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 ORGANIZATION FOR INTERNATIONAL INVESTMENT AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products initially placed in the stream of commerce by the corporation.

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INTEREST OF THE *AMICI CURIAE*

The Organization for International Investment and the Association of International Automobile Manufacturers Inc. are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting interstate and foreign commerce, and in promoting policies that secure for their members and this nation the benefits of an open national and global economy.[1]

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII is charged with promoting the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations across this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States in 2009 was approximately $2.3 trillion. James K. Jackson, Congressional Research Service, *Foreign Direct Investment in the United*

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[1] No party's counsel authored this brief (in whole or in part), and no person other than *amici*, their members, or their counsel contributed monetarily to this brief's preparation or submission. *Amici* are advised that, by virtue of blanket consent letters both dated November 5, 2010, from Petitioners and Respondents, all parties consent to the filing of this brief. Petitioners' letter has been docketed; inasmuch as Respondents' letter does not yet appear on the docket, a copy is submitted with this brief.

States: An Economic Analysis 1 (July 28, 2010), *available at* http://www.fas.org/sgp/crs/misc/RS21857.pdf. Direct investment capital inflows in 2008 totaled approximately $325 billion. *Id.* Most of that amount, roughly $260 billion, represents new investments. *Id.* at 4. OFII's goal is to make the United States an increasingly attractive location for companies headquartered outside the United States to conduct more business and employ more Americans within our borders.

The Association of International Automobile Manufacturers Inc. (AIAM) is a not-for-profit trade association that represents international motor vehicle manufacturers and distributors, certain original equipment suppliers, and other automotive-related trade associations. AIAM's mission is to protect and promote the unique interests of international automakers in the United States. It is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety, fuel economy and the environment. AIAM's members account for 40 percent of all passenger cars and light trucks sold annually in the United States. Nationwide, international automakers have invested over $43 billion in U.S.-based production facilities, have a combined domestic production capacity of 4.2 million vehicles, directly employ over 80,000 Americans, and generate almost 600,000 U.S. jobs through dealerships and suppliers nationwide. AIAM's automobile manufacturer members include: American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi

Motors North America, Inc., Nissan North America, Inc. Peugeot Motors of America, Subaru of America Inc. and Toyota Motor North America, Inc.

Automobile manufacturing today is an international business. AIAM's members are subsidiaries of global companies that design, manufacture, distribute and sell passenger vehicles and light-duty trucks all over the world. The legal issues addressed in this case are of major importance to AIAM's member companies, all of whom have considerable experience litigating in state and federal courts in the United States, especially cases involving product liability disputes.

SUMMARY OF ARGUMENT

Not only does the decision below represent a plain legal error regarding the requirements for general jurisdiction, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984), it also misapprehends this Court's stream-of-commerce jurisprudence requiring purposeful contacts with the forum state, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985), and ignores the "bedrock principle" of law requiring respect for corporate distinctions. *United States* v. *Bestfoods*, 524 U.S. 51, 61–62 (1998).

The North Carolina Court of Appeals holds that it may assert general jurisdiction over foreign defendants on any claim whatsoever if the "Defendants have 'purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina.'" Pet. App. 20a. As Petitioners demonstrate in their brief on the merits, mere sales of a product to a forum state, let alone the

unintentional distribution that occurred here, do not constitute the kind of "continuous and systematic general business contacts" required for the assertion of general jurisdiction. *Helicopteros*, 466 U.S. at 416.

Moreover, the jurisdictional test articulated by the North Carolina Court of Appeals would not even satisfy this Court's requirements for specific jurisdiction. First, ignoring the difference between a state and the United States, the decision below discards the requirement that a defendant have at least some minimum contacts with the forum state in particular. Second, ignoring the requirement for purposeful contacts, the court finds jurisdiction based on what it believes a foreign company "should know" about where an affiliate might distribute products it acquires from the defendant company. Finally, as a fig leaf to disguise its assertion of universal general jurisdiction over any company in the world with affiliates serving the U.S. market, the court offers a new requirement that companies affirmatively avoid particular U.S. states, regardless of whether they have any contacts there in the first place.

