Supreme Court, U.S.
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No. __-___

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

NILO D. TUAZON,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether product sales and sales-related activities in the forum state can constitute sufficient minimum contacts to support the exercise of general jurisdiction over a company incorporated and headquartered elsewhere, and thus allow suit on claims having no connection to the forum.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are contained in the caption of this case.

Petitioner R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to appellant R.J. Reynolds Tobacco Company, a New Jersey Corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American, Inc., which is a North Carolina corporation. Brown & Williamson Holdings, Inc. holds more than 10% of the stock of Reynolds American, Inc.

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PETITION FOR CERTIORARI

R.J. Reynolds Tobacco Company ("Reynolds") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, upholding the jurisdiction of the District Court for the Western District of Washington to entertain a lawsuit against Reynolds, incorporated and headquartered in North Carolina, by a citizen of the Philippines, seeking recovery for illnesses incurred in the Philippines after smoking Reynolds products for several decades while resident there.

OPINION AND JUDGMENT BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 433 F.3d 1163. An order and amended order of that court denying rehearing and rehearing en banc (Pet. App. 1a-2a) are unreported. The opinion of the district court (Pet. App. 32a-44a) and its order certifying interlocutory appeal (Pet. App. 31a) are also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 11, 2006. A timely motion for rehearing and rehearing en banc was denied on March 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of Section 1 of the Fourteenth Amendment, which provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. XIV, § 1.

The case also involves the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. CONST. AMEND. V.

STATEMENT OF THE CASE

Respondent Nilo D. Tuazon ("Tuazon"), the plaintiff below, is a citizen of the Republic of the Philippines, where he lived for the first 65 years of his life. Pet. App. 22a n.6; Appellant's Excerpts of Record at ER 29-30 ("Excerpts of Record"), *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006). R.J. Reynolds Tobacco Corporation ("Reynolds"), the defendant below, is a company incorporated and having its principal place of business in North Carolina.[1] Tuazon sued Reynolds in the Western District of Washington, invoking that court's diversity jurisdiction.

Tuazon was born in the Philippines in 1938. At the age of 17 he began smoking Salem cigarettes, which had been sold through a Philippine licensee of a former Reynolds affiliate. Pet. App. 3a-5a. About 10 or 15 years ago, Tuazon began to experience health conditions that he attributed to his smoking, and at that time his physicians and others advised him to stop smoking. More recently, he was diagnosed with a chronic lung disorder. *Id.* Tuazon is both a member of the Philippine bar and a plaintiff in the Philippine courts. While still living in the Philippines, Tuazon began researching cases filed in the United States against tobacco companies to assist him in filing his complaint. Pet. App. 4a; Excerpts of Record at ER 30, 45-46. However, he decided not to bring his claims in the Philippines, fearing that any award he would receive would be "niggardly" or "ridiculously low." Pet. App. 24a; Excerpts of Record at ER 44-45.

Tuazon immigrated to Renton, Washington, in April 2003. Pet. App. 4a. He filed this case within eight days of his arrival in the United States. Excerpts of Record at ER 30, 49. Tuazon retains a personal residence and substantial

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[1] At the time plaintiff filed suit, and prior to a corporate reorganization that took place on July 30, 2004, Reynolds was incorporated in New Jersey.

property interests in the Philippines, and expects to return there for periodic visits. Excerpts of Record at ER 38-40.

Tuazon alleges that a supposed "global conspiracy" to suppress health-related information kept him from learning about the dangers of Reynolds' product. Pet. App. 5a, 32a. He claims that this alleged conduct violated his rights under the laws of the Philippines, which are asserted to apply to the claims in this case. Pet. App. 20a; Excerpts of Record at ER 2. Tuazon alleges that conduct relevant to his claim occurred in a variety of places, including in the United States, but he does *not* assert that his claim arises out of any conduct occurring in the State of Washington. Pet. App. 7a, 20a, 32a. Tuazon acknowledges that his alleged tobacco-related disease developed while he was in the Philippines. *Id.*

Reynolds is neither incorporated nor headquartered in Washington, and maintains no executive offices or manufacturing operations there. Excerpts of Record at ER 10. Its activities in Washington "are no greater in kind than [its] activities . . . in any other state." *Id.* at 11.

