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No. 10-76

In the Supreme Court of the United States

GOODYEAR LUXEMBOURG TIRES, SA,
GOODYEAR LASTIKLERI T.A.S., AND
GOODYEAR DUNLOP TIRES OPERATIONS, SA,

Petitioners,

v.

EDGAR BROWN AND PAMELA BROWN,
CO-ADMINISTRATORS OF THE ESTATE OF JULIAN DAVID
BROWN, AND KAREN M. HELMS, ADMINISTRATRIX OF THE
ESTATE OF MATTHEW M. HELMS,

Respondents.

On Writ of *Certiorari* to the
North Carolina Court of Appeals

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether foreign-based subsidiaries of an American corporation that choose to become part of an ongoing and highly-integrated business enterprise operating within the forum may evade that state's general personal jurisdiction even though they regularly sell tens of thousands of their products through that enterprise in the forum state?

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STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is correct except in its characterization of the Court of Appeals' decision. *See* Petitioners' Brief at 2. As demonstrated herein, "the court below," did not "[b]ase[] such general jurisdiction solely on the fact that a portion of the tires that Petitioners manufacture has reached [North Carolina] via the stream of commerce." *Id.*

INTRODUCTION

This case tests the limits of outsourcing.[1]

Goodyear Tire & Rubber Company ["Goodyear"], an American tire-maker, and Petitioners, its foreign design and manufacturing subsidiaries, made a strategic business decision to conduct their business in North Carolina as members of a highly-integrated intra-corporate, global enterprise. As members of the Goodyear enterprise, however, Petitioners did not function as free-standing businesses. Instead, they ceded to the enterprise some core business functions, including solicitation of orders and distribution of their own products. As one Goodyear official scoffed, Petitioners "just build widgets." JA256.

After successfully utilizing the Goodyear enterprise to sell tens of thousands of their tires in North Carolina, however, Petitioners claim that they cannot be sued there for the fatal injuries their tire inflicted upon two North Carolina teenagers in France because North Carolina's courts have no general personal jurisdiction over them.

This Court must, therefore, decide whether, by outsourcing product design and manufacturing to subsidiaries in foreign countries, American corporations like Goodyear have also "outsourced" to foreign courts the exclusive right to decide whether their subsidiaries are liable in tort for deaths resulting from the defective products those subsidiaries produce.

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[1] "Outsourcing involves contracting for services from third parties that would historically have been done in-house by a business' employees." Ann Spiotto & James Spiotto, *The Ultimate Downside of Outsourcing: Bankruptcy of the Service Provider*, 11 AM. BANKR. INST. L. REV. 47 (Spring 2003).

STATEMENT

I. THE ACCIDENT

Thirteen-year-old Julian Brown and Matt Helms were once considered among the best young soccer players in their home state of North Carolina. JA122-23. Both were invited to play on its Olympic development team at European tournaments. JA124-24.

On April 18, 2004, Julian, Matt, and their teammates rode on a bus to Charles de Gaulle Airport to begin their long journey home. PA31a. Outside Paris, a tire on that bus, "designed, manufactured and distributed" by Goodyear Luxembourg Tires, SA ["Goodyear Luxembourg"], Goodyear Lastikleri T.A.S. ["Goodyear Lastikleri"], and Goodyear Dunlop Tires Operations, SA ["Goodyear Operations"], through Goodyear's "internal distribution" system, blew out when its plies separated. PA31a, 33-35a; JA255. The driver lost control of the speeding bus, it hit a concrete wall, and overturned, crushing and killing Matt Helms, who died at the scene in the rain. PA31a; JA126-27.

Julian Brown was thrown from the bus by the accident then trapped underneath it when the bus rolled atop him. JA126. He suffered 2 broken legs, a broken jaw, severe pelvic fractures, and severe head trauma. *Id.* Julian lay in a coma for 8 days. *Id.* When French doctors pronounced him brain dead, his parents, Respondents Edgar and Pamela Brown, and his sister, who had all travelled from North Carolina, made the agonizing decision to remove life support. *Id.* They were at his side when he died.

II. THE GOODYEAR TIRE

The tire that led to Julian's and Matt's deaths was manufactured in Turkey by Goodyear Lastikleri, designed by Goodyear Luxembourg, and sold through Goodyear Operations. PA32a; JA202, 236. Called a Goodyear Regional RHS tire, JA236, the tire bore certification markings required by the U.S. Department of Transportation before tires may be sold in the United States. JA202-03; 290-91.

These tires are not regularly sold in the United States; however, modified versions were imported in 2006 when a strike closed the American plant that ordinarily produced them. JA237-38. Most were eventually returned to Europe unsold. JA238. The Court should not confuse these tires, as Petitioners do, *see* Petitioners' Brief at 3, with the thousands of automobile, bus, truck, and specialty tires imported into and sold by Petitioners in North Carolina through Goodyear's internal distribution system, described below.

III. PETITIONERS' ROLE IN THE GOODYEAR ENTERPRISE

Petitioners are Goodyear subsidiaries. PA34a. Goodyear owns 100% of Goodyear Operations' stock. *Id.* Goodyear is an American-based multinational corporation that develops, markets, and sells tires for myriad applications. A named defendant below, JA119, Goodyear did not contest the trial court's assertion of general personal jurisdiction over it here and has not joined Petitioners' appeal.

Goodyear and its subsidiaries conduct their global tire business through a highly-integrated, "internal"

supply and distribution system of which each is part. JA255. As explained by Donn Kramer, Director of Product and Supply Chain Management for Commercial Systems, as Goodyear's representative, he "takes a product from concept through production, deciding performance parameters and so on. And then on the supply side it's scheduling the plants for production on the commercial product side the business, and customer service, OEM [original equipment manufacturer] replacement, and deployment of the product from the facilities." JA224-25.

Goodyear's global enterprise has deep and long-standing roots in North Carolina. JA121. Goodyear has been registered to do business there since 1956 and maintains a registered agent in Raleigh.[2] It also owns and operates three large tire and tire-mold manufacturing plants in Fayetteville, Statesville, and Asheboro, North Carolina.[3]

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[2] Dep't of the Secretary of State, N.C, *available at* http://www.secretary.state.nc.us/corporations/Corp.aspx?PitemId=5030445 [listing for "Goodyear Tire & Rubber Company"]. Upon request, a court "shall" take judicial notice of facts not subject to reasonable dispute. *See* FED. R. EVID. 201. *Government of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) (Rule 201 applies even on appeal). This Court is requested to take judicial notice of the facts set forth in the listed public records.

[3] *See supra* note 2; FED. R. EVID. 201. This Court is requested to take judicial notice of property tax records for Goodyear from Iredell, Randolph, and Cumberland Counties, North Carolina, *available at* http://www.co.iredell.nc.us/apprcard/apprcard.asp?Parcel=4773059126.000&Card=001 ["mold plant"]; http://txpwa.co.randolph.nc.us/publicweb access/BillDet ails.aspx?BillPk=1955884 [real property]; http://txpwa.co.randolph.nc.us/publicwebaccess/BillDetails.aspx?BillPk=2001705 [business personal property]; http://152.31.99. 19/d21lib/www/SWMW200.

By participating in Goodyear's global enterprise, Goodyear subsidiaries, irrespective of their level of ownership by Goodyear, surrender their status as independent and free-standing businesses. Instead, they act as carefully-coordinated operational links in the Goodyear global supply chain – "sources" in Goodyear parlance. JA228, 270. To that end, Goodyear Luxembourg and Goodyear Lastikleri did not directly solicit sales of their own products in North Carolina *or anywhere else*. Instead, as Mr. Kramer explained:

> Q. The originating request comes from Goodyear US to these –
> A. Right, right.
> Q. – either your subsidiary corporations or related companies?
> A. Right.

JA279 ("it would be emanating from a request that we [Goodyear] would make for a requirement for something we do not have . . ."); JA227, 228, 256.

Once a request to supply products was made through the Goodyear enterprise and products were produced, whether the plant was located in Turkey or North Carolina, the distribution process was the same. JA264. "There's three channels, either goes to OE [original equipment], it goes to replacement, or it goes for export." *Id*. Moreover, Mr. Kramer made clear that "they [Petitioners] don't send tires into the United States for distribution. We [Goodyear] make that determination in this country." JA279. Mr. Kramer testified that this practice was not confined to goods sent to the United States:

CGI ["industrial" property]; http://152.31.99.19/d21lib/www/SMMW110.CGI?LRPARC=128029&TXYEAR=2010 [plant equip.], respectively.

> A. Well, first of all, the plant in Turkey [Goodyear Lastikleri] doesn't control any distribution.
> Q. Okay.
> A. They just manufacture the tire.
> Q. Got you.
> A. They don't interface with any of the other pieces. Their job is to be given a forecast or a ticket and then they just build widgets.

JA256. In other words, "they would not deal directly with customers or bring tires into the United States without our [Goodyear's] approval and sanction." JA256. He emphasized that "Europe would never send tires over here through . . . as one of our enterprises without coming through [Goodyear] North America Tire to say, you know, should tire come in or shouldn't come in . . . *that just doesn't happen*." JA259 (emphasis supplied).