Compounding these errors in the law regarding personal jurisdiction, the North Carolina Court of Appeals completely disregards the corporate separateness of the foreign Goodyear companies (the defendants) from the Goodyear entities that actually distributed tires within the United States, attributing without any analysis the actions of the latter to the foreign Goodyear defendants to establish jurisdiction over them.

Based on their members' experience as companies within multinational corporate groups engaged in significant international commerce, *amici* can attest that these legal errors present serious real-world concerns for the conduct of their business and risk

material negative consequences for the flow of international commerce. Indeed, the United States Department of Commerce has reported on the concerns of international investors regarding the fairness and predictability of the U.S. legal environment. See Charles G. Schott, 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* 5–6 (Oct. 2008), *available at* http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf ("*Department of Commerce Report*") (reporting results of multiple studies). Considering the large role that foreign direct investment plays in the U.S. economy and the many contributions that companies such as *amici*'s members make in terms of domestic employment and investment, increasing legal uncertainty risks undermining the continued vitality of the United States as a highly attractive destination for foreign investment.

ARGUMENT

I. THE NORTH CAROLINA COURT OF APPEALS' ERRONEOUS APPLICATION OF AN INCORRECT STREAM-OF-COMMERCE ANALYSIS TO A GENERAL JURISDICTION CASE IMPOSES A SIGNIFICANT BURDEN ON THE CONDUCT OF INTERNATIONAL COMMERCE.

A. The North Carolina Court Of Appeals' Decision Erases A Critical Distinction Between General And Specific Jurisdiction.

This Court has made clear that a state's assertion of general jurisdiction requires a defendant to have

more substantial contacts with the forum state than does the assertion of specific jurisdiction. *Helicopteros*, 466 U.S. at 414–15. This is because general jurisdiction allows a defendant to be sued on any claim in the forum state, whereas specific jurisdiction requires that the claim sued upon arise from or be related to the defendant's contacts with the forum state. *Id.*

Specifically, this Court has instructed that where a plaintiff's claims do "not 'arise out of,' and are not related to," the foreign defendant's activities within the state, a court "must explore the nature of [the defendant's] contacts with the state [] to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins* [v. *Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)]." *Helicopteros*, 466 U.S. at 415-16.

In *Perkins*, the Court explained that a state's exercise of jurisdiction over a defendant where the cause of action did not relate to in-state activities goes "one step further" than those cases involving a connection between the in-state conduct and the cause of action. *Perkins*, 342 U.S. at 446. A court may take this further step only where "'the continuous corporate operations within a state were thought *so substantial and of such a nature* as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" *Id.* (quoting *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 318–19 (1945)) (emphasis added).

The required "continuous and systematic" contacts were found to exist in *Perkins* because the defendant corporation effectively had established its principal place of business in the forum state during the relevant period. 342 U.S. at 447–48; see *Keeton* v.

Hustler Magazine, Inc., 465 U.S. 779 n.11 (1984) (discussing *Perkins*). By contrast, in *Helicopteros*, this Court declined to find general jurisdiction in Texas over a foreign company, even though its employees made regular trips to Texas and conducted some business there. 466 U.S. at 416–17. Thus, the basic requirement for general jurisdiction is a level of "continuous and systematic" contacts that "approximate physical presence in the forum state." *Schwarzenegger* v. *Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (internal quotation marks omitted); *Perdue Research Found.* v. *Sanofi-Synthelabo, SA*, 338 F.3d 773, 787 (7th Cir. 2003).

Until the decision below in this case, the general jurisdiction requirement for "continuous" and "substantial" operations "within a state" was sharply distinguished from the mere "deliver[y] [of] products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980). Because general jurisdiction broadly allows a defendant to be sued on any claim—whereas specific jurisdiction requires the claim to be connected to the forum—*amici* submit that it is important to maintain the distinction between the two doctrines found in this Court's prior decisions.