Reynolds sells cigarettes in the State of Washington, in numbers roughly proportionate to Washington's share of the United States population. Its annual sales there of $145-240 million amount to about 2.6% of Reynolds' domestic sales. Pet. App. 4a. Reynolds is licensed to do business in Washington and engages in activities necessary to support its sales there, including contracting with a local warehouse company for storage and delivery of products and leasing an office. Pet. App. 15a, 33a. Six or seven permanent employees have worked at the office, with an additional 32 or 33 sales personnel working out of their homes. Pet. App. 33a; Excerpts of Record at ER 11. Reynolds advertises its products to Washington consumers, has conducted market research there, and has engaged in political lobbying opposing laws that would have banned or limited smoking or cigarette advertising. Pet App. 4a-5a. In addition, Reynolds

has provided research grants to the University of Washington. *Id.*

Based on these facts, Reynolds filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction[2] and, in the alternative, on *forum non conveniens* grounds. The parties thereupon took discovery relating to jurisdictional issues, including interrogatories, a deposition of Tuazon, and document production. The district court denied Reynolds' motion on March 17, 2004, Pet. App. 44a, and certified its Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 31a. The Ninth Circuit accepted certification.

In its opinion dated January 11, 2006, the Ninth Circuit (McKeown, J.) affirmed the district court's decision. The court queried "first, whether Washington's jurisdictional statute confers jurisdiction over Reynolds." Upon finding that it did, the court turned to the question "whether the exercise of jurisdiction comports with federal due process requirements." Pet. App. 7a.

The court below stated that "minimum contacts exist where a defendant has 'substantial' or 'continuous and systematic' contacts with the forum state." Pet. App. 10a. The court discussed this Court's decisions in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). The court remarked that "navigating the territory between *Perkins* and *Helicopteros* requires us to balance the facts of each case," and noted that Ninth Circuit precedent has "not . . . articulated a definitive litany of factors" to assist in this navigation. Pet. App. 12a (citing

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[2] Tuazon never claimed that Reynolds was subject to specific jurisdiction—based on events occurring in Washington—so the only issue was whether Reynolds was amenable to general jurisdiction there. Pet. App. 7a, 34a.

Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

While recognizing that "a corporation does not necessarily submit to general jurisdiction in every state in which it merely sells a product," Pet. App. 16a-17a, the Ninth Circuit nonetheless found that contacts sufficient to establish general jurisdiction were present here:

> The magnitude of Reynolds' operations and sales in Washington reflects an undeniable presence in the state; it has held a license to do business there since 1940, has advertised in purely local publications since at least the 1950s, has engaged in local political activity to protect its market,[3] and maintains a permanent office and workforce in the state.
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> . . .
>
> Although limited sales and licensing arrangements alone may be insufficient to establish general jurisdiction, Reynolds' decades long presence and its integration into Washington's markets can hardly be characterized as "mere" interaction with the state.
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> . . .
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> Although general jurisdiction is infrequently exercised, to conclude that it exists here does not mean that every case of failed specific jurisdiction will lead to the grant of general jurisdiction. The determination simply depends upon the nature and extent of the contacts.
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[3] The Ninth Circuit described Reynolds' political activities as "local opposition to city and state legislation that would have banned or limited smoking and cigarette advertising." Pet. App. 4a-5a.

> [W]e hold that Reynolds' continuous and substantial contacts are sufficient to support the exercise of general jurisdiction.

Pet. App. 15a-17a.

The court also determined, based on this Court's guidance in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), that the exercise of general jurisdiction over Reynolds in the State of Washington in this instance was reasonable, Pet. App. 17a-21a, and that dismissal on grounds of *forum non conveniens* would be improper. Pet. App. 21a-30a. In both of these rulings, the court relied significantly on the interest of the plaintiff in obtaining, and the State in providing, a forum for a person resident there. Pet. App. 19a, 27a.

On March 7, 2006, the Ninth Circuit denied Reynolds' petition for rehearing and rehearing en banc, Pet. App. 1a-2a, whereupon Reynolds filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The decision below amounts to a holding that any large corporation that engages in substantial sales and sales-related activities across the nation satisfies the due process minimum contacts test for general jurisdiction in any State of the union. Under this test, manufacturing corporations like Petitioner Reynolds that sell their products in most or all states of the union, and thus engage in a systematic and ongoing array of advertising, marketing, and distribution activities throughout the country, will be found to possess sufficient minimum contacts to support suit in most or all states on claims having no connection whatsoever to those states. The Ninth Circuit thus joins a growing list of federal

circuits that in recent years have upheld general jurisdiction based on sales-related activities.[4]

These rulings are flatly at odds with longstanding authority in this Court, and contrary to the common practice in our courts, under which litigation is most commonly brought in the jurisdiction in which the harm occurs. They are also contrary to clear holdings in several other circuits that the sales and promotion of products in a state do not constitute the minimum contacts required for general—as distinguished from specific—jurisdiction.

While a court's power to exercise jurisdiction over a prospective defendant historically depended on the party's actual presence in the jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), where corporations are concerned, this Court long ago recognized that "the terms 'present' or 'presence' are used merely to symbolize those activities of [a] corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945). The critical analysis turns on whether the defendant corporation "has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks omitted).

