mrs. Piercey argued that the employer could not rely upon ss. 32 and 34 of *The Workers' Compensation Act, 1983*, S.N. 1983, c. 48, which provide that the right to compensation for injuries arising in the course of a worker's employment is limited to that specifically provided for by the Act. Mrs. Piercey claimed that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were of no force and effect under s. 52(2) of the *Constitution Act, 1982* as they violated s. 15 of the *Canadian Charter of Rights and Freedoms*.

The trial judge, Hickman C.J., agreed that the provisions unjustifiably denied the right of access to the courts which was held to be an element of s. 15 equality rights. However, Hickman C.J. also held that Mrs. Piercey was unable to rely upon the

[1] An appeal from the judgment of the Newfoundland Court of Appeal was dismissed: see [1989] 1 S.R.C. 922.

par la Cour d'appel de Terre-Neuve[1] (1988), 67 Nfld. & P.E.I.R. 16, 44 D.L.R. 501, dans un renvoi portant sur la validité constitutionnelle des art. 32 et 34 de *The Workers' Compensation Act, 1983*. Requête accueillie.

D. Geoffrey Cowper, pour la requérante.

W. G. Burke-Robertson, c.r., pour l'intimé.

Version française des motifs de l'ordonnance rendus par

LE JUGE SOPINKA—Cette demande d'intervention est présentée dans le cadre d'un pourvoi relatif à un renvoi adressé à la Cour d'appel de Terre-Neuve par le lieutenant-gouverneur en conseil de Terre-Neuve (*Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (C.A.T.-N.)) Le renvoi tire son origine de la décision *Piercey v. General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373 (D.P.I.C.S.T.-N.) Samuel Piercey était un employé de General Bakeries Ltd. qui, allègue-t-on, a été électrocuté dans l'exercice de ses fonctions. Son épouse, M^me^ Shirley Piercey, a allégué que le décès de son époux était dû à la négligence de son employeur, General Bakeries Ltd.

Devant la Division de première instance de la Cour suprême de Terre-Neuve, M^me^ Piercey a fait valoir que l'employeur ne pouvait invoquer les art. 32 et 34 de *The Workers' Compensation Act, 1983*, S.N. 1983, chap. 48, qui prévoient que le droit à une indemnité pour les blessures subies par un travailleur dans l'exercice de ses fonctions est limité à ce que la Loi prévoit expressément. Madame Piercey soutenait que les art. 32 et 34 de *The Workers' Compensation Act, 1983* étaient inopérants en vertu du par. 52(2) de la *Loi constitutionnelle de 1982* parce qu'ils violaient l'art. 15 de la *Charte canadienne des droits et libertés*.

Le juge de première instance, le juge en chef Hickman, a reconnu que les dispositions niaient de manière injustifiable le droit d'accès aux tribunaux qui a été considéré comme une composante des droits à l'égalité garantis par l'art. 15. Cependant,

[1] Un pourvoi formé contre le jugement de la Cour d'appel de Terre-Neuve a été rejeté: voir [1989] 1 R.C.S. 922.

Charter as her husband's death occurred on July 22, 1984, prior to April 17, 1985 when s. 15 came into force. It was held that s. 15 could not apply retrospectively.

As the opinion of Hickman C.J. on the constitutionality of ss. 32 and 34 of *The Workers' Compensation Act, 1983* was *obiter dictum*, there was no ground upon which the Crown could appeal. Mrs. Piercey did not appeal. As a result, a Reference on this issue was directed to the Newfoundland Court of Appeal.

In the Court of Appeal, the Attorney General of Newfoundland presented the Reference. Acting as interveners by original order or by subsequent leave were: the Workers' Compensation Commission of Newfoundland and Labrador; la Commission de la santé et de la sécurité au travail du Quebec; the Attorney General of Nova Scotia; the Workers' Compensation Board of New Brunswick; the Workers' Compensation Board of Manitoba; the Attorney General of British Columbia; the Workers' Compensation Board of British Columbia; the Workers' Compensation Board of Prince Edward Island; the Workers' Compensation Board of Alberta; the Workers' Compensation Board of Yukon; the Canadian Manufacturers Association; the Canadian Labour Congress; the Newfoundland and Labrador Federation of Labour; Canadian National Railways; Marine Atlantic Limited; General Bakeries Limited, and Shirley Piercey. All but Mrs. Piercey supported the legislation. The Court of Appeal held that ss. 32 and 34 of *The Workers' Compensation Act, 1983* were not inconsistent with s. 15(1) of the *Charter*. In addition, Goodridge C.J.N. held that s. 15 does not apply to causes of action arising before April 17, 1985.