B. The North Carolina Court Of Appeals Abandoned The "Constitutional Touchstone" Requiring Purposeful Minimum Contacts Of The Defendant With The Forum State.

While it is not even applicable in this general jurisdiction case, the North Carolina Court of Appeals' articulation of the stream-of-commerce doctrine would be error even in the context of a

specific jurisdiction case.[2] The fact that the court below incorrectly applied the stream-of-commerce doctrine to find general jurisdiction over foreign companies exponentially compounds the error.

In applying a stream-of-commerce analysis, the North Carolina Court of Appeals stated that "the appropriate question" for determining jurisdiction in North Carolina is "whether Defendants have 'purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina.'" Pet. App. 20a; see also *id.* at 17a–19a. Yet, as this Court has made clear, "the constitutional touchstone [is] whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316). This test focuses on two key elements: the purposeful actions of the defendant itself and the nature of the defendant's contacts with the forum state in particular, both of which the North Carolina Court of Appeals disregards.

Because the Due Process Clause protects individual liberty against state power, *id.* at 471–72, the focus of a court's personal jurisdiction analysis must be on the actions *of the defendant* that are purposefully directed toward the forum state. The North Carolina Court of Appeals identified not a single action purposefully directed at North Carolina by the foreign Goodyear affiliates that are the defendants. Indeed, the court stated that "the record appears to

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[2] *Amici* note that the North Carolina Court of Appeals' stream-of-commerce analysis in this case contains many of the same errors as the New Jersey Supreme Court decision in *J. McIntyre Machinery, Ltd.* v. *Nicastro, ut ex.*, No. 09-1343.

be devoid of evidence that Defendants took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina." Pet. App. 22a. That should have been the end of the inquiry, and the lawsuit should have been dismissed. Instead, the court discussed what the defendants "should have" known based on the fact that they provided tires to other Goodyear affiliates. Due process requires that each defendant's actions be "assessed individually" and each must have the requisite purposeful minimum contacts. *Keeton*, 465 U.S. at 781 n.13; see Section II *infra*.

The court's analysis also fundamentally failed to recognize that the requisite purposeful conduct of the defendant must be directed at the "forum State," not simply the United States in general. For instance, the court concluded that the foreign Goodyear affiliates "knew or should have known that a Goodyear affiliate obtained tires manufactured by [them] and sold them in the United States in the regular course of business." Pet. App. 27a.

The North Carolina Court of Appeals' disregard for the difference between the State of North Carolina and the United States as a whole seriously undermines the bounds that our federal-state system imposes on each individual state. Contrary to the view of the North Carolina Court of Appeals, state lines are not meaningless and North Carolina is not the equivalent of the United States. This Court has held that personal jurisdiction requires minimum contacts with the forum state, not simply any state in the nation. *World-Wide Volkswagen*, 444 U.S. at 293.[3] As this Court emphasized in *World-Wide*

[3] The clear inference to draw from the plurality's analysis in *Asahi* is that state court jurisdiction must be based on contacts

Volkswagen, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* While this Court has expanded the limits of personal jurisdiction from strict territorial presence to minimum contacts with the forum state, it has never accepted the proposition that a state could exercise power over a defendant who has no "'contacts, ties, or relations'" with that state. *Id.* at 294 (quoting *Int'l Shoe*, 326 U.S. at 319). There is no basis for a state to have jurisdiction over a defendant based on the latter's contacts with other states in the nation. Moreover, in the context of a non-U.S. defendant, the need to ensure that states adhere to appropriate limits on their jurisdictional assertions is even stronger, given the importance of comity, presumptions against the extraterritorial reach of U.S. authority, and the preeminent federal (rather than state) role in managing the country's relations with other nations. See, *e.g.*, *Asahi*, 480 U.S. at 115; *Japan Line, Ltd.* v. *Cnty. of L.A.*, 441 U.S. 434, 448 (1979); *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968); *McCulloch* v. *Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963); Gary B. Born, *Reflections on Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 30–31 (1987); see also Section III *infra*.