In a series of cases, this Court has discussed the nature of the minimum contacts analysis as the threshold limitation[5]

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[4] As discussed *infra*, at 18 n.9, several state Supreme Courts have also upheld the assertion of general jurisdiction based on sales-related activities.

[5] The Question Presented here addresses only the threshold Due Process issue whether Reynolds has minimum contacts with Washington sufficient to support general jurisdiction, and not the second question of whether, if there are such minimum contacts, jurisdiction must nonetheless be denied as unreasonable under the factors articulated in *Asahi*, 480 U.S. at 113.

on jurisdiction over non-resident corporations. The Court has noted repeatedly that, in determining whether a particular exercise of jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), *quoted in Calder v. Jones*, 465 U.S. 783, 788 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770, 775 (1984); *Rush v. Savchuk*, 444 U.S. 320, 327 (1980). Accordingly, the analysis is not "simply mechanical or quantitative," looking at "whether the activity [of a corporation within the forum state] is a little more or a little less." *Int'l Shoe*, 326 U.S. at 319. It focuses, most basically, on the relationships between the defendant's particular conduct in the forum, and the harms that are the subject matter of the lawsuit.

Thus, as the Court noted in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where a manufacturer promotes and sells "its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." *Id.* at 297. This kind of jurisdiction, which exists because "a controversy is related to or 'arises out of' a defendant's contacts with the forum," is referred to as "specific jurisdiction." *Helicopteros*, 466 U.S. at 414 & n.8.

The Court has also addressed the question of whether, and under what circumstances, a corporation may be subjected to

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(continued...)

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's 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." *World-Wide Volkswagen Corp. [v. Woodson,]* 444 U.S. [286, 292 (1980)] (citations omitted).

"general jurisdiction"—that is, held to answer for claims that do not arise from or relate to events occurring in the forum state. Again, historically the question was characterized as one of presence in the forum. Thus, much as jurisdiction for all purposes may be secured over a natural person based on his physical presence in the forum, *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990), a corporation may be sued on any matter, arising in the forum or not, in the jurisdiction where it is incorporated or is headquartered. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966), *cited in Helicopteros*, 466 U.S. at 415 n.9. Beyond that core instance of corporate "presence" in the forum, this Court has declined to articulate any qualitative rules to guide courts in determining whether sufficient contacts exist to confer general jurisdiction over corporations.

Instead, the Court has repeated the overarching litany of *International Shoe*, that there must be minimum contacts "sufficient" to render the assertion of jurisdiction consistent with "traditional notions of fair play and substantial justice." *E.g.*, *Helicopteros*, 466 U.S. at 414 (internal quotation marks omitted). As a result, lower courts are left to scrutinize the outcomes of a handful of cases decided over the last century in an effort to discern how far to go in asserting jurisdiction over a non-resident corporation as to claims unrelated to the forum. These decisions of this Court suggest that such open-ended jurisdiction over unrelated matters is very strictly confined.

This Court's decision in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), represents the high-water mark for general jurisdiction. There, the Ohio courts had entertained claims against a Philippine mining company that were unrelated to any activities in the State of Ohio. The case presented the unique circumstance that the Japanese occupation of the Philippines had caused the company's president to relocate its offices to Ohio, from which location

he conducted the activities of the business. There, he kept company files, held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on Ohio bank accounts, engaged an Ohio bank to act as a transfer agent, and supervised policies dealing with rehabilitation of the corporation's properties in the Philippines. *See Id.* at 448. In short, "he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." On this basis, the Court "conclude[d] that . . . it would not violate federal due process for Ohio . . . to take . . . jurisdiction of the corporation in this proceeding." *Id.*

Since *Perkins*, the Court has twice suggested that contacts of a quality falling well short of general business operations in the forum cannot support jurisdiction over causes of action unrelated to that forum. In *Keeton v. Hustler Magazine, Inc.* 465 U.S. 772, 779 & n.11 (1984), the Court compared the defendant's contacts with the New Hampshire forum with the "general business" activities present in *Perkins*, and concluded that sales of magazines in the forum "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." And in *Helicopteros*, 466 U.S. at 416, the Court posed the question as whether the contacts there "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." It concluded that contacts, which included the purchase of helicopters and training of personnel in the forum state, failed to meet that test.