Thus, when Goodyear Lastikleri shipped tires to North Carolina, it shipped them solely through Goodyear's regular, internal distribution network, and at its request. Mr. Kramer explained:

> Q. Were those tires shipped solely through Goodyear chain or were those tires sold to independent dealers from Europe, for example?
> A. Well, for our involvement *they would never go through another independent dealer. We would handle it through our internal distribution.*
> Q. Okay. And do you know if those 1,847 tires[4] sold in North Carolina, were all of those

[4] After subsequent review, Goodyear and Donn Kramer determined that the actual sales numbers were substantially higher. JA293-94.

> sold through Goodyear tire dealers or Goodyear – through the Goodyear distribution, internal distribution or were they sold through independent?
>
> * * *
>
> A. Well, *Goodyear would have brought them in* –
>
> Q. Okay.
>
> A. – and then they would have been sold through the independent dealers.

JA254-55 (emphasis supplied). The distribution process was the same for Goodyear Luxembourg's and Goodyear Operations' products. JA269-70; 294. In sum, *none* of Petitioners' products ever left the Goodyear enterprise and its "internal distribution" system until *after* they reached North Carolina.[5]

During the relevant period, Petitioners manufactured, at Goodyear's request, more than 44,000 tires they sold in North Carolina through the Goodyear enterprise described above. JA293-94. In particular, from 2004 through 2007, Goodyear Luxembourg manufactured, at Goodyear's request, 6,402 commercial truck, trailer and passenger vehicle tires it sold through that enterprise in North

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[5] Petitioners misstate the evidence when they claim that 1) Petitioners did not know their tires were being sold in the U.S. or North Carolina, 2) tires eventually sold in North Carolina were "sold" to an unidentified "affiliate" in Europe; and 3) Goodyear itself "purchased a small percentage of those tires from the European affiliate." Petitioner's Brief at 48-49. There is nothing in the testimony cited or, indeed, in the record here that suggests that these tires were "sold" to anyone until after they reached North Carolina. Until that point, Donn Kramer testified that they remained in Goodyear's "internal distribution" system. JA255.

Carolina. JA293-94. Similarly, Goodyear Operations manufactured, at Goodyear's request, 33,923 passenger vehicle tires it sold through the Goodyear enterprise in North Carolina. JA294. Finally, Goodyear Lastikleri manufactured, at Goodyear's request, 4,059 passenger vehicle tires it sold through the Goodyear enterprise in the state. JA294.

Mr. Kramer conceded that specialty tires manufactured at Petitioners' plants were also routinely requested, brought into, and sold by them in North Carolina through the Goodyear enterprise to replace those sold as original equipment on "low-boys," and horse and boat trailers. JA241-43. He admitted that tires manufactured at Goodyear Luxembourg's plant had also been requested, brought into, and sold by Goodyear Luxembourg through the Goodyear enterprise in North Carolina for use on cement mixers, waste haulers, and front-end loaders. JA248-49. Goodyear needed to import these tires into North Carolina because Goodyear did "not have a source here. . ." JA250-51 (Q. "[G]oodyear US plants may not make that particular type of tire? A. Right."). Thus, Goodyear's ordinary and exclusive way of supplying these specialty tires to buyers and dealers who requested them in North Carolina was to "source" them from Petitioners' plants abroad.

Unfortunately, although he was designated as Goodyear's representative for a FED. R. CIV. P. 30(b)(6) deposition on these issues, JA205-07, Mr. Kramer did no research and thus could not quantify the actual numbers of such sales, or of the many tires sold as original equipment on European passenger cars, buses, and trucks imported into North Carolina. JA248. Thus, the trial court found that "the number

of tires shipped into North Carolina from each of these manufacturers may actually be substantially higher . . ." PA33a.

IV. THE DECISIONS BELOW

A. The Trial Court's Order

The trial court, in its order exercising general personal jurisdiction over Petitioners, never used the term "stream of commerce." PA30-36a. Not once.

Instead, it made four key conclusions of law: 1) "[d]efendants have continuous and systematic ties with the State of North Carolina;" 2) "[d]efendants activities in North Carolina are substantial;" 3) the quantity, nature, and quality of their contacts as well as North Carolina's interest in the case, and the convenience of the parties all "weigh in favor of the exercise of general jurisdiction over the defendants;" and 4) the "exercise of general jurisdiction over the defendants comports with due process and does not offend traditional notions of fair play and substantial justice." PA35-36a.

In support of these conclusions, the Court focused on Goodyear's highly-integrated business model. PA33-35a; *see* PA6a & n.4. In particular, it found:

> 12. The defendants, as manufacturers, did not have their own distribution system for the sale of their tires, but instead *used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and North Carolina.*

> 13. The defendants knew or should have known that tires they manufactured were *shipped to the United States through their Goodyear parent and affiliated companies* and sold in North Carolina on a continuous and systematic basis.
>
> * * *
>
> 16. [A]ll three of the foreign defendant companies are subsidiaries of Goodyear in the United States *and as such have additional, abundant ties to the United States*.

PA33-34a (emphasis supplied). The Court found Petitioners' substantial tire sales in North Carolina through the Goodyear's enterprise, the revenue Petitioners derived from them, the "quality of those contacts, which include systematic and repeated contacts with the state of North Carolina for the purpose of commerce, along with the defendants' ownership by a U.S. corporation doing substantial business in North Carolina, weighed in favor of a finding of general jurisdiction over the defendants." PA34a.

B. The Court of Appeals' Opinion

In reviewing the trial court's order, the Court of Appeals engaged in a two-step process. It determined first "whether the [trial court's] findings are supported by competent evidence;" and, if so, "whether . . . the exercise of personal jurisdiction would violate defendant's due process rights." PA10a (quoting *Better Bus. Forms, Inc. v. Davis*, 462 S.E.2d 832, 838 (N.C. 1995)).

The Court focused first on "'[w]hether the trial court's findings of fact support its legal conclusions that Defendants had 'continuous and systematic contacts with North Carolina' thereby justifying the exercise of general personal jurisdiction over Defendants." PA13a. Thus, "[t]he relevant question before both the trial court and this Court is whether Defendants' 'activities in the forum are sufficiently continuous and systematic' . . ." *Id.* It then discussed the factors courts ordinarily consider in determining whether such contacts exist. PA12a.

The Court correctly recognized that, in assessing Petitioners' contacts with North Carolina, it must insure that those contacts resulted from "actions by Defendants rather than from mere happenstance or coincidence or the actions of others." PA13a. Unfortunately, in evaluating the contacts here, the Court took a slight detour.

The Court apparently responded to language, adopted by North Carolina's courts[6] from *Hanson v. Denckla,* 357 U.S. 235, 253 (1958),[7] and *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984), utilizing the "purposeful availment" concept for the limited purpose of assessing whether, in the general jurisdiction context, contacts could be attributed to a foreign defendant or were, instead, the "unilateral" acts of someone else. It then

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[6] *See Modern Globe, Inc. v. Spellman*, 263 S.E.2d 859, 863 (N.C. Ct. App. 1980) (quoting *Hanson,* 357 U.S. at 253), *quoted in Lulla v. Effective Minds, LLC*, 646 S.E.2d 129, 133 (N.C. 2007) (cited by the trial court).

[7] "It is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 357 U.S. at 253.

engaged in extended *dicta* discussing that standard as used in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980), for assessing whether the exercise of specific jurisdiction over a foreign defendant offends due process. *See* PA14a-21a. It was, however, in the more limited context that the Court asked whether Petitioners had "purposefully injected their products into the stream of commerce without any indication that [they] desired to limit the are of distribution of [their] product as to exclude North Carolina" PA20a.

That limitation becomes apparent when the trial court states, at the end of the same paragraph:

> Thus, we must evaluate the validity of the trial court's decision that [Petitioners] were subject to the jurisdiction of the Onslow County Superior Court by examining whether the trial court's findings of fact, considered in their entirety, provide an adequate basis for a conclusion that Defendants had 'continuous and systematic contacts with North Carolina' in light of the well-established legal principles outlined above.

PA21a.

The Court's exuberant concern for proper attribution of contacts becomes apparent when it questions trial court findings 17 and 21, PA22a, and concludes that Petitioners were not "directly" responsible for their tires' presence in North Carolina, in large part, because Petitioners were never directly responsible for their tires' presence *anywhere*. PA21a; JA223-28; 256; 279.

In finding that the evidence supported the trial court's findings, the Court explained: "through a regular process employed within the Goodyear organization, a substantial number of tires manufactured by the Defendants were imported into the United States and distributed to various entities in North Carolina." PA26a. The Court, therefore, found that Petitioners "purposefully and intentionally" placed their products in the Goodyear distribution enterprise, which it described as the "stream of commerce," PA27a, knew or should have known that "a Goodyear affiliate obtained the tires manufactured by Defendants and sold them in the United States in the regular course of business," PA27a, and "that several thousand tires manufactured by each of the Defendants eventually found their way into North Carolina markets through *the operation of a continuous and highly-organized distribution process*." *Id.* (emphasis supplied).