In an attempt to create some connection to North Carolina, the court below adopted what this Court has explicitly rejected—allowing mere foreseeability

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with that specific state; otherwise, there would have been no reason to contrast that situation with the undecided question of whether a federal court could exercise jurisdiction over a foreign defendant based on national contacts. *See Asahi Metal Indus.* v. *Super. Ct.*, 480 U.S. 102, 113 n.* (1987) (plurality opinion).

to serve as a basis for personal jurisdiction. "'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. Throughout its opinion, the North Carolina Court of Appeals focused on what the defendants "should know" about where their products might end up, rather than on any affirmative actions the defendants actually took to market or direct their products to a particular state. Rejecting similar reasoning, this Court has explained that "[a]lthough it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

In practical effect, the rule would subject a foreign corporation to the general jurisdiction of any state for simply allowing its products to be distributed by another entity with ties to the U.S. market, so long as the products eventually reached that state—even though the corporation did not direct the products there and the claim is unrelated to the products. This rule creates significant and disturbing uncertainty and unpredictability for multinational corporations making fundamental decisions about where and how to do business, in contravention of this Court's instruction that due process allows entities to structure their operations to predict their amenability to suit. *World-Wide Volkswagen*, 444 U.S. at 297.

C. The Decision Below Places An Impractical And Unworkable Obligation On Firms To Take Affirmative Steps To Avoid The Possibility Of Their Products Reaching Particular States.

According to the North Carolina Court of Appeals' interpretation of the stream-of-commerce doctrine, due process requirements for general jurisdiction are somehow satisfied where a defendant has "'purposefully injected [its] product into the stream of commerce without any indication that [it] desired to limit the area of distribution of [its] product so as to exclude North Carolina.'" Pet. App. 20a. This "affirmative avoidance" obligation turns on its head this Court's well-established rule in specific jurisdiction cases, and certainly has no relevance here.

This Court has always looked to a defendant's *purposeful* conduct directed at, or efforts to do business in, a particular state. *Burger King*, 471 U.S. at 472–75. Instead of requiring actual purposeful conduct directed at North Carolina, however, the decision below asserts jurisdiction based on the defendants' failure to avoid the state. Specifically, the court found that the foreign Goodyear affiliates "purposefully and intentionally manufactured tires and placed them in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina." Pet. App. 27a. The affirmative avoidance obligation, already an erroneous departure from this Court's precedent, makes no sense in this case, as the foreign Goodyear manufacturers did not even target the United States for their tires. Rather, "the extent to which tires manufactured by Defendants were sold in the United States depended on the extent to which

Goodyear affiliates responsible for distributing tires in the United States exercised the option" of obtaining such tires from the defendants. Pet. App. 25a.

The decision below would, in practice, impose jurisdiction by default anywhere a foreign company's products end up and require a foreign company to take affirmative steps to avoid a particular state, even if it has no contacts there at all. Yet, this Court has rejected the proposition that "[e]very seller of chattels . . . appoint[s] the chattel his agent for service of process." *World-Wide Volkswagen*, 444 U.S. at 296.

Not only is this rule unworkable from a practical perspective, it is also undesirable. The rule would create an incentive for companies to adopt extraordinary measures in the hope of blocking commerce with particular states, increasing costs to consumers and complicating their access to the global marketplace. Given the practical difficulties of affirmatively avoiding individual states, such a rule poses a very clear risk that some foreign producers will choose simply to abandon the United States market altogether.

D. These Combined Legal Errors Increase Legal Uncertainty For Foreign Firms And May Damage U.S. Efforts To Attract Foreign Direct Investment.