These modern decisions are in accord with a series of cases from the early twentieth century in which the Court repeatedly declined to uphold jurisdiction over claims unrelated to the forum, where defendant's relevant contacts were limited to sales and solicitation activities in the forum state. *See People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 85-87 (1918) (advertising, selling cigarettes to in-state distributors, and sending agents to solicit orders from retailers to be filled by the distributors did not support suits

unrelated to forum activity); *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1914) (even assuming defendant railroad, a Virginia corporation, did business in Louisiana, service of process in accordance with Louisiana law was insufficient to give Louisiana court jurisdiction over cause of action for injuries sustained in Alabama); *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533 (1907) (where defendant railroad had no track or property in the forum State, its employment of an agent and maintenance of an office in the forum, through which it solicited "considerable" passenger and freight business, did not support jurisdiction over claims unrelated to the forum); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 20-22 (1907) (no jurisdiction in Pennsylvania over claims by Pennsylvania residents based on policy issued in Indiana, because "the business was not transacted in Pennsylvania," even assuming defendant insurance company did business in Pennsylvania).[6]

I. There Is Substantial Disagreement in the Circuits on the Recurring Question Whether Sales and Sales-Related Activities in the Forum Can Constitute Minimum Contacts Sufficient to Support General Jurisdiction

This Court has made clear that the sufficiency of minimum contacts depends on the quality rather than the

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[6] In *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218 (1913), the Court upheld the jurisdiction of New York courts over a railroad that operated no trains in the State, where a single bill of lading provided for delivery of poultry to New York City by "two [rail]roads [that] together constitute a continuous line from St. Louis [to New York]," *id.* at 228, and required that claims be made "at the point of delivery or at the point of origin" as an essential prerequisite to liability. *Id.* at 222. This consolidated line—the "Cotton Belt Route"— retained a joint freight agent in New York, with whom plaintiff initially pursued his claim for deficient handling of the poultry, filing litigation there only after those efforts at settlement had failed. *Id.* at 225-26.

quantity of a corporation's activity in the forum. At the same time, it has declined to draw any explicit distinctions as to the nature of corporate activities that will suffice to support general jurisdiction. It is therefore not surprising that the circuits have become badly divided on the most commonly recurring question in this area: whether activities conducted to achieve the sales of products in a state, in the absence of general corporate presence unrelated to sales, can suffice to confer jurisdiction over the corporation for all purposes. The decision below rested squarely on the longstanding activities of Reynolds in Washington state, all of which related directly to the marketing and sales of its products there. In that regard, Reynolds' activities in Washington are much like those of countless national and international corporations. The vast majority of products purchased and used by American consumers are mass produced, advertised and sold throughout the nation or the world.

Since this Court's decisions early in the last century discussed above, the dominant view of American courts has been that sales-related activities do not constitute minimum contacts sufficient for general jurisdiction. That rule is implicit in the decisions of many courts in many cases. A number of modern federal cases have put a finer point on it. In particular, the First, Fourth, Fifth, and Eleventh Circuits, in rendering decisions declining to find general jurisdiction where the central argument for the contrary outcome rested on the sales of goods, have made statements in the course of their rulings indicating the insufficiency of such contacts as a basis for general jurisdiction.

In *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 217 (1st Cir. 1984), the First Circuit declined to allow product liability claims relating to use of a medical device to proceed in a New Hampshire federal court, where the device was used and the alleged injury occurred in Massachusetts, notwithstanding the defendant's concession that its products were sold in New Hampshire through a number of wholesale

distributors located there. Quoting its own earlier decision to the same effect in *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 586-87 (1st Cir. 1970), the First Circuit stated that "where 'defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction.'"

In *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993), the Fourth Circuit reached a similar conclusion on similar facts. As in *Glater*, plaintiffs claimed injury from use of a medical device. The only connection of either party to the Maryland forum was the fact that defendant employed between 17 and 21 "detail representatives and consumer product representatives," most of whom were residents of Maryland. *Id.* at 1198. "As a result of these representatives' efforts, Searle had $9,000,000-$13,000,000 annual sales in Maryland between 1983 and 1987, which constituted approximately two percent of its total sales." *Id.* After discussing two of its own prior decisions that diverged on distinguishable facts, the court cited *People's Tobacco Co.*, 246 U.S. 79, among other cases, "holding that advertising and solicitation alone do not justify general jurisdiction." 991 F.2d at 1199. Ultimately, the court "[found] the case at bar controlled by *Ratliff [v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir. 1971)]'s rule that [product] advertising and solicitation activities alone do not constitute the 'minimum contacts' required for general jurisdiction." 991 F.2d at 1200.