The Court of Appeals made clear that its use of "stream of commerce" analysis was limited to whether tire sales in North Carolina could be charged to Petitioners for jurisdictional purposes.

> Instead of adopting a general rule precluding the use of stream of commerce analysis to support a finding of general personal jurisdiction, we believe that the real issue is the extent to which Defendants' product were, in fact, distributed in North Carolina markets. . . the trial court's findings reflect that thousands of tires manufactured by each of the Defendants were distributed in North Carolina *as the result of a highly organized*

> *distribution process that involved Defendants and other Goodyear affiliates.*

PA28a (emphasis supplied). On *that* basis, the Court found "competent evidence" that the exercise of general jurisdiction over Petitioners in North Carolina was proper and did not offend due process. PA29a.

SUMMARY OF ARGUMENT

This case presents the Court with a clear choice between refining well-established principles of "general jurisdiction"[8] to reflect and address the realities of 21st-Century transnational commerce or calcifying those principles in discarded 19th-Century business models.

Looking to the distant past, Petitioners would require the physical presence in the forum of a legal fiction – the corporation – before a court could exercise general jurisdiction over it. Sixty-five years ago, in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court rejected as obsolete just such a "presence" requirement and expanded jurisdictional boundaries to reflect the business realities of the time. The "minimum contacts" test it

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[8] "When a state exercises personal jurisdiction over a defendant not arising out of or related to the defendant's contacts with the forum, the state has been said to be exercising 'general jurisdiction' over the defendant." *Hall*, 466 U.S. at 415, n.9 (1984) (citing Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81 (1980); Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966)).

announced governs the exercise of personal jurisdiction over corporations to this day. It has four requirements: the corporation's contacts with the forum must be 1) continuous; 2) systematic; and 3) substantial such that the exercise of general jurisdiction over it 4) comports with due process.

Since *International Shoe* was decided, American corporations and their foreign subsidiaries have increasingly conducted their U.S. business through highly-integrated networks in which each constituent corporation plays a critical role. "Outsourcing" manufacturing to foreign countries has only increased this trend. When, as here, the products those foreign subsidiaries manufacture injure American citizens, however, these subsidiaries claim that they are beyond the reach of U.S. courts.

This Court has already constructed the jurisprudential foundation needed to exercise general jurisdiction over Petitioners. In fact, even the Government admits that lower courts routinely exercise jurisdiction over corporations under similar circumstances. You would never know it from reading Petitioners' Brief.

Petitioners claim that the Court of Appeals' decision conflicts with dozens of opinions from state and circuit courts. Yet most of these courts have also asserted jurisdiction over or found corporations liable on similar facts and enterprise theories. A purported conflict arises only because Petitioners characterize this case as one in which the Court asserted general jurisdiction over defendants solely because they placed some goods in the ordinary "stream of commerce," *without more*, and some ended up in North Carolina. That is simply not what happened.

Petitioners chose to become participants in a highly-integrated, "internal" Goodyear supply and distribution enterprise. Through that enterprise, Goodyear requested tires on behalf of North Carolina buyers and dealers, Petitioners manufactured tires based on such requests, then utilized the internal distribution network to transport, import, and sell tens of thousands of tires in North Carolina, deriving substantial income from such sales. *They made no sales in North Carolina outside this enterprise*. Petitioners' contacts with North Carolina were, therefore, continuous, systematic, and substantial.

Due process is also satisfied by the exercise of general jurisdiction over Petitioners. In other areas of the law, this Court has found that due process concerns are satisfied for corporations that actively participate in integrated business enterprises. Traditional due process concerns – convenience, interest, and fairness – are also satisfied here.

There are sound policy reasons to affirm the Court of Appeals' decision. Adopting Petitioners' jurisdictional model would devastate the U.S. economy by encouraging American companies to "outsource" manufacturing and jobs to foreign subsidiaries in order to "outsource" these subsidiaries' tort liability to foreign courts. By contrast, there is no reason to believe that trade will collapse because this Court affirms. Finally, courts are equipped to control forum-shopping, if any.

The exercise of general jurisdiction over Petitioners here was proper. Respondents respectfully request that this Court affirm the decision of the Court of Appeals as to all Petitioners and remand the case for trial.

ARGUMENT

I. TO EXERCISE GENERAL JURISDICTION OVER PETITIONERS, THIS COURT REQUIRES CONTINUOUS, SYSTEMATIC, AND SUBSTANTIAL CONTACTS WITH THE FORUM, NOT PHYSICAL "PRESENCE" IN IT

A. *International Shoe* and Its Progeny Rejected 19th Century Notions of "Presence" as a Prerequisite to Exercising General Jurisdiction Over Corporations

Since Roman times, a court's jurisdiction to render judgment *in personam* had been grounded in its *de facto* power over the defendant's person. *Burnham v. Superior Court of Calif.*, 495 U.S. 604, 611 (1990) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§554, 543 (1846)). Thus, a defendant's "presence" in the forum was once considered a prerequisite to rendition of judgments binding upon him. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); *Philadelphia & Reading R. Co. v. McKibbon,* 243 U.S. 264, 265 (1917). This comes as no surprise.

"Prior to the 1850's, it was either assumed or required that the operations of corporations would be confined to their chartering states." *See* Henry Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 151 (1985), *cited in* Joseph Sommer, *The Subsidiary: Doctrine Without a Cause*, 59 FORDHAM L. REV. 227, 275 & n.182 (1990). In fact, the first corporate subsidiary was not created until 1888, ten years *after Pennoyer* was decided. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J. dissenting). It was generally

acknowledged at that time, however, that, for corporations, "presence" was "purely fictional." *Burnham*, 495 U.S. at 618 (citing 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 360, 384 (1935); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)).

"In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity led to an 'inevitable relaxation of the strict limits on state jurisdiction' over nonresident individuals and corporations." *Hanson,* 357 U.S. at 260. That "relaxation" culminated in *International Shoe.*

In *International Shoe*, 326 U.S. at 316, the Court recognized the right of state courts to assert jurisdiction over nonresident corporations.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, have certain minimum contacts with it such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'

Id. (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court justified its abandonment of the traditional requisite of "presence" in the forum by the difficulty of applying that concept to corporations.

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its

> behalf by those who are authorized to act for it. *To say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided.*

326 U.S. at 316 (emphasis supplied). Thus, the Court held that due process demands are met "by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.* at 317. It added, "an 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *Id.*

Against this backdrop, the Court concluded that jurisdiction over foreign corporations in the forum was appropriate "when the activities of the corporation there have not only been *continuous and systematic*, but also give rise to the liabilities sued on . . ." *Id.* (emphasis supplied).

Although *International Shoe* arose out of attempts by the State of Washington to collect deficiencies in payments to its unemployment compensation fund for salesmen employed by the Illinois company in Washington, the Court also announced the jurisdictional yardstick to be used when claims arise *outside* the forum.

> While it has been held . . . that continuous activity of some sorts within the state is not enough to support the demand that the corporation be amendable to suits unrelated to that activity . . . there have been instances in which *the continuous corporate operations*

> *within the state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealing entirely distinct from those activities.*

Id. at 318. The Court eschewed "mechanical or quantitative" due process tests. *Id.* at 319. Instead, "whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.*

The Court reaffirmed these principles in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952). A nonresident sued in Ohio a Philippine corporation that had been "carrying on in Ohio a continuous and systematic, but limited, part of its business" during World War II for claims arising from its unrelated activities elsewhere. *Id.* at 438. Although the corporation had never been licensed to do business in Ohio or appointed an agent for service there, the Court did not find those markers "a conclusive test." *Id.* at 445.

The Court found that the due process clause neither prohibits or compels Ohio's exercise of general jurisdiction over nonresident corporations. *Id.* at 446. Instead, the question is "whether, as a matter of due process, the business done in Ohio by the . . . mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation." *Id.* at 447.

In *Perkins*, the corporation had no office or ongoing mining operations in Ohio. *Id.* Instead, the company's president and principal shareholder had a

personal office in which he conducted his personal affairs, some activities on the company's behalf, and kept the company's files. *Id.* at 447-48. He conducted some company correspondence and drew salary checks in Ohio, using two local banks which held some company funds. *Id*. at 448. An Ohio bank acted as transfer agent for Benguet's stock and he held few board meetings at his home or office in Ohio. *Id.* at 448. Finally, he oversaw the rehabilitation of the company's mining operations in the Philippines from his office in Ohio. *Id.*

On these facts, the Court found that "he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company" such that "it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding." *Id.*

In *McGee v. Int'l Life Ins.Co.*, 355 U.S. 220, 226 (1957), the Court reaffirmed that "in the continuing process of evolution this Court has accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over corporations." The Court acknowledged that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents," in large part, because of "increasing nationalization of commerce. . ." *Id*. at 222-23.

This Court again reaffirmed *International Shoe's* departure from historic reliance on presence in the forum in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The Court first pronounced that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." *Id.* at 212.

> Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present' but on whether there have been 'such contacts of the corporation with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.'

Id. at 204.

In *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982), an insurance case, the Court announced that personal jurisdiction "represents a restriction on judicial power *not as a matter of sovereignty*, but as a matter of individual liberty." (Emphasis supplied). Otherwise, it reasoned, personal jurisdiction could not be waived. *Id.* at 703. On that basis, it reaffirmed that the test for personal jurisdiction was "minimum contacts," not "presence." *Id.* at 702-03.

The Court continued the evolution from the concept of "presence" in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). A New York resident sued Hustler Magazine, an Ohio corporation with its principal office in California, for libel in New Hampshire. Hustler's only connection with New Hampshire was its regular sales of 10,000 to 15,000 magazines there each month. *Id.* at 772. Nevertheless, the Court found New Hampshire's exercise of jurisdiction over Hustler proper even for claims for damages from the libel in all 50 states under the state's "single publication rule." *Id.* at 773, 781 & n.2.

The same year, the Court decided *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), as case arising from a helicopter crash in Peru that killed four U.S. citizens. Their survivors sued Helicopteros Nacionales de Colombia ["Helicol"], a Colombian corporation and owner of the helicopter, in Texas. None of the survivors or decedents were Texas residents.

Helicol was not authorized to do business in Texas, had no agents for service of process, never performed helicopter operations in the state, or sold any products that reached Texas. *Id.* at 412. It never solicited business in Texas, signed a contract or had any employees based there, never recruited any employee in the state, owned any real or personal property, or maintained an office or establishment there either. *Id.*

In fact, Helicol's only contacts with the state were 1) the fact that decedents were hired in Houston by a Houston-based consortium [of which Helicol was not part]; 2) Helicol's CEO once met and negotiated part of its deal with decedents' employer in Houston; 3) Helicol made helicopter and spare part purchases in Texas from 1970-77; 4) Helicol occasionally sent pilots to Texas for training and to ferry aircraft to South America; 5) it sent management and maintenance personnel to Texas to receive "plant familiarization" and technical advice; and 6) Helicol received monies drawn on Texas banks. *Id.* at 411.

In holding that the exercise of general jurisdiction over Helicol in Texas offended due process, the Court framed its inquiry as "whether [Helicol's contacts with Texas] constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Id.* at 412.

In analyzing these contacts, the Court first dismissed the notion that the source of Helicol's checks mattered in its jurisdictional inquiry. *Id.* at 416-17 (citing *Hanson,* 357 U.S. at 253; *Kulko v. California Superior Court*, 436 U.S. 84, 93-94 (1978)). In *Hanson*, the Court made clear that

> The unilateral activity of those who claims some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the protection of its laws.

357 U.S. at 253 (emphasis supplied); *see Keeton*, 465 U.S. at 781 (jurisdiction appropriate where defendant "deliberately" engaged in significant activities in the state). The *Hall* Court also rejected Helicol's purchases in Texas, relying on *Rosenberg*'s conclusion that "mere purchases [as opposed to sales], even if occurring at regular intervals, are not enough to warrant" the exercise of general personal jurisdiction.[9]

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[9] 466 U.S. at 417 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923)). Nothing in the Court's citation to *Rosenberg,* however, evinces its resurrection of *Pennoyer's* "presence" requirement. In fact, in a footnote, the Court noted the limited proposition for which it and the *International Shoe* Court cited that case. 466 U.S. at 418, n.12. In dissent, Justice Brennan challenged even this narrow reliance on *Rosenberg's* continuing validity. *Id.* at 420 (Brennan, J., dissenting).

In dissent, Justice Brennan challenged the Court's conclusion that the exercise of general jurisdiction over Helicol was improper. *Id.* at 420. He observed first that "the Court makes no attempt, however, to ascertain whether the narrow view of *in personam* jurisdiction adopted by the Court in Rosenberg comports with 'the fundamental transformation of our national economy' that has occurred since 1923." *Id*. at 422 (Brennan, J., dissenting) (quoting *McGee*, 355 U.S. at 222-23). Noting the vast expansion and increasing complexity of the modern business environment, he complained:

> while relying on these modern-day realities to denigrate the significance of Helicol's contacts with the forum, the Court refuses to acknowledge that these same realities require a concomitant expansion in a forum's jurisdictional reach.

Id. at 424, n.2.

No Court since *Hall* has addressed directly the limits of general jurisdiction. Nevertheless, several have reaffirmed the rule that jurisdiction "may not be avoided merely because the defendant did not physically enter the forum State." *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985).

> [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus . . . *we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.*

Id. (emphasis supplied).

Similarly, in *World-Wide Volkswagen,* 444 U.S. at 294, the Court acknowledged that, in response to the "increased the flow of commerce between the States . . . the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of [*Pennoyer*], to the flexible standard of [*International Shoe*]." *Id.* In fact , it announced that the Court had "abandon[ed] the shibboleth that '[the] authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id.* at 293, (quoting *Pennoyer*, 95 U.S. at 720). Nevertheless, it held that the "total absence" of contacts with the forum precluded specific jurisdiction in that case. *Id.*

Both Justices Brennan and Marshall dissented. Both objected that the Court's decision did not reflect the realities of modern commerce. Justice Marshall focused on the realities of the marketplace and, in particular, on the "purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles." *Id.* at 314-15 (Marshall, J., dissenting).

Ironically, it may be *Burnham*, 495 U.S. 604, a case involving "tag" jurisdiction over a nonresident individual, that drove the final stake in *Pennoyer*'s heart. "It may be that whatever special rule exists permitting 'continuous and systematic' contacts . . . to support jurisdiction with respect to matters unrelated to activity in the forum applies only to corporations, *which have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.*'" *Id.* at 610, n.1 (quoting *International Shoe*, 326 U.S. at 316)

(emphasis supplied); *see also Shaffer*, 433 U.S. at 203.

Thus, the jurisdictional test this Court must apply here is whether Petitioners had continuous, systematic, and substantial contacts with North Carolina sufficient to "make it reasonable, in the context of our federal system of government, to require the corporation[s] to defend the particular suit there," *not* whether these legal fictions are "present" in an increasingly "virtual" forum. *Shaffer*, 433 U.S. at 204.

B. Continuous, Systematic, and Substantial Contacts Exist Where, As Here, Foreign Subsidiaries Choose to Become Part of an Ongoing, Internal, Integrated Enterprise Operating Within the Forum

1. This Court's Decisions Countenance the Exercise of General Jurisdiction Over Petitioners

"'If *International Shoe* stands for anything . . . it is that a truly interstate [or international] business may not shield itself from suit by a careful but formalistic structuring of its business dealings.'" *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) (Breyer, J.) (quoting *Vencedor Manufacturing Co. v. Gougler Indus.*, 557 F.2d 886, 891 (1st Cir. 1977)). Although justices of this Court have recognized that the proliferation of complex multinational business enterprises may require the concomitant expansion of jurisdictional rules to

address them, the Court has had few opportunities to undertake that expansion. Nevertheless, in the few it has had, this Court has built the jurisprudential foundation it needs to determine the limits of due process in 21st-Century transnational commerce and in this case.

Starting with *International Shoe*, the Court embraced the idea of attribution or merger for jurisdictional purposes of local corporate activities and those of foreign corporations or subsidiaries. *See* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 2 (1986). In *International Shoe*, the Court permitted salesmen's activities in Washington to supply the necessary contacts with International Shoe in Illinois to support the exercise of jurisdiction over it in Washington even though International Shoe otherwise conducted no business and had no other contact with that state. 326 U.S. at 320.

In *Perkins*, as in this case, the Philippine mining company engaged in no manufacturing or actual production in the forum state. In fact, in *Perkins*, unlike this case, the company had no sales in the forum. The Court upheld the assertion of general jurisdiction over Benguet because its president had engaged in "continuous and systematic *supervision*" of the company's activities from the forum. 342 U.S. at 448 (emphasis supplied). Four years before, in *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 813-16 (1948), the Court had held similarly that a foreign parent could be "found" in the United States because of its "constant supervisions and intervention" in the activities of its U.S. subsidiaries

going well "beyond normal exercise of shareholder's rights."

Although business practices have grown more complex since *Perkins* was decided in 1952, its principle − that supervision of distant business activities from the forum may be sufficient alone to warrant the exercise of general jurisdiction over foreign corporations − remains intact.

Justices Brennan and Marshall, in their dissenting and/or concurring opinions in *Hall*, *World-Wide Volkswagen,* and *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif.,* 480 U.S. 102 (1987), anticipated that the Court would examine the business context in which a defendant's contacts with the forum arise. *See, e.g., World-Wide Volkswagen,* 444 U.S. at 314-15 (Marshall, J., dissenting).