The United States is the largest recipient of foreign direct investment in the world.[4] United Nations

[4] Foreign direct investment "occurs when non-resident firms or individuals commit their capital to a country for the long-run, by purchasing a significant interest in existing domestic companies or assets, or creating new domestic legal entities or assets." Robert E. Litan, U.S. Chamber Inst. for Legal Reform,

Conference on Trade & Dev., *World Investment Report 2010*, at 4 (June 2010). This investment from abroad is an essential element of the United States economy, creating millions of jobs and proving needed financing for growth. One major explanation for this success is the rule of law and the efforts of all three branches of government to develop a sufficiently stable legal regime to encourage investment.

The U.S. Department of Commerce has reported, however, that the unpredictability and cost of litigation are among the top concerns of foreign businesses considering both whether to invest and whether to continue to invest in the United States. *Department of Commerce Report* at 5–6 (reporting results of multiple studies). For instance, a study jointly commissioned by New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer found concerns about the United States legal environment among business leaders in the financial services sector. *Sustaining New York's and the U.S.'s Global Financial Services Leadership* 15–16 (Jan. 2007), *available at* http://www.nyc.gov/html/om/pdf/ ny_report_final.pdf ("*Bloomberg-Schumer Report*"). According to the *Bloomberg-Schumer Report*, the business leaders surveyed ranked a "fair and predictable legal environment" as the second most important factor in assessing potential countries in which to do business. *Id.* These business leaders believed the United States was at a disadvantage relative to the United Kingdom, for example, in part because of "concerns

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Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System 5 (Aug. 2007), *available at* http://www.instituteforlegal reform.com/component/ilr_docs/29/issue/LAI/STU.html.

that the US legal environment is less fair and less predictable than the UK environment." *Id.*

Part of the unpredictability in the U.S. legal environment comes from our federal system, with its multitude of potential legal regimes that a company may encounter. In the *Department of Commerce Report*, the potential application of federal and state law was noted as a "distinctive feature of the U.S. legal system" that an "international investor might find . . . unfamiliar." *Id.* at 3–4 & Box 1. Yet at that time, the Department was at least able to state with confidence that "[e]ven with 50 States (plus the District of Columbia), it is typically clear *which State legal systems are relevant*." *Id.* at 4 (emphasis added). If the North Carolina Court of Appeals decision is upheld, the Department could no longer offer potential foreign investors even this modest assurance about the predictability of the U.S. legal environment. Companies that release their products to separate companies within a multinational corporate group with business in the United States risk being haled into court in a state on any claim whatsoever if those affiliates happen to distribute some of those products to the state. Indeed, the U.S. legal system would no longer be one in which businesses can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

A recent member survey by *amicus* OFII of 65 Chief Executive Officers of U.S. subsidiaries of foreign companies revealed that the costs associated with the United States legal system are seen as a drawback to investing here. OFII, *The Insourcing Survey, A CEO-Level Survey of U.S. Subsidiaries of Foreign Companies* 8 (April 2008), *available at* http://www.

ofii.org/docs/ceo2008.pdf. A study conducted by Robert Litan, commissioned by the U.S. Chamber of Commerce, found similar results. Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 5 (Aug. 2007), *available at* http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/LAI/STU.html.[5] In particular, Litan noted that "the multiplicity of governing jurisdictions creates both complexity and uncertainty" and reported that some of those surveyed "believe[d] the complexity and uncertainty stemming from [the U.S.] system may be worse than elsewhere." *Id.* at 16–17. If this fear of uncertainty existed when companies thought they could predict their amenability to suit based on their purposeful contacts with a given state, it will be orders of magnitude worse if foreign companies may be subject to the general jurisdiction of a state court based on the fact that they "should have known" that someone else might send their products somewhere in the United States.

Not only would this rule increase legal uncertainty, it would dramatically expand opportunities for forum shopping. As the Department of Commerce has noted, "[t]he U.S. legal system has had a problem with forum shopping." *Department of Commerce Report* at 7. "Practices such as forum shopping have contributed to [foreign companies'] fear of litigation (and liability) and are seen as a source of significant investor uncertainty." *Id.* at 8. The decision below would allow potential plaintiffs suing a foreign

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[5] Litan conducted interviews with representatives of several foreign companies that have invested or established operations in the United States, as well as with attorneys who have counseled foreign companies regarding U.S. investment decisions. *See Id.* at 11–12.

company on any grounds to choose among any U.S. jurisdiction where another company has distributed its products.