In *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), the Fifth Circuit addressed whether a federal court in Texas could assert jurisdiction over a Kansas aircraft manufacturer in connection with an air crash in Mississippi, based on the fact that, over a five-year period, defendant had sold nearly $250 million worth of aircraft and parts in Texas, thanks in part to nationwide advertising and a network of independent dealers located in Texas. *Id.* at 372. Emphasizing the absence of any contacts between the forum and any party to the case, and the care taken by defendant to

conduct its affairs so as to "shield it from the general jurisdiction of the courts of other states such as Texas," the court concluded that the fact that defendant "has engaged in a nationwide advertising program [to promote sales through independent dealers] does not support a finding of general jurisdiction." *Id.* at 376; *see also Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 218 (5th Cir. 2000) (finding insufficient contacts for general jurisdiction based on contacts including sales of products to entities located in the forum.)

And in *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990), a libel action was brought in Florida based on statements made by defendant musician in New York and published in Florida and elsewhere by a magazine not party to the suit. Plaintiff asserted both specific and general jurisdiction, and the Eleventh Circuit rejected both theories. In connection with plaintiff's efforts to predicate general jurisdiction on defendant's concerts and record sales in the state, the court concluded:

> If Hall could be sued on an unrelated cause of action because of concerts and record sales, then he likely would be amenable to suit in all the states of the union on any cause of action. We reject without further discussion the possibility that Hall is generally present in Florida for jurisdictional purposes based on these contacts.

Id. at 1516 n.7; *see also Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol El Carmen S.A.*, 197 F.3d 1070, 1075 (11th Cir. 1999) (rejecting an assertion of general jurisdiction based on sales in the forum and noting that "[g]eneral jurisdiction has been found lacking even where a company had employees, agencies and salespeople regularly in the forum").

Finally, in contradicting the longstanding principle that activities within a state to promote sales of products are not

themselves sufficient to support general jurisdiction, the Ninth Circuit below also acted contrary to its own prior decision in *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240 (9th Cir. 1984). There, the court found insufficient contacts in California to support general jurisdiction over a West German corporation that used "independent nonexclusive sales representatives" to solicit product orders in California by, among other means, maintaining a showroom display in San Francisco and attending trade shows and sales meetings in the State. In rejecting the assertion of general jurisdiction, the Ninth Circuit noted that "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action." *Id.* at 1242. The Ninth Circuit also observed that "[t]his court has stated that the *Perkins* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its unusual facts." *Id.*[7]

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[7] There is also substantial clear authority in the State courts that sales of products in the forum State is an insufficient basis on which to predicate general jurisdiction over a corporate defendant located elsewhere. *See, e.g.*, *John Norrell Arms, Inc. v. Higgins*, 962 S.W.2d 801, 804 (Ark. 1998) (forum sales "manifestly insufficient" for general jurisdiction); *Fisher Governor Co. v. Superior Court*, 347 P.2d 1, 3 (Cal. 1959) ("[M]ore contacts are required for the assumption of [general] jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives."); *Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1150-51 (D.C. 1985) (solicitation, advertising, and $3 million in forum sales "cannot be deemed 'substantial' within the meaning of *International Shoe*"); *Wainscott v. St. Louis-San Francisco Ry. Co.*, 351 N.E.2d 466, 471, 474 (Ohio 1976) (maintenance of two forum sales offices and agents, for purpose of soliciting business on out-of-state rail lines, insufficient for general jurisdiction); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807, 809-10 (Tex. 2002), *cert. denied*, 537 U.S. 1191 (2003) (Texas sales amounting to 3.5% of worldwide sales, safe-deposit agreements with Texas residents, and research contract with University of Texas qualitatively insufficient for general jurisdiction).

Notwithstanding the weight of this Court's venerable case law disapproving general jurisdiction based on a non-resident corporation's sales-related activities in a forum State, and those federal circuit decisions adhering to that position, since this Court last addressed the due process limits on general jurisdiction in 1984, a significant counter-trend has developed in a number of federal circuits.

First, in 1989, in *Michigan National Bank v. Quality Dinette, Inc.*, 888 F.2d 462 (6th Cir. 1989), the Sixth Circuit affirmed the existence of minimum contacts sufficient to support general jurisdiction entirely on the ground that an Alabama corporation manufacturing furniture solicited orders and sold its products in the State of Michigan. Plaintiff, a Michigan bank, was thus allowed to proceed in Michigan against the Alabama defendant on claims unrelated to any of its Michigan sales activities. The Sixth Circuit reasoned:

> Although appellees have no real estate, bank accounts or telephone listings in Michigan, they do retain an independent sales representative in the state and conduct mail order solicitations of Michigan businesses. Similarly, although appellees did not participate in trade shows or other promotional events in Michigan, appellees nevertheless made over 400 sales totaling over $625,000 in 1986 and 1987. These factors, along with the fact that appellees made at least one sale in Michigan each and every month during 1986 and 1987, indicate that appellees have conducted a "continuous and systematic part of their general business" in Michigan.

Id. at 466. *But cf. Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1993) (annual sales of over $900,000 through two independent distributors held insufficient to support general jurisdiction).