In *Burger King*, the majority did just that: "We have previously noted that when commercial activities are 'carried on in behalf of' an out-of-state of state party those activities may sometimes be ascribed to the party . . . at least where he is a 'primary [participant]' in the enterprise and has acted purposefully in directing those activities. . ." 471 U.S. at 480, n.22. Because the case could be decided on other issues, however, the Court declined to "resolve the permissible bounds of attribution." *Id.*

These cases demonstrate this Court's increasing willingness to consider and recognize that understanding the nature and complexity of the businesses in which purported contacts arise is critical to its jurisdictional inquiry, particular where multinational corporations are concerned, and that, in highly-integrated business enterprises, the actions of one corporate actor often cannot – and should not – be distinguished from those of another.

2. Other Courts Regularly Exercise General Jurisdiction Over Corporations Under Similar Circumstances

In seeking *certiorari* here, Petitioners claimed that the Court of Appeals' decision conflicts with decisions from the Third, Fifth, and Seventh Circuits, and the states of Texas, Alabama, and Kansas. *See* Petition for Writ of *Certiorari* at 10. It does not.

To the contrary, these courts have addressed questions of whether participation in highly-integrated business enterprises operating within the forum subjects members to general jurisdiction there and found that it does. In general, these courts have looked to the level of economic integration between parent and subsidiary, instead of the legal boundaries between them, in evaluating the defendants' contacts with the forum.[10] Some commentators have called this principle "jurisdictional merger." Brilmayer & Paisley, *supra*, at 14. "[M]erger occurs when the parent and subsidiary are part of a common enterprise that relies on the efforts of both entities to carry out a common plan."[11]

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[10] *See generally* PHILLIP BLUMBERG & KURT STRASSER, THE LAW OF CORPORATE GROUPS §§24.09; 29.03-04 (2d ed. 2010); *see also* Kurt Strasser & Phillip Blumberg, *Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy*, ACCOUNTING, ECONOMICS AND LAW: A CONVIVIUM 1(1) (2010), *available at* http://www.bepress.com/ael/vol1/iss1/4 (summary of enterprise theory).

[11] *Id.* at 30 (citing Blumberg & Strasser). Although typical merger cases arise from efforts to hold corporate parents responsible for their subsidiaries' activities, because the

Among the factors these courts have considered as significant to whether a common enterprise exists are whether the subsidiary is an independent decision-making body;[12] whether its administrative organization is complete;[13] whether the parent and subsidiary project and integrated posture to the public;[14] and whether they exchange information, personnel and group resources.[15] One court described these as "plus" factors, "something beyond the subsidiary's mere presence in the bosom of the corporate family." *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465-66 (1st Cir. 1990).

Berry v. Lee, 428 F. Supp.2d 546, 549 (N.D. Tex. 2006), is typical and provides a close analogue here. A Texas resident sued Chinese and Korean subsidiaries in Texas, complaining of sexual harassment and attempted rape that took place on a foreign business trip. She successfully contended that the exercise of general jurisdiction over these corporations was appropriate because, together with

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doctrine merges rather than attributes their conduct, it should also apply equally to subject subsidiaries with local parents to jurisdiction in the forum.

[12] *Finance Co. of Am. v. BankAmerica Corp*., 493 F. Supp. 895, 907 (D. Md. 1980); *Bland v. Kentucky Fried Chicken*, 338 F. Supp. 871, 877 (S.D. Tex. 1971).

[13] *Finance Co. of Am.,* 493 F. Supp. at 907; *DCA Food Indus. v. Hawthorn Mellody*, 470 F. Supp. 574, 583, 585 (S.D.N.Y. 1979).

[14] *DCA Food Indus*, 470 F. Supp. at 585; *Handlos v. Litton Indus*., 304 F. Supp. 347, 350-51 (E.D. Wis. 1969).

[15] *See* Brilmayer & Paisley, *supra,* at 30 (citing *Tokyo Boeki [U.S.A.], Inc. v. S.S. Navarino*, 324 F. Supp. 361, 364-65 (S.D.N.Y. 1971); Phillip Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 344 (1990) (listing factors).

their Texas-based affiliates and president, they formed a "single business enterprise"[16] with sufficient contacts with Texas to warrant the exercise of general jurisdiction over them.

The Court noted first that "Berry's burden of demonstrating a *prima facie* case of personal *jurisdiction* through alter ego and single business enterprise theories is 'less stringent' than the standard she must meet at trial to prove *liability*."[17] It then listed a number of "factors weighing in favor of fusing the corporations . . ." for jurisdictional purposes. *Id.* at 554. "No single factor is determinative, and the ultimate question is one of control." *Id.* Judged by these standards, the Court found that the local parent's ownership, control, and portrayal to the public that all of the companies were part of a common enterprise warranted the exercise of general jurisdiction over foreign subsidiaries.

The Fifth Circuit has upheld Texas' "single business enterprise" doctrine in both the jurisdictional and liability contexts. *See Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 428 (5th

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[16] Texas recognizes the doctrine for both jurisdictional and liability purposes. *See El Puerto De Liverpool v. Servi Mundo Llantero S.A. De C.V.*, 82 S.W.3d 622, 634 (Tex. App. – Corpus Christi 2002, pet. filed). "Under that doctrine, when corporations are not operated as separate entities, but integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for the debts incurred in pursuit of that business purpose." *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 595 (5th Cir. 1999).

[17] *Id.* at 556 (quoting *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983)) (emphasis supplied). The Texas Supreme Court recently added a fraud element to impose *liability*. *See SSP Partners v. Gladstrong Invs. Corp.*, 275 S.W.3d 444, 455 (Tex. 2008).

Cir. 2005); *Hollowell v. Orleans Reg'l Hosp*. LLC, 217 F.3d 379, 388 (5th Cir. 2000).

Courts in the Third and Seventh Circuits have also approved similar doctrines. In the Third Circuit, numerous courts have held that "general jurisdiction does exist when the parent corporation exercises such a degree of control that . . . the corporations function as one integrated enterprise."[18] In the Seventh Circuit, courts may disregard the corporate form for jurisdictional purposes under "unity of purpose" and "alter ego" doctrines.[19]

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[18] *Heinrich v. Serv. Corp. Int'l*, 2009 U.S. Dist. LEXIS 62832 *7 (W.D. Pa. July 22, 2009) (citing *Lucas v. Gulf & Western Indus., Inc*., 666 F.2d 800, 806 (3d Cir. 1981)); *Gaul v. Zep Mfg. Co*., 2004 U.S. Dist. LEXIS 9689 *15 (E.D. Pa. May 26, 2004); *Ames v. Whitman's Chocolates*, 1991 U.S. Dist. LEXIS 18389 *8 (E.D. Pa. Dec. 30, 1991).

[19] *See, e.g., Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 379 (7th Cir. 2008) ("unity of purpose"); *Van Dorn Co. v. Future Chemical & Oil Corp*., 753 F.2d 565, 571 & n.1 (7th Cir. 1985) (alter ego); *Bulova Watch Co. v. K. Hattori & Co*., 508 F. Supp. 1322, 1336 (E.D.N.Y. 1981) (exercise of both general and specific jurisdiction permissible over Japanese corporation based on "common sense" appraisal of the business relationship); *Roorda v. Volkswagenwerk, A.G*., 481 F. Supp. 868, 870-71 (D.S.C. 1979).

In *Torres v. Goodyear Tire & Rubber Co*., 901 F.2d 750 (9th Cir. 1990), a liability case involving virtually identical facts and Goodyear, the Court observed that

> we do not believe it is good law to allow multinational firms the freedom to compartmentalize strict liability by choosing organizational forms that will require actions for defective design of a product such as this to be brought in Luxembourg, those for defective manufacture in Great Britain, those for defective labeling in a third, and the like . . .

Other courts would allow the exercise of general jurisdiction over foreign corporations on similar grounds. For example, a recent North Carolina court, in *Manley v. Air Can*., 2010 U.S. Dist. LEXIS 125218 *12-14 (E.D.N.C. Nov. 29, 2010), reaffirmed that "general personal jurisdiction" could be asserted over corporate defendants where plaintiffs "make a showing approaching that necessary under traditional 'alter ego' analysis."[20]

Against this backdrop, it becomes apparent that the source of the purported conflict here lies not in the Court of Appeals' decision to uphold the exercise of general jurisdiction over Petitioners under these circumstances, but in its imprecise use of the phrase, "stream of commerce" and Petitioners' baroque portrayal of that use here.

Over time, the phrase has become a jurisdictional Rorschach test. To the Court of Appeals, it clearly meant Goodyear's highly-integrated internal supply

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Id. at 754 (Noonan, J., concurring) (quoting *Torres v. Goodyear Tire & Rubber Co*., 1990 Ariz. LEXIS 1 *15-16 (Ariz. Jan. 4, 1990)) (emphasis supplied).