Whatever fears of litigation exist in the corporate boardrooms of foreign companies doing business in the United States will be multiplied by a rule that permits the plaintiff's lawyer essentially to choose the forum in which to litigate any claim arising worldwide, simply because a separate company distributed the company's products and those products found their way into the United States. North Carolina's rule, if adopted by this Court, would literally make it open season on foreign corporations and risk a flight from doing business within the United States. The economic effects are outlined below. See Section II.B. *infra.*

II. THE NORTH CAROLINA COURT OF APPEALS' DISREGARD OF CORPORATE DISTINCTIONS WILL NEGATIVELY AFFECT FOREIGN INVESTMENT IN THE UNITED STATES.

In the decision below, not only did the North Carolina Court of Appeals apply the wrong standard to find general jurisdiction, it ultimately found such jurisdiction based on the actions of entities other than the defendants. Specifically, the North Carolina Court of Appeals found that the defendant foreign companies had sufficient contacts with North Carolina to establish general jurisdiction based on the actions of separate companies who distributed tires to the state market. Finding jurisdiction on this basis, whether general or even specific, violates this Court's clear instructions regarding the need for a separate due process analysis as to each defendant and respect for corporate distinctions.

A. The Actions Of Separate Corporate Entities Are Not Attributable To Each Other.

The "respect for corporate distinctions" is a "bedrock principle" of law "deeply ingrained in our economic and legal systems." *Bestfoods*, 524 U.S. at 61–62; *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises launched, and huge sums of capital attracted."). This fundamental principle of corporate law provides that "a corporation will not be held liable for the acts of its subsidiaries or other affiliated corporations." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43 (2007).

The rule of corporate separateness applies equally to the issue of personal jurisdiction. *Keeton*, 465 U.S. at 781 n.13; *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 338 (1925); see also 18 Fletcher, *supra* § 8640.50 (noting that "where the subsidiary is operated as a distinct corporation, the subsidiary's contacts with the forum cannot be imputed to the parent for jurisdictional purposes"); John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. Rev. 445 (2004) (finding that *Cannon* is followed by a majority of courts referencing it).

Based on this "bedrock principle," this Court has long refused to ignore legitimate corporate distinctions in analyzing personal jurisdiction. See *Keeton*, 465 U.S. at 781 n.13; *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); *Cannon Mfg. Co.*, 267 U.S. at 338. As this Court has emphasized, "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary.

Each defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n.13 (citing *Consol. Textile Co.* v. *Gregory*, 289 U.S. 85, 88 (1933); *Peterson* v. *Chi., R.I. & Pac. R.R.*, 205 U. S. 364, 391 (1907)); *Rush*, 444 U.S. at 332 ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."); *Phila. & Reading Ry.* v. *McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact . . . that 'subsidiary companies' did business within the state, warrant a finding that the defendant did business there."). The application of the doctrine of corporate separateness to questions of personal jurisdiction only makes sense. If a parent corporation cannot be held liable based on the acts of its subsidiary, its jurisdictional fate also should not depend on the actions of its subsidiary. Similar interests are at stake in both circumstances: the need for predictability in structuring business arrangements and investment decisions.

Thus, in a case where a foreign manufacturer's product is sold in, or reaches, the United States through the actions of a separate entity, the court must evaluate "individually" each defendant's contacts with the forum state. It is constitutionally improper to base a finding of general jurisdiction over one company on the grounds that a separate company distributed products in the forum. The fact that two corporations may be affiliated does not change the constitutional analysis. See, *e.g.*, *Keeton*, 465 U.S. at 781 n.13; *McKibbin*, 243 U.S. at 268.