Next, in 1996, in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996), the Second Circuit found that the St. Louis manufacturer of a "curtain wall system" for a building in Florida had sufficient minimum contacts for general jurisdiction in the Vermont forum, based on product sales activities there. The court cited sales of nearly $4 million worth of its products in that state over a six-year period, supportive national advertising, defendant's relationship with builders and dealers in Vermont, and related promotional activities there. The court's reasoning to that effect was *dicta*, because the court ultimately rejected the assertion of jurisdiction on reasonableness grounds. *See id.* at 575.

In 2000, in *LSI Industries Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369 (Fed. Cir. 2000), the Federal Circuit similarly found minimum contacts, and affirmed the assertion of general jurisdiction in Ohio, over a Connecticut corporation headquartered in Virginia, based on the company's sale of products unrelated to the subject of the lawsuit:

> Based on Hubbell's millions of dollars of sales of lighting products in Ohio over the past several years and its broad distributorship network in Ohio, we find that Hubbell maintains "continuous and systematic" contacts with Ohio. Therefore, Hubbell is subject to general jurisdiction in Ohio under the Due Process Clause.

Id. at 1375.

Finally, in 2004, in *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070 (8th Cir. 2004), *cert. denied*, 543 U.S. 1147 (2005), the Eighth Circuit joined the group of circuits willing to uphold the assertion of general jurisdiction on the basis of sales activities within the State. The court acknowledged that defendant, Sherwin Williams, was incorporated and had its principal place of business in Ohio, and that the subject matter of the suit was unrelated to any activities carried on in

the forum (Arkansas). Nonetheless, it found sufficient minimum contacts to support general jurisdiction, based primarily on the fact that defendant "operates retail stores in Arkansas and has a registered agent for service of process there."[8] *Id.* at 1075.[9]

Accordingly, the Court should grant certiorari to resolve the substantial and growing split in the federal circuits on the question whether sales-related activities in the forum State are sufficient minimum contacts to support general jurisdiction.[10]

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[8] The Eighth Circuit's holding appears to rest primarily on the presence of Sherwin Williams retail stores in Arkansas. While the decision mentions Sherwin Williams' registered agent, the decision does not appear to rest on Eighth Circuit case law suggesting that the mere fact of having a registered agent in a State can amount to consent to general jurisdiction. *See Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990). Indeed, the idea that "mere service on [a corporation's registered agent] automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles." *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (emphasis in original). That much has been clear for nearly a century. *See Simon*, 236 U.S. at 130 (relying on "the principle laid down in *Old Wayne Mut. Life Assoc. v. McDonough*, 204 U.S. 22 (1907), that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states").

[9] General jurisdiction based on sales-related activities in the forum has likewise been upheld by several State courts. *See, e.g., Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) ("privilege of making [forum] sales" of up to $85,000 annually, through mail, phone, and one single independent sales representative sufficient for general jurisdiction); *Glover v. W. Air Lines, Inc.*, 745 P.2d 1365, 1368 (Alaska 1987) (holding that franchisor's receipt of $11,000 from in-forum franchisee was "more than sufficient" to be a "substantial" contact justifying general jurisdiction); *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632 (N.C. 1977) (holding that solicitation and sales of $50,000 over 21 months, along with one forum visit, was sufficient for general jurisdiction).

[10] The unresolved nature of this issue has been noted in the academic literature. *See, e.g.*, Patrick J. Borchers, *The Problem with General*

II. The Sufficiency *Vel Non* of Sales Activities as Minimum Contacts Supporting General Jurisdiction Is a Frequently Recurring Question That Implicates Fundamental Principles of Fairness and Federalism

It bears repeating that the measure and character of minimum contacts that will suffice to subject a defendant to suit by all comers on any and all claims is a question of constitutional dimensions. With the long-arm statutes of nearly all states extended to the limit of the Due Process Clause,[11] "traditional notions of fair play and substantial justice" embodied in the Fifth and Fourteenth Amendments largely define the geographical reach of state and federal courts over absent corporate defendants being called to answer for claims unconnected to the forum.

One protection of the Due Process clause is to "give[] 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." *World-Wide*

(continued...)

Jurisdiction, 2001 U. CHI. LEGAL FORUM 119, 127 ("[T]he matter of whether forum-state sales subject the seller to general jurisdiction ... is a common fact scenario, yet no clear answer exists."); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL FORUM 141, 158 (Noting among unanswered questions, the propriety of asserting "general jurisdiction over foreign multinational enterprises that sell large quantities of their products in the United States.").