[20] *Id.* at *12 (citing *Wyatt v. Walt Disney World Co.*, 565 S.E.2d 705, 711 (2002); *Ash v. Burnham Corp.*, 343 S.E.2d 2, 4, *aff'd*, 349 S.E.2d 579 (N.C. 1986) (per curiam)); *see, e.g., Warren v. Honda Motor Co.*, 669 F. Supp. 365, 370 (D. Utah 1987); *Hoffman v. Telecommunications, Inc.,* 575 F. Supp 1463, 1471 (D. Kan. 1983) (nature of intercorporate relationship is highly probative of the quality and nature of the nonresidents contact with forum through affiliated corporation); *see also Taurus IP v. DaimlerChrysler Corp*., 519 F. Supp. 2d 905, 918-19 (W.D. Wis. 2007) (Although "[t]he alter ego doctrine and related doctrines are typically employed to . . . reach a controlling entity" for liability purposes, these doctrines are also "relevant to . . . personal jurisdiction") (citing *IDS Life Ins. Co. v. SunAmerica Life. Ins. Co*., 136 F.3d 537, 540 (7th Cir. 1998)).

and distribution enterprise. To Justice Brennan, it was "the regular and anticipated flow of products from manufacture to distribution to retail sale." *Asahi,* 480 U.S. at 107 (Brennan, J., concurring). In Petitioners' eyes, however, the phrase apparently evokes "unpredictable currents or eddies" that result in the serendipitous arrival of defendants' goods in the forum. *Id.*

Because of this convenient ambiguity, Petitioners could characterize the decision as contrary to holdings that "injecting a product, even in substantial volume, into a forum's 'stream of commerce,' *without more,* does not support general jurisdiction." Petitioners' Brief at 37 (emphasis supplied). Only by portraying the decision in such superficial terms could Petitioners argue the existence of a conflict where none actually exists.

Apparently, the Government was fooled. Otherwise, it would not have admitted that "[a] different analysis may be warranted by the case-specific interactions between particular affiliated corporations, as when a subsidiary acts as the agent or alter ego of the parent corporation, or vice-versa." Government's Brief at 26, n.9 & cases cited therein; *see* GARY BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 144 (2d ed. 1922).

When the Court's decision is viewed in its proper light, *none* of the allegedly conflicting circuit or state court cases on which Petitioners rely present any impediment to the exercise of jurisdiction here. In fact, read carefully, many actually support Respondents' arguments.

For example, in *D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 109 (3d Cir. 2009), the court found the

exercise of general jurisdiction improper in *Pennsylvania* but appropriate in *Colorado* based on the relationship between parent and subsidiary. The Court explained: "[The subsidiary] exists to conduct [the parent's] business in North and South America. Moreover, as the exclusive . . . subsidiary in the Americas . . . [it] fairly could be described as the 'source of life' to [the parent's] operations."

Similarly, in *Jackson v. Tanfoglio Giuseppe S.R.L.*, 615 F.3d 579, 588 (5th Cir. 2010), the court recognized that one corporations' contacts with the forum may be imputed to another corporation under an "alter ego" theory, but did not find facts to support such imputation there.

Likewise, in *Merriman v. Crompton Corp.*, 146 P.3d 162, 185 (Kan. 2006), an allegedly conflicting price-fixing case, the Court recognized and applied a "conspiracy theory" of jurisdiction in which all acts in furtherance a common scheme were attributable to all members.[21] On that basis, it found that foreign defendants had continuous and systematic contacts with the forum, but declined the exercise of jurisdiction over them on due process grounds.

Spir Star AG v. Kimich, 310 S.W.3d 868, 875 (Tex. 2010), and *Brown v. Abus Kransysteme, GmbH*, 11 So.3d 788, 795 (Ala. 2008), are typical of the cases Petitioners cite. They are not general jurisdiction cases. None involves highly-integrated multinational

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[21] *Id.* at 181-82; *see generally* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983). Although the Court used the theory to establish specific jurisdiction, it did not foreclose its use in general jurisdiction cases.

corporations or enterprise allegations. *See, e.g., Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987). Thus, none precludes the exercise of general jurisdiction here. The Court, in *Kimich*, explained:

> A nonresident manufacturer does not avoid Texas law merely by forming a Texas affiliate or utilizing a Texas distributor to sell its products in Texas markets. Just as manufacturers cannot escape liability for defective products by selling them through a subsidiary or distributor, neither can they avoid jurisdiction related to such claims by the same means.

Id. at 875.

3. The *Cannon* Doctrine, if It Survives, Does Not Preclude the Exercise of General Jurisdiction Over Petitioners

In *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-337 (1925) and *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 88, (1933), this Court held that a subsidiary's business in the forum did not automatically constitute its parent's "doing business" there so as to warrant an inference that the parent was "present" there. *Cannon* thus involved no question of constitutional power. When *International Shoe* rejected corporate "presence," however, both cases were effectively overruled. Nevertheless, Petitioners rely on both cases for the broader notion that a parent is not automatically subject to jurisdiction because its subsidiary operates in the forum.

Even if *Cannon* and *Gregory* were still good law, Respondents do not make a bare claim that Petitioners' acts are attributable to Goodyear solely as their parent. Instead, the trial court recognized their coordinated participation in a highly-integrated enterprise and effectively merged the acts of parent and subsidiaries for jurisdictional purposes. As demonstrated below, this Court has recognized the difference. Thus, neither case forecloses the exercise of general jurisdiction over Petitioners here.[22]

This is also true of *Rush v. Savchuk*, 444 U.S. 320 (1980), and *Keeton*, 465 U.S. 770. In *Rush*, a *quasi in rem* action based on an insurance policy, the Court explained that "naturally, the parties' relationship with each other may be significant in evaluating their ties to the forum." 444 U.S. at 332 (emphasis supplied). Against that backdrop, Rush's instruction that *International Shoe's* requirements be met as to each defendant does not foreclose the possibility that activities in the forum engaged in by a closely-related party might be legally attributed to another party under an enterprise, alter ego, or "piercing" theory.

In *Keeton*, the Court's jurisdictional finding was grounded in the parent's own magazine sales in the state of New Hampshire. It, therefore, does not prevent the exercise of general jurisdiction here.

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[22] *Amici's* attempt to revive the *Cannon* doctrine by relying on *United States v. Bestfoods*, 524 U.S. 51 (1998), is unavailing. In *Bestfoods*, the Court found only that, to hold a corporate parent liable for cleanup costs under CERCLA, the Government had to meet the statute's test of whether the parent was the polluting facility's "operator," not the participation-and-control test generally applied to assess a parent's supervision over subsidiaries.

C. Petitioners Have Continuous, Systematic, and Substantial Contacts with North Carolina

To determine whether the exercise of general jurisdiction over potential defendants is proper, North Carolina courts engage in a two-step inquiry. First, they assess whether a defendant is subject to the state's long-arm statute, N.C. GEN. STAT. §1-75.4. If it is, then the court must determine whether the exercise of personal jurisdiction over that defendant is consistent with due process requirements, that is, whether it has sufficient "minimum contacts" with North Carolina "such that 'traditional notions of fair play and substantial justice' are not offended by maintenance of the suit" there. *See Cameron-Brown Co. v. Daves*, 350 S.E.2d 111, 113-14 (N.C. App. 1986) (quoting *International Shoe*, 326 U.S. at 316).

"When evaluating the existence of personal jurisdiction pursuant to G.S. §1-75.4(1)(d)," "the question of statutory authorization 'collapses into the question of whether [a defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.'" *Bruggeman v. Meditrust Acquisition Co.*, 532 S.E.2d 215, 218, *disc. rev. denied & appeal dism'd*, 546 S.E.2d 90 (N.C. App. 2000) (quoting *Hanes Cos. v. Ronson*, 712 F.Supp. 1223, 1226 (M.D.N.C. 1988)). Courts will ordinarily examine the "1) quantity of the contacts between the defendant and the forum state, 2) quality and nature of the contacts, 3) the source and connection of the cause of action to the contacts, 4) the interest in the forum state, and 5) convenience of the parties." *Cameron*, 350 S.E.2d at 114.

Subsection 1-75.4(1)(d) permits the exercise of "general personal jurisdiction," *Lang v. Lang*, 579 S.E.2d 919, 921 (N.C. 2003), "[w]hen the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic to permit the General Court of Justice to exert personal jurisdiction over that defendant." *Skinner v. Preferred Credit*, 638 S.E.2d 203, 210 (N.C. 2006). The statute does not require that these contacts be "substantial."

Instead, under N.C. GEN. STAT. §1-75.4(1)(d), "[a] court of this State . . . has jurisdiction over a person" "in any action, whether the claim arises within or without this State, in which a claim is asserted against a party" who "[i]s engaged in *substantial activity* within this State, whether such activity is wholly interstate, intrastate, *or otherwise*." (emphasis supplied). The North Carolina courts interpret §1-75.4(1)(d) "[t]o make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 630 (N.C. 1977).

All three Petitioners unquestionably fall within Subsection 1-75.4(1)(d)'s purview. Thus, the only remaining question here is whether Petitioners have minimum contacts with North Carolina sufficient to meet due process standards.