To the extent there are concerns about potential misuse of the corporate form, this Court has made clear that "there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate

veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Bestfoods*, 524 U.S. at 62. Thus, were a subsidiary company established as part of a scheme to escape liability—contrary to the record here—such unfairness is already addressed by existing law. But in the absence of any suggestion, much less a finding, that the corporate form has been misused, a court should not ignore the "respect for corporate distinctions" by attributing the acts of one corporate entity to another for purposes of finding the requisite jurisdictional contacts.

While this Court has noted that "the parties' relationships with each other may be significant in evaluating their ties to the forum," *Rush*, 444 U.S. at 332, it has always been careful to hold fast to that "constitutional touchstone" by emphasizing that "[t]he requirements of *International Shoe*, however, *must be met as to each defendant* over whom a state court exercises jurisdiction." *Id.* (emphasis added).

This Court has expressly recognized that the Due Process Clause protects the right of defendant corporations 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 Volkswagen*, 444 U.S. at 297. Providing this "degree of predictability to the legal system" is critical to maintaining a legal environment that continues to attract substantial foreign investment. *Id.*

B. Under The North Carolina Court Of Appeals' Rule, Foreign Companies Would Face Significantly Increased Risk From Having Subsidiaries In The United States.

Companies operating in the global marketplace, whether based in the United States or abroad, utilize a wide variety of corporate structures and business arrangements to bring their products from the place of manufacturing to the end market. Companies may establish subsidiaries or affiliates to serve different countries or regions or may sell their products to independent distributors in a country. These arrangements are not nefarious schemes to be battled by state courts; they are legitimate forms of carrying on beneficial international and interstate commerce. Moreover, many of these arrangements bring significant benefits to the U.S. economy in the form of foreign direct investment. In addition to being wrong as a legal matter, the decision below creates a number of negative consequences.

The North Carolina Court of Appeals goes far beyond any of this Court's precedents regarding either general or specific jurisdiction, subjecting a company to jurisdiction in North Carolina on any claim whatsoever simply because an affiliated company had contacts with the state. Based on the North Carolina Court of Appeals' reasoning, any foreign manufacturer with a U.S. subsidiary that manufactures, sells, or distributes its products would be subject to general jurisdiction in any state in which those products happened to end up.

The U.S. subsidiaries of foreign companies provide significant benefits to the U.S. economy, which this decision risks by increasing legal uncertainty and fueling anxiety. The U.S. subsidiaries of foreign

companies provide jobs to 5.5 million Americans and support an annual payroll of over $400 billion. OFII, *Insourcing Facts*, *available at* http://www.ofii.org/resources/insourcing-facts.html (last visited Nov. 17, 2010) ("*Insourcing Facts*"). Not only do foreign-owned business employ millions of Americans, they also indirectly support an additional 4.6 million jobs because they purchase 80 percent of their inputs from U.S. businesses. U.S. Dep't of Treasury, *Fact Sheet: An Open Economy Is Vital to United States Prosperity* (May 10, 2007), *available at* http://www.treas.gov/press/releases/hp395.htm. What is more, the jobs provided by these U.S. subsidiaries tend to be higher paying, offering an average compensation per worker of $73,124, which is 34.7 percent higher than compensation at all U.S. companies. See *Insourcing Facts*.

These U.S. subsidiaries also make significant investment expenditures here, spending almost $40 billion on research and development and $183 billion on plant construction and new equipment. See *Insourcing Facts*. In addition, they constitute a significant portion of U.S. corporate tax collections, bringing in almost $53 billion in 2007. Internal Revenue Serv., *Historical Summary: Foreign-Controlled Domestic Corporations as a Percentage of All Corporations, Selected Items for Selected Tax Years, 1971-2007*, *available at* http://www.irs.gov/taxstats/bustaxstats/article/0,,id=96311,00.html.[6]

As discussed above, see Section I.D. *supra*, a country's legal environment represents one of the primary considerations when companies consider foreign investment opportunities. While the overall

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[6] Data for tax year 2007 is the most recent available from the IRS.

quality and fairness of the United States legal environment is widely recognized, foreign businesses investing here have expressed concern about the cost of litigation in the United States and the fairness and predictability of the legal environment. See *Department of Commerce Report* at 5–6. For companies considering whether to establish subsidiaries here or evaluating their continued investments, the North Carolina Court of Appeals decision represents a significant blow to both fairness and predictability.