[11] According to one commentator, as of 2001, forty-three states and the District of Columbia extend their extraterritorial personal jurisdiction to the "full extent" authorized by the Due Process Clause, while seven states (Connecticut, Florida, Illinois, Indiana, Ohio, Mississippi and New York) do not. *See* Jeffrey Untermohle, *Maryland's Diminished Long-Arm Jurisdiction in the Wake of Zavian v. Foudy*, 31 U. BALT. L. REV. 1, 11-13 nn. 68-69 (2001). Since 2001, Indiana has amended its long arm statute to coincide with the majority position. *See* Ind. Code § 34-8-2-2.

Volkswagen, 444 U.S. at 297. The growing circuit split outlined above makes it difficult for those in the business of selling goods in more than one jurisdiction to predict where they will be subject to suit. In a country where nearly all goods are marketed nationwide, and many are sold throughout the world, this means that a very large universe of potential defendants will be unable to predict where they may be held to answer for injuries that are essentially local to one jurisdiction.

As this Court has noted repeatedly, where a party systematically markets its product in a state, "it is not unreasonable to subject it to suit . . . if its allegedly defective merchandise has there been the source of injury to its owner or to others." *Id.* When a corporation "'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297. Put another way, since the connection between "the defendant, the forum, and the litigation" is the oft-cited justification for personal jurisdiction, *Shaffer*, 433 U.S. at 204, the reasonable expectation of the innumerable corporations that sell products throughout the nation is that they will be held to answer for a product-related harm in the forum where the particular product that caused the harm was sold.

There are substantial reasons to foreclose litigation in fora that lack any connection to the subject matter of the lawsuit. Congress has very recently highlighted the "mounting stack of evidence" of litigation abuses in plaintiff-friendly fora, "where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations)." S. REP. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (discussing the purposes of the Class Action Fairness Act). More generally, in recent

years, particular fora within the United States have become notorious for engaging in unfair and abusive practices. *See, e.g.,* Am. Tort Reform Found., *Judicial Hellholes 2005* at 8, *available at* http://www.atra.org/reports/hellholes/report.pdf (last visited May 26, 2006) (noting that, among other litigation abuses, judges in so-called "judicial hellholes . . . often do not stop forum-shopping, [and permit] personal injury lawyers [to] file cases there even if no connection to the jurisdiction exists"). And, as this case illustrates, the risk extends beyond having to defend lawsuits in the courts of one State based on conduct that occurred in one of the other 49 States. Suits on claims arising outside the United States—such as this one—are also in play.

It is also important to bear in mind that the due process rule at issue here does not just apply with regard to jurisdiction over American corporations. Under the panel decision below, plaintiffs will often be able to establish minimum contacts sufficient for general jurisdiction over foreign corporations.[12] If assertions of general jurisdiction over U.S. businesses based on sales activities offends *our* sense of fairness—because of the lack of connection between the defendant, the forum, and the litigation—it is truly

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[12] Satisfaction of the minimum contacts requirement, of course, does not necessarily mean that jurisdiction can be asserted over a particular foreign defendant consistent with due process. *Asahi*'s reasonableness analysis, focusing on the burden on the defendant, the forum's and plaintiff's interests, the judicial system's interest in efficient resolution of controversies, and the shared interests of the "'States in furthering fundamental substantive social policies,'" 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292), may yet lead to a conclusion, as in *Asahi*, that no such assertion would be reasonable. *Id.* at 116. But it is far from clear that this will commonly be true in the instance of large, multinational corporate defendants—of the type who typically sell products nationwide—since any "burden" may be deemed mitigated by the defendant's sheer size, and the fact that those corporations will otherwise be called upon to answer for injuries in the states where they occur. *See, e.g., Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129-30 (2d Cir. 2002).

anathema from the perspective of many foreign legal systems. *See, e.g.*, Juenger, *supra,* 2001 U. CHI. LEGAL FORUM at 155, 162 (describing general jurisdiction as the "rift that separates this country from all others"). Faced with uncertainty and the burdens articulated above, such businesses may even be "dissuaded" from coordinating sales efforts in the United States, thereby causing a "significant impact on [our] foreign trade relations." Brief of the Solicitor General as *Amicus Curiae* Supporting Petitioner at 1, 3, *Helicopteros*, 466 U.S. 408 (1984) (No. 82-1187) (urging this Court to "recognize the realities of today's sophisticated marketing practices," and restrict the scope of general jurisdiction).