As set forth in detail above, Petitioners, as subsidiaries of Goodyear, PA34a, enjoyed tens of thousands of tire sales in North Carolina during the relevant period. PA32a; JA293-93. Moreover, these sales numbers are *substantially understated.* PA32-33a; JA248. Petitioners were the sole source for

specialty tires for horse and boat trailers, cement mixers and the like as these items were not produced domestically. JA241-43; 248-49; 250-51. Equally important, untold numbers of Petitioners' tires were sold in North Carolina as original equipment on European passenger cars, buses, and trucks. Both numbers are "untold" only because Petitioners and Goodyear failed to supply that information upon proper and timely request. JA248. All such sales generated substantial revenues for "Goodyear, [Petitioners], and its related companies." PA33a.

Petitioners had only one way to make these sales: through the fixed, "internal" supply and distribution enterprise, coordinated by Goodyear, of which all Petitioners played an integral part. JA255. Within that enterprise, an "originating request" for tires for North Carolina would be initiated by Goodyear and transmitted to Petitioners. JA227-28;256; 270, 279. Once that request arrived and the tires were produced, they were sent to North Carolina through Goodyear's internal distribution system. JA254-55. There was no possibility that Petitioners' products could arrive in North Carolina by any other means or without Goodyear's "approval and sanction." JA259.

It is, therefore, highly misleading for Petitioners to state that they neither solicited nor advertised for business in North Carolina because, as operational links in Goodyear's internal supply chain, they did not solicit business or advertise *anywhere*. JA165-66. Similarly, their statements that they neither shipped nor "actively sold" products in North Carolina also ring hollow since, as members of Goodyear's enterprise, they were not permitted to do so at all. *Id.*

For these reasons, although Petitioners, "as manufacturers did not have their own distribution system" for the referenced tire sales, the trial court could state honestly that they "used their Goodyear parent and affiliated companies to distribute the tires they manufactured to . . . North Carolina." PA33a. Thus, they knew their tires would be "shipped to the United States through their Goodyear parent and affiliated companies and sold in North Carolina on a continuous and systematic basis" because any other distribution process "just doesn't happen." *Id.*; JA259.

Moreover, Petitioners regularly prepared even tires that were not ordinarily sold in the U.S. [Goodyear Regional RHS] for possible sale there, marking them as required by U.S. government regulations. JA202-03.

Petitioners' participation as key actors in the Goodyear internal, ongoing supply and distribution enterprise in North Carolina resulted in tens of thousands of tire sales there. It, therefore provides sufficient continuous, substantial, and rigidly-systematic contacts with North Carolina to satisfy the requirements of due process.

II. DUE PROCESS CONCERNS ARE SATISFIED WHEN CORPORATE DEFENDANTS CHOOSE TO BECOME PART OF AND MAKE SUBSTANTIAL SALES THROUGH ONGOING, INTERNAL, INTEGRATED ENTERPRISES OPERATING WITHIN THE FORUM

Even if foreign corporations possess the requisite minimum contacts with the forum, the exercise of general jurisdiction over them violates due process unless it comports with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In determining the fairness and reasonableness of a forum's exercise of general jurisdiction, a court will normally consider 1) the defendant's burden in litigating in the forum; 2) the forum state's interest in the litigation; 3) the plaintiff's interest in convenient and effective relief; 4) the judicial system's interest in efficient resolution of controversies; and 5) the shared interest of the several states in furthering fundamental substantive social policies." *Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292.

A. Due Process Considerations Are Satisfied in Treating Certain Highly-Integrated American Multinational Corporations and Their Subsidiaries as a Single Enterprise

This Court has repeatedly held that it does not offend due process to impose liability on or exercise jurisdiction over corporations that are part of functionally-integrated business enterprises. The Court has long employed the "unitary business" doctrine to find that it does not offend due process to tax local affiliates of American multinational

corporations. *See Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980); *Exxon Corp. v. Dep't of Rev. of Wisconsin*, 447 U.S. 207 (1980); Phillip Blumberg, *The Corporate Entity, supra* note 15, at 348-55.

Similarly, the National Labor Relations Board has developed and this Court has upheld use of an "integrated enterprise" or "single employer" doctrine in labor and employment discrimination cases. *See Radio & Television Broadcast Technicians Local Union v. Broadcast Serv. of Mobile*, 380 U.S. 255 (1965) (per curiam); Blumberg, *The Corporate Identity*, *supra* note 15, at 355-58.

The "integrated enterprise" standard has also been applied and upheld in cases arising under the Fair Labor Standards Act. The Act defines an "enterprise" as "the related activities performed (either through unified operations or common control) by any person or persons for the common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." *Id.* Under it, separate incorporation and entity law are irrelevant. *See* Blumberg, *The Corporate Entity, supra* note 15, at 358.

B. Petitioners' Contacts With North Carolina Meet Due Process Standards

The Defendants' burden. "The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'" *World-Wide Volkswagen*, 444 U.S. at 292. Thus, "the relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to

defend the particular suit which is brought there.'" *Id.* (quoting *International Shoe*, 326 U.S. at 317).

Yet the limits imposed on state jurisdiction by the Due Process Clause, "in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." *World-Wide Volkwagen*, 444 U.S. at 292. In *McGee,* 355 U.S. at 222-23, the Court observed that "this trend is largely attributable to a fundamental transformation in the American economy . . . modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." That was 1957.

The Court acknowledged 20 years later, in *World-Wide Volkswagen*, that these "historical developments" "have only accelerated in the generation since [*McGee*] was decided." 444 U.S. at 293. Thus, the *Asahi* Court recognized that "when minimum contacts have been established, *often* the interests of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." 480 U.S. at 114 (emphasis supplied).

As members of an ongoing Goodyear enterprise that has deep ties to North Carolina, Petitioners would suffer little burden in litigating in North Carolina. Petitioners admit that a defendant with such deep ties is *presumed* able to defend itself in the forum without great expense or hardship. Petitioners' Brief at 41 (citing Lea Brilmayer, *et al*., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 741 (1988)). Because Goodyear itself is already subject to the trial court's general jurisdiction, that presumption unquestionably applies to it. Because Petitioners are part of the Goodyear enterprise in North Carolina and they do

continuous and substantial business in the state as a result; because that enterprise is the exclusive vehicle for their tire sales in the state; and because they use the same lawyers as Goodyear does, PA35a, it is also reasonable to apply that presumption to Petitioners. *Id.* Failing that, these facts and those found by the trial court demonstrate that Petitioners would not be inconvenienced by litigating this case in North Carolina.

Finally, there are three Petitioners from three different countries here. If Respondents' claims are jointly litigated, two of them will always be "inconvenienced" by litigating in a foreign country. It is not, therefore, unreasonable for Respondents' claims to be tried in North Carolina, where Goodyear will litigate.

The Forum State's interest. A state has significant interest "in protecting its citizens by providing a local forum in cases which involve effects 'of a sort highly dangerous to persons and things,' RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24, Comment A (1971). These would normally be product liability or other tort cases."[23] North Carolina has repeatedly expressed its "'manifest interest' in providing its citizens with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 348 S.E.2d 782, 787 (1986). In fact, the state's interest in protecting its citizens is so strong that it may even prohibit some dangerous products from

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[23] *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 602 (7th Cir. 1979); *Kimich*, 311 S.W.3d at 8 ("Texas has a substantial interest in protecting its citizens against harm from dangerous products entering this state").

entering the state at all. *See generally Rasmussen v. Idaho,* 181 U.S. 198 (1901); *Missouri, K. & T.R. Co. v. Haber,* 169 U.S. 613, (1898). This is particularly true where a product results in the death or serious injury to its citizens because the state may have to care for injured citizens or decedents' families at taxpayer expense.

Reflecting this strong interest, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 50 permits states to exercise jurisdiction over any foreign corporation "which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable."

Petitioners clearly caused "effects" in North Carolina. They allegedly killed two North Carolina children through the negligent design and manufacture of their tires. If that were not sufficient interest alone to satisfy due process concerns, Goodyear operates three tire plants in North Carolina. Thus, the state has a high interest in insuring that incentives safely to manufacture tires are maintained by holding those responsible for negligent tire manufacture and design accountable in North Carolina.

The Plaintiffs' interest. By filing suit against a multibillion-dollar industry giant like Goodyear and its subsidiaries, Respondents are already at a serious disadvantage. Forcing them to litigate against this well-financed behemoth's subsidiaries in a foreign country, in a foreign language, under laws designed for different cultures and social welfare structures, makes their suit a practical impossibility and

renders Goodyear's subsidiaries effectively judgment-proof. It may even raise its own due process problems in denying injured plaintiffs effective access to the courts.

Asahi's "unique burden" on one who not only "must traverse the distance between" its home base and the forum, but also submit to "a foreign nations' judicial system" may indeed be "severe," but it is exponentially more so for individual plaintiffs. *See* 48 U.S. at 114; Petitioners' Brief at 52. As one court explained: "Forcing plaintiffs to sue the designer in Japan is much more burdensome than forcing a corporation, which is inextricably linked with a manufacturer that places its product worldwide, to litigate in [the U.S.] . . . it is not against traditional notions of 'fair play and substantial justice' . . ." *Warren,* 669 F. Supp. at 371. This imbalance strongly militates in favor of allowing Respondents to litigate in their home state.