III. THE NORTH CAROLINA COURT OF APPEALS' RULE OVERREACHES ITS SOVEREIGN POWER AND INTERFERES WITH THE CONDUCT OF THE NATION'S FOREIGN RELATIONS.

At their core, the requirements for personal jurisdiction derive from the inherent limits of state authority. See, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958) (holding that the "requirements for personal jurisdiction over nonresidents . . . . are a consequence of territorial limitations on the power of the respective States"). More recently, this Court has strongly reaffirmed the fundamental underlying basis for personal jurisdiction, which is a state or nation's sovereign power over its territory. *Burnham* v. *Super. Ct.*, 495 U.S. 604, 608–09, 618 (1990). This is why, even when expanding the limits of personal jurisdiction to allow jurisdiction over nonresident defendants, this Court has always required the existence of "'minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen*, 444 U.S. at 291 (quoting *Int'l Shoe*, 326 U.S. at 316).

Moreover, because the North Carolina Court of Appeals decision burdens non-U.S. entities and

international commerce, it presents a special concern. *Asahi Metal Indus. Co.* v. *Super. Ct.*, 480 U.S. 102, 115 (1987). A majority of this Court in *Asahi* concluded that a case involving a non-U.S. defendant calls for special consideration of the interests of other nations "as well as the Federal interest in Government's foreign relations policies." *Id.* The Court instructed that these interests require "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" and cautioned that "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Id.* (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

In this case, the North Carolina Court of Appeals' failure to apply the proper test for general jurisdiction involves more than just a question of individual liberty or interstate federalism; it touches on the proper role of the states vis-à-vis the federal government. The primacy of the federal role in relations with foreign governments and persons pervades the federal system established by the Constitution. See Born, *supra*, at 29–31, n.123. And, while this case does not involve direct state regulation of foreign commerce, the Constitution's express grant of power to Congress to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, embodies the notion that "[f]oreign commerce is pre-eminently a matter of national concern." *Japan Line*, 441 U.S. at 448. As such, "'[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Id.* (quoting *Bd. of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)).

This is for good reason: if state courts are allowed to follow the expansive rule of general jurisdiction adopted by the North Carolina Court of Appeals, courts in other countries, perhaps with legal systems less impartial and independent, may well follow suit. See, *e.g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963) (recognizing that perceived affronts to foreign sovereign interests could "invite retaliatory action from other nations").

While the grant of the foreign commerce power to Congress does not preclude state courts from exercising jurisdiction over foreign companies, it does call for heightened scrutiny to ensure that states' assertions of jurisdiction stay within their legitimate bounds and are reasonable. *Asahi*, 480 U.S. at 115. It also means that there is a branch of government with ample authority to weigh the competing concerns associated with the expansion of our global economy. That institution is Congress. But, in all events, a state's exercise of general jurisdiction over a foreign company with no "contacts, ties, or relations" to that state cannot stand under our Constitutional system. *Int'l Shoe*, 310 U.S. at 319. This Court should reaffirm the fundamental principles of due process that protect each individual defendant from state court overreaching.

The rule adopted by the North Carolina Court of Appeals would allow North Carolina to assert general jurisdiction, on any claim whatsoever, over a company from any nation whose products happen to end up in the state. Not only is this unreasonable under the "great care" urged by the Asahi majority, it goes well beyond the "'traditional notions of fair play and substantial justice'" that allow jurisdiction over an "absent," or foreign, defendant "only with respect

to suits arising out of the absent defendant's contacts with the State." *Burnham*, 495 U.S. at 609–10 (quoting *Int'l Shoe*, 326 U.S. at 316).

CONCLUSION

For the reasons set forth above, and in the Brief for Petitioners, the decision below should be reversed.

Respectfully submitted,

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