Finally, a rule that permits States to exercise general jurisdiction over all companies that sell products and engage in sales-related activities within their boundaries undermines important federalism and comity interests protected by the Due Process Clause. As this Court has explained, constitutional limits on personal jurisdiction "act[] to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. It is important, "in the context of our federal system of government," *Int'l Shoe*, 326 U.S. at 317, to keep the States from exercising powers outside their respective spheres of interest. Put another way, this Court's personal jurisdiction jurisprudence recognizes that in a world of multiple sovereigns, not every sovereign will possess the requisite connections to "the defendant . . . and the litigation" in any given case. *Shaffer*, 433 U.S. at 204. But the rule adopted by the Ninth Circuit imperils that constitutional order by essentially obliterating State boundaries for a large class of defendants—namely, those national and international companies that market goods and services throughout the country. Under the Ninth Circuit rule, the only limitation on State court jurisdiction over disputes involving those kinds of companies is the plaintiff's choice

of where to file suit. That is a scheme sharply at odds with "our federal system of government." *Int'l Shoe*, 326 U.S. at 317.

III. The Court Should Grant Certiorari Now In Order To Prevent Extensive Wasteful Litigation

As this Court has recognized, "litigation over whether [a] case is in the right court is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (internal quotation marks omitted). The cases discussed in Section I, *supra*, give some indication of the nature and extent of the judicial resources being invested in litigating the amenability of absent corporate plaintiffs to general jurisdiction. The Court's immediate intervention to resolve the conflict posed by this case would flesh out one important element of the "qualitative" nature of necessary minimum contacts where general jurisdiction is concerned—whether sales of products are the sort of actions that afford jurisdiction over a foreign corporation for all purposes. By announcing a "bright-line" jurisdictional rule in that respect, the Court could "ensure[] that judges and litigants will not waste their resources" in drawn out litigation over that issue. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment).

Litigation associated with efforts to assert general jurisdiction over corporations located elsewhere is particularly wasteful for a number of reasons. The experience of the lower courts, including in this case, is that determining general jurisdiction will often require extensive discovery on issues wholly irrelevant to the merits of the case.[13] In this case, for instance, the focus of discovery thus

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[13] *See, e.g.*, *Saudi v. Acomarit Maritimes Servs., S.A.*, 245 F. Supp. 2d 662, 670 (E.D. Pa. 2003) (acknowledging "extensive jurisdictional discovery" before denying general jurisdiction), *aff'd*, 114 F. App'x. 449 (3rd Cir. 2004), *cert. denied*, 544 U.S. 976 (2005); *Burns & Russell Co.*

far has been on activities that indisputably never affected Tuazon or his claim, such as Reynolds' warehouse lease, its local political activities, and the number and workplace of Reynolds' Washington employees. None of this effort advances the ball one inch toward a resolution of the merits of the case. And, as commentators have noted, the expense and uncertainty of jurisdictional disputes forces some defendants to acquiesce in an unconstitutional assertion of jurisdiction.[14]

Jurisdictional litigation is also particularly pernicious because it goes to the court's fundamental power to act, and thus often generates appeals and reversals. *See, e.g.*, *Asahi*, 480 U.S. 102; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros*, 466 U.S. 408; *World-Wide Volkswagen*, 444 U.S. 286; *Shaffer*, 433 U.S. 186; *Hanson*, 357 U.S. 235. The vast majority of decisions made by a trial court, such as those relating to discovery or evidence issues, are appealed only rarely because the decisions are committed to the trial court's discretion or subject to the harmless error doctrine. But jurisdictional questions are reviewed *de novo*, and an erroneous assertion of jurisdiction requires reversal of

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v. Oldcastle, Inc., 198 F. Supp. 2d 687, 689 (D. Md. 2004) (same); *Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 230 (D.C. 2006) (same); *Schott Glas v. Adame*, 178 S.W.3d 307, 312 (Tex. App. 2005) (same).

[14] *See* Mary Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction,* 2001 U. CHI. LEGAL FORUM 171, 198-99 (observing that the "uncertainty and the expense of litigating jurisdiction" causes defendants to choose not to assert the defense, because while "[p]ersonal jurisdiction debate is a wonderful activity for the classroom, [it is] a timely and costly one for clients") (internal quotation marks omitted); Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 582 (1995) ("Judged by its internal costs, our current law of personal jurisdiction is a disaster.").

the entire proceeding. *See, e.g.*, *Helicopteros*, 466 U.S. 408 (effectively voiding a judgment entered after a jury trial).

In addition, litigation of jurisdictional issues in a state of legal uncertainty about whether contacts of a particular type can ever suffice to support a forum's authority is not only wasteful in its own right, but is a major obstacle to settlement of some disputes that might otherwise be amenable to settlement. Parties who see a substantial open question whether the trial court is even empowered to hear their case are unlikely to be in the frame of mind to work at compromising less cosmic disagreements that may be presented by the merits of the cases. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369-71 (1988) (observing that settlement usually depends upon converging estimates of the case, which is discouraged by uncertain and unstable legal doctrine).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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