The Judicial System's interest. As discussed above, if this case is jointly litigated, at least two Petitioners will be forced to litigate in a foreign country. The only resolution that allows all Petitioners to litigate in their home countries is to force Respondents to litigate their claims piecemeal against each individual defendant in each of three foreign countries. Such a proposal would make the litigation cost-prohibitive and render Petitioners effectively judgment-proof. Moreover, it would be highly inefficient and fail to serve the cause of judicial economy.

Thus, the judicial system has a strong interest in having these claims litigated together in an appropriate forum. As the North Carolina courts already have general jurisdiction over Goodyear, at least one case will be tried in North Carolina. It is reasonable, given Petitioners' close relationship with Goodyear through their joint activities in North Carolina, to try claims against all of them there.

"Shared interest of the several states in furthering fundamental substantive social policies." This Court may take judicial notice that North Carolina's unemployment rate is currently 9.6%. U.S. Bureau of Labor Statistics, *Unemployment Rates for States,* (Oct. 2010), *available at* http://www.bls.gov/web/laus/laumstrk.htm. It is 10.7% in neighboring South Carolina and 10.0% in Kentucky. *Id*. All three states, therefore, have a critical interest in insuring that manufacturing jobs at Goodyear plants in North Carolina and elsewhere in those states are not sent offshore. As demonstrated below, increased outsourcing to foreign countries is one sure consequence of reversal in this case.

For all of these reasons, Respondents can satisfy the *Asahi* test. The Due Process Clause would, therefore, permit the exercise of general jurisdiction over Petitioners in North Carolina.

III. ADOPTING PETITIONERS' JURISDICTIONAL MODEL WOULD DEVASTATE THE U.S. ECONOMY

Petitioners and *amici* argue that affirming the Court of Appeals' decision or otherwise permitting the assertion of general jurisdiction over Petitioners would destroy international trade and devastate U.S. foreign policy. *See, e.g.,* Brief of the United States ["Government's Brief"] at 28. It won't.

These arguments are all based on a false premise – that the exercise of general jurisdiction here was based solely upon Petitioners' release of a few goods into the "unpredictable currents" of international commerce and their chance arrival in North Carolina. As demonstrated above, it was not. Moreover, these arguments ignore the countervailing damage to the U.S. economy adoption of Petitioners' anachronistic jurisdictional model would inflict.

A. Permitting American Corporations to "Outsource" to Foreign Courts Their Foreign Subsidiaries' Tort Liability Would Accelerate Outsourcing to Foreign Countries of American Manufacturing and Jobs

If this Court reverses the Court of Appeals' decision, it will have rule that foreign subsidiaries' participation in an ongoing, internal supply and distribution enterprises in the forum state (over part of which the forum's courts have already asserted general jurisdiction), combined with substantial numbers of regular sales in the forum by those subsidiaries through that enterprise, are insufficient to warrant the exercise of general jurisdiction over

these subsidiaries by courts in the forum state. Put another way, the Court would have to hold that, by outsourcing parts of its manufacturing and design to subsidiaries located in foreign countries, an American multinational corporation also "outsources" to foreign courts the exclusive right to decide whether those subsidiaries are liable in tort for the injuries caused by the defective products they produce. On the day that decision is announced, American manufacturers will have new and powerful incentive to head for the border.

The location of the forum matters to plaintiffs. As the Court in *McGee* explained, "When claims were small or moderate[,] individual claimants frequently could not afford the cost of bringing an action in a foreign forum – thus in effect making the company judgment proof." 355 U.S. at 223. There is also no question that, because of different regulatory climates and cultures, American courts are perceived by businesses around the world as more generous to plaintiffs and dangerous to corporations. *See infra* note 24. Finally, as discussed above, it is well understood that one purpose of creating subsidiaries is to attempt to limit or insulate a corporation from tort liability. It, therefore, makes sense for a corporation, acting in the interests of it shareholders alone, to try to limit its liability or amenability to suit in this fashion.

By allowing corporations subject to general jurisdiction in the forum to treat what are, in every practical sense, merely its corporate divisions as separate, free-standing foreign companies for jurisdictional purposes, this Court would encourage the latter's proliferation.

In the last decades, American corporations have increasingly moved manufacturing to offshore subsidiaries to avail themselves of lower wage rates and relaxed regulatory and tax climates. *See, e.g.,* Mark Baker, "*The Technology Dog Ate My Job:" The Dog-Eat-Dog World Of Offshore Labor Outsourcing,* 16 FLA. J. INT'L L. 807, 810 (2004). Off-loading tort liability to foreign subsidiaries *and foreign courts* will not only increase the likelihood that manufacturing will be moved offshore, give foreign companies looking to relocate a powerful reason *not* to build their facilities in the United States, but it will give a competitive advantage to American corporations that do outsource their manufacturing and design over those that do not. U.S trade and the U.S. economy will suffer accordingly. As one court explained under similar circumstances:

> Under defendant's theory, the only forum for direct relief from the designer would be Japan. *Adopting the defendant's rationale would encourage manufacturers to form separate, independent organizations for product design.* Thus designers would be insulated from suit except in the jurisdiction in which they physically reside. There is no sound policy supporting such a result. . .

Warren, 669 F. Supp. at 371.

B. No Threatened Trade Apocalypse Will Occur if This Court Affirms

Although Petitioners claim generally that U.S. trade partners would revolt if this Court affirms, those partners would not necessarily object to the exercise of general jurisdiction over Petitioners *on*

these facts. Instead, an expert group at the Hague negotiations has already proposed that the rules for disregarding the independent legal personality of a subsidiary or parent be left to the national law of each contracting state. *See* Catherine Kessedjian, Hague Conference on Private Int'l Law, June 1997, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, Prelim. Doc. No. 7 at 72 n.150 (Apr. 1997), *available at* http://www.hcch.net/upload/wop/jdgm pd7.pdf.

Moreover, international business' purported disenchantment with the American judicial system cannot reasonably be blamed on the potential outcome in this case. Some foreign corporations *already* fear litigating in American courts.[24] Likewise, even trade partners who impose "exorbitant" jurisdictional rules on American businesses[25] have long complained when general

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[24] Patrick Borchers, *A Few Little Issues For The Hague Judgments Negotiations*, 24 BROOKLYN J. INT'L L. 157, 160 (1998).

[25] France permits anyone domiciled in France to sue anyone, anywhere, over anything in the French courts. *See* Code civil [C. civ.], arts. 14-15 (Fr.), *quoted in* Kevin Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 92 & n. 15 (1999). Germany bases jurisdiction on the presence of a defendant's assets in Germany; England on personal service in the U.K. *See* Freidrich Juenger, *A Hague Judgments Convention?,* 24 BROOKLYN J. INT'L L. 111, 115-16 (1998). Pursuant to the Brussels and Lugano trade treaties, these practices have migrated to other signatories, including Luxembourg and Belgium. *See* Clermont, *supra,* at 92, n.16.

jurisdiction is asserted over nonresident corporations under certain circumstances.[26]

Petitioners and *amici* also suggest that permitting the exercise of jurisdiction here would discourage distribution of foreign goods in the U.S. *See* Government's Brief at 30. With the U.S. trade deficit looming at $44 billion, that may not be a bad thing.[27] Yet there is little actual likelihood that *imports* would be discouraged given the unique facts of this case and of most cases in which general jurisdiction is alleged. The number of actual cases in which courts have exercised general personal jurisdiction over nonresident defendants is quite small. *See, e.g.,* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630-31 (1988) (counting actual cases).

Commentators have also concluded that "the 'unitary business' standard turning on 'functional integration' imposes relatively *tight boundaries to*

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[26] Clermont, *supra* note 25, at 96-97. General jurisdiction based on minimum contacts with the forum is not the only object of derision in foreign capitols. As one commentator explained:

> [G]eneral jurisdiction triggered merely by the defendant's temporary presence in the forum (transient rule) . . . which was confirmed by the United States Supreme Court [in *Burnham*] as an exercise in conformity with contemporary notions of American due process, *lacks conformity with virtually all international standards. . . Even the American Law Institute views it as a transgression of international law*.

Joachim Zekoll, *Could a Treaty Trump Supreme Court Jurisdiction Doctrine? The Role and Status of American Law in the Hague Judgments Convention Projec*t, 61 ALB. L. REV. 1283, 1296-97 (1998).

[27] *See* U.S. Census Bureau, *U.S. International Trade in Goods and Services Highlights*, (Nov. 10, 2010), *available at* http://www.census.gov/indicator/www/ustrade.html.

define the type of multinational enterprise that are included, and is *limited* to particular models of managerial direction and of economic integration." Blumberg, *The Corporate Entity, supra* note 15, at 355 (emphasis supplied). For these reasons, general jurisdiction is, as practical matter, "[s]eldom properly available against a defendant from abroad." Clermont, *supra* note 25, at 115.

Finally, the pervasive presence of Goodyear in North Carolina and the highly-integrated nature of its distribution network also militate against any flood of cases. The risk of jurisdiction and liability in such cases is not, therefore, sufficiently great to affect overall corporate behavior.

Petitioners and *amici* also argue