This application by Mr. Cowper is on behalf of Suzanne Côté to intervene in this case pursuant to Rule 18 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicant is an injured

il a également conclu que M^me^ Piercey ne pouvait invoquer la *Charte* parce que le décès de son époux était survenu le 22 juillet 1984, soit avant l'entrée en vigueur de l'art. 15, le 17 avril 1985. Il a conclu que l'art. 15 ne pouvait s'appliquer rétroactivement.

Comme l'opinion du juge en chef Hickman sur la constitutionnalité des art. 32 et 34 de *The Workers' Compensation Act, 1983* était une opinion incidente, il n'existait aucun moyen sur lequel Sa Majesté pouvait fonder un appel. Madame Piercey n'a pas interjeté appel. En conséquence, la question a fait l'objet d'un renvoi à la Cour d'appel de Terre-Neuve.

En Cour d'appel, le procureur général de Terre-Neuve a présenté le renvoi. Agissaient comme intervenants en vertu de l'ordonnance initiale ou par autorisation subséquente: la Workers' Compensation Commission of Newfoundland and Labrador, la Commission de la santé et de la sécurité au travail du Québec, le procureur général de la Nouvelle-Écosse, la Commission des accidents du travail du Nouveau-Brunswick, la Commission des accidents du travail du Manitoba, le procureur général de la Colombie-Britannique, la Workers' Compensation Board of British Columbia, la Workers' Compensation Board of Prince Edward Island, la Workers' Compensation Board of Alberta, la Workers' Compensation Board of Yukon, l'Association des manufacturiers canadiens, le Congrès du travail du Canada, la Newfoundland and Labrador Federation of Labour, la Compagnie des chemins de fer nationaux du Canada, Marine Atlantic Limited, General Bakeries Limited et Shirley Piercey. Tous, sauf M^me^ Piercey, appuyaient les dispositions en cause. La Cour d'appel a conclu que les art. 32 et 34 de *The Workers' Compensation Act, 1983* n'étaient pas incompatibles avec le par. 15(1) de la *Charte*. En outre, le juge en chef Goodridge de Terre-Neuve a conclu que l'art. 15 ne s'appliquait pas aux causes d'action ayant pris naissance avant le 17 avril 1985.

M^e^ Cowper, agissant pour le compte de Suzanne Côté sollicite par la présente requête l'autorisation d'intervenir en l'espèce conformément à l'art. 18 des *Règles de la Cour suprême du Canada*,

person who has brought a challenge of similar British Columbia provisions (ss. 10 and 11 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437) based on the unconstitutionality of a statutory bar to private compensation. The action of Mrs. Côté has been stayed by an order of the British Columbia Supreme Court pending the outcome of this appeal. Mr. Cowper has been retained by several other plaintiffs who are in circumstances similar to Suzanne Côté and who wish to have him present argument in this appeal.

Our Rule 18 gives this Court a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention. As well, s. 55(4) of the *Supreme Court Act*, R.S.C. 1970, c. S-19, provides for submissions from persons interested in a reference.

The criteria for the exercise of this discretion were the subject of considerable argument on this motion. Counsel were understandably handicapped because these criteria have, perhaps purposely, not been commented on by this Court in recent cases. Threshold requirements are set out in Rule 18(3)(*a*) and (*c*). These criteria can be summarized as follows: (1) an interest and (2) submissions which will be useful and different from those of the other parties.

The application was resisted principally on the basis that having a similar case does not satisfy the interest requirement. It was also argued that the applicant has not demonstrated that his argument will differ from that of Mrs. Piercey's counsel.

(1) Interest

One of the few authorities in this Court on the exercise of the Court's discretion is *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, in which Pigeon J. held that any interest is sufficient, subject always to the exercise of discretion. From the cases cited by Justice Pigeon, it is apparent that having a

DORS/83-74. La requérante est une personne qui a subi des blessures et qui conteste des dispositions semblables en Colombie-Britannique (les art. 10 et 11 de la *Workers Compensation Act*, R.S.B.C. 1979, chap. 437) en invoquant l'inconstitutionnalité d'une interdiction légale d'obtenir une indemnité autre que celle prévue par la loi. La Cour suprême de la Colombie-Britannique a ordonné la suspension de l'action de M^me^ Côté en attendant l'issue du présent pourvoi. Les services de M^e^ Cowper ont été retenus par plusieurs autres demandeurs qui sont dans une situation semblable à celle de Suzanne Côté et qui souhaitent qu'il plaide dans le cadre du présent pourvoi.

L'article 18 des Règles confère à notre Cour un vaste pouvoir discrétionnaire pour décider s'il y a lieu d'autoriser ou non une personne à intervenir ainsi que le pouvoir discrétionnaire de fixer les modalités de l'intervention. De même, le par. 55(4) de la *Loi sur la Cour suprême*, S.R.C. 1970, chap. S-19, prévoit que des personnes intéressées peuvent être entendues dans un renvoi.

Les critères de l'exercice de ce pouvoir discrétionnaire ont fait l'objet d'un long débat dans la présente requête. Les avocats étaient naturellement désavantagés du fait que, peut-être à dessein, notre Cour n'a pas commenté ces critères dans des affaires récentes. Les exigences minimales sont énoncées aux al. 18(3)*a*) et *c*) des Règles. Ce sont en résumé: (1) un intérêt et (2) des allégations qui seront utiles et différentes de celles des autres parties.

L'opposition à la demande repose principalement sur l'argument que le fait d'être dans une situation semblable ne satisfait pas à l'exigence de l'intérêt. On a également soutenu que la requérante n'a pas démontré que son argumentation serait différente de celle de l'avocat de M^me^ Piercey.

(1) L'intérêt

Un des rares arrêts que notre Cour a rendus sur l'exercice de son pouvoir discrétionnaire est *Norcan Ltd. v. Lebrock*, [1969] R.C.S. 665, dans lequel le juge Pigeon a conclu que tout intérêt suffit, sous réserve toujours de l'exercice du pouvoir discrétionnaire. Il ressort de la jurisprudence

similar case can satisfy this requirement. The discretion, however, will not ordinarily be exercised in favour of an applicant just because the applicant has a similar case. Indeed it has been held in some courts that this is not a sufficient interest. See *Solosky v. The Queen*, [1978] 1 F.C. 609, and *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.)

I agree with Pigeon J. that "any interest" extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party. Although this is usually a tenuous basis upon which to base an application for intervention, in this appeal Mr. Cowper's client is in the unenviable position of facing an opponent in the British Columbia litigation, the Attorney General of British Columbia, who has the right to intervene in this appeal. There is an aura of unfairness about this which should be remedied by granting this application unless the other criteria dictate the contrary conclusion. This unfairness is exacerbated by the imbalance of representation in favour of those supporting the constitutionality of the legislation which would occur if the applicant were denied the right to intervene.

(2) Useful and Different Submissions

This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05: "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue". It is more difficult for a private litigant to demonstrate that his or her argument will be different. This submission is usually met by the response that the able and

citée par le juge Pigeon que le fait d'être dans une situation semblable peut satisfaire à cette exigence. Cependant, le pouvoir discrétionnaire ne sera habituellement pas exercé en faveur d'un requérant seulement parce qu'il est dans une situation semblable. Certains tribunaux ont même conclu que cela ne constitue pas un intérêt suffisant. Voir *Solosky c. La Reine*, [1978] C.F. 609, et *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.)

Je suis d'accord avec le juge Pigeon que «tout intérêt» vise un intérêt dans l'issue d'un pourvoi si la réponse donnée à la question de droit soumise doit s'appliquer à un autre litige en cours auquel le requérant est partie. Cela est ordinairement considéré comme une justification assez faible d'une demande d'intervention, mais la cliente de Me Cowper en l'espèce se trouve dans la situation peu enviable d'avoir comme adversaire dans son litige en Colombie-Britannique le procureur général de la Colombie-Britannique qui, lui, a le droit d'intervenir en l'espèce. Cette situation dégage une impression d'injustice qui devrait être dissipée en accueillant la présente demande, à moins que les autres critères ne dictent une conclusion contraire. Cette injustice serait accentuée par la surabondance de représentation des tenants de la constitutionnalité des dispositions en cause si on refusait à la requérante le droit d'intervenir.

(2) Des allégations utiles et différentes

Ce critère est largement respecté lorsque le requérant a fait face à la question et en a acquis une connaissance approfondie qui peut donc lui permettre d'apporter un point de vue nouveau ou de fournir des renseignements supplémentaires à son sujet. Comme l'a affirmé Brian Crane dans *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), à la p. 1.1.05: [TRADUCTION] «une intervention est bienvenue lorsque l'intervenant peut fournir à la Cour des renseignements nouveaux et un point de vue nouveau sur une importante question constitutionnelle ou publique». Il est plus difficile pour un particulier de démontrer que ses allégations seront différentes. On répond habituellement à cet argument que l'avocat

experienced counsel already in the case will cover all bases.

In my opinion this is not a disqualifying factor here. The only party advancing the position taken by the applicant will be Mrs. Piercey. Her interest in the outcome is somewhat tenuous given the conclusion at trial that s. 15 could not be invoked to retroactively apply to a cause of action arising prior to April 17, 1985. Unlike Mrs. Piercey, the applicant has a definite stake in the outcome. In my view, the applicant can add to the effective adjudication of the issue by ensuring that all the issues are presented in a full adversarial context. This need for an adversarial relationship was one of the factors considered by this Court when granting applicant intervener status in *Norcan*, *supra*, and in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

In the circumstances of this case, therefore, I grant leave to the applicant and others in similar circumstances represented by Mr. Cowper to intervene in this appeal. Pursuant to Rule 18, the applicant may file a factum and present oral argument to be limited to not more than fifteen minutes. There will be no costs of the application.

Motion granted.

Solicitors for the applicant: Russell & DuMoulin, Vancouver.

Solicitor for the respondent: The Attorney General of Newfoundland, St. John's.

compétent et expérimenté déjà inscrit au dossier traitera de toutes les aspects de la question.

À mon avis, cela ne contribue pas à faire perdre qualité pour agir en l'espèce. La seule partie qui soutient la même thèse que la requérante est M^me^ Piercey. Son intérêt dans l'issue du pourvoi est quelque peu négligeable étant donné la conclusion, formulée en première instance, que l'art. 15 ne peut s'appliquer rétroactivement à une cause d'action ayant pris naissance avant le 17 avril 1985. Contrairement à M^me^ Piercey, la requérante a un enjeu précis dans le résultat. À mon avis, la requérante peut contribuer à l'efficacité du processus de décision dans ce litige en assurant que toutes les questions litigieuses sont présentées dans un contexte pleinement contradictoire. Cette nécessité d'un rapport contradictoire est un des facteurs dont cette Cour a tenu compte quand elle a accordé au requérant le statut d'intervenant dans les affaires *Norcan*, précitée, et *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357.

Dans les circonstances de la présente affaire, j'accorde donc à la requérante et aux autres personnes qui se trouvent dans une situation semblable et qui sont représentées par M^e^ Cowper, l'autorisation d'intervenir dans ce pourvoi. Conformément à l'art. 18 des Règles, la requérante peut produire un mémoire et plaider pendant une durée maximale de quinze minutes. Il n'y aura pas d'adjudication de dépens relativement à la requête.

Requête accueillie.

Procureurs de la requérante: Russell & DuMoulin, Vancouver.

Procureur de l'intimé: Le procureur général de Terre-Neuve, St. John's.

TAB 3C

Laura Norberg *Appellant*

v.

Morris Wynrib *Respondent*

INDEXED AS: NORBERG *v.* WYNRIB

File No.: 21924.

1991: February 14.

Present: Sopinka J.

APPLICATION FOR INTERVENTION

Practice — Intervention — Applicant raising new argument based on Charter in Supreme Court of Canada — Applicant bringing new perspective to appeal — Charter issue to be decided on the appeal and not on the application to intervene — Application allowed.

APPLICATION FOR LEAVE TO INTERVENE on an appeal from a judgment of the British Columbia Court of Appeal (1990), 44 B.C.L.R. (2d) 47, 66 D.L.R. (4th) 553, [1990] 4 W.W.R. 193, dismissing an appeal from a judgment of Oppal J. (1988), 27 B.C.L.R. (2d) 240, 50 D.L.R. (4th) 167, [1988] 6 W.W.R. 305, 44 C.C.L.T. 184, dismissing the action. Application allowed.

Helena Orton, for the applicant Women's Legal Education and Action Fund.

M. Van Dusen, for the respondent.

The following are the reasons delivered by

SOPINKA J.—This is an application by the Women's Legal Education and Action Fund (LEAF) to intervene in this appeal.

The issue is the legal remedy, if any, which a woman has against a doctor with whom she engaged in sexual intercourse in exchange for a drug to which she was addicted. The issues include whether an action for sexual assault or breach of

Laura Norberg *Appelante*

c.

Morris Wynrib *Intimé*

RÉPERTORIÉ: NORBERG *c.* WYNRIB

N° du greffe: 21924.

1991: 14 février.

Présent: Le juge Sopinka.

DEMANDE D'INTERVENTION

Pratique — Intervention — Nouvel argument fondé sur la Charte soulevé par le requérant devant la Cour suprême du Canada — Pourvoi abordé sous un angle différent par le requérant — Question relative à la Charte à examiner lors de l'audition du pourvoi et non dans le cadre de la demande d'intervention — Demande accueillie.

DEMANDE D'AUTORISATION D'INTERVENIR dans un pourvoi contre un arrêt de la Cour d'appel de la Colombie-Britannique (1990), 44 B.C.L.R. (2d) 47, 66 D.L.R. (4th) 553, [1990] 4 W.W.R. 193, qui a rejeté l'appel interjeté contre une décision du juge Oppal (1988), 27 B.C.L.R. (2d) 240, 50 D.L.R. (4th) 167, [1988] 6 W.W.R. 305, 44 C.C.L.T. 184, qui avait rejeté l'action. Demande accueillie.

Helena Orton, pour le requérant le Fonds d'action et d'éducation juridiques pour les femmes.

M. Van Dusen, pour l'intimé.

Version française des motifs rendus par

LE JUGE SOPINKA—Il s'agit d'une requête du Fonds d'action et d'éducation juridiques pour les femmes (le Fonds d'action) en vue d'obtenir l'autorisation d'intervenir dans le présent pourvoi.

Le litige porte sur le recours judiciaire, s'il y a lieu, qu'une femme a contre un médecin avec qui elle a eu des rapports sexuels en contrepartie d'une drogue dont elle était dépendante. Parmi les questions qui se posent, il y a celle de savoir s'il y a

fiduciary duty lie and, in particular, whether the appellant's alleged consent and illegal activity provide defenses to her claim; and further whether any damages lie for breach of the fiduciary duty.

The appellant consents to the application but it is opposed by the respondent. The respondent opposes the application principally on the ground that the applicant will add nothing new to the argument in the appeal and that the *Canadian Charter of Rights and Freedoms* should not be raised for the first time in this Court. I am satisfied that the applicant can present argument from a different perspective with respect to some of the issues and should be allowed to intervene. The respondent will be free to argue on the appeal that the *Charter* should not be raised on the ground that it will occasion prejudice. Whether it can be raised should be decided on the appeal and not on this motion.

In the result, the applicant will be entitled to intervene, file a factum and argue orally, limited to twenty minutes.

Application allowed.

Solicitor for the applicant: Women's Legal Education and Action Fund, Toronto.

Solicitors for the respondent: Epstein Wood Logie & Wexler, Vancouver.

lieu d'intenter une action pour agression sexuelle ou pour manquement à une obligation fiduciaire et, en particulier, celle de savoir si le consentement qu'aurait donné l'appelante et l'activité illégale constituent des moyens de défense opposables à sa demande. Il y a de plus la question de savoir si des dommages-intérêts peuvent être accordés pour manquement à l'obligation fiduciaire.

L'appelante consent à la requête, mais l'intimé s'y oppose. L'intimé s'oppose à la requête principalement pour le motif que le requérant n'ajoutera rien de nouveau à l'argumentation soumise en appel et que la *Charte canadienne des droits et libertés* ne devrait pas être invoquée pour la première fois en notre Cour. Je suis convaincu que le requérant peut présenter des arguments sous un angle différent en ce qui concerne certaines des questions en litige et qu'il devrait être autorisé à intervenir. Il sera loisible au requérant de faire valoir, lors du pourvoi, que la *Charte* ne devrait pas être invoquée pour le motif que cela va causer un préjudice. La question de savoir si elle peut être invoquée devrait être tranchée au cours de l'audition du pourvoi et non dans le cadre de la présente requête.

En définitive, le requérant est autorisé à intervenir, à produire un mémoire et à plaider oralement pendant vingt minutes.

Demande accueillie.

Procureur du requérant: Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

Procureurs de l'intimé: Epstein Wood Logie & Wexler, Vancouver.

File Number: 35682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)
BETWEEN:

CHEVRON CORPORATION AND CHEVRON CANADA LIMITED
Appellants
(Respondents/Appellants by Cross-Appeal)

– and –

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMONADO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE
Respondents
(Appellants/Respondents by Cross-Appeal)

MOTION RECORD FOR INTERVENTION
U.S. CHAMBER OF COMMERCE
Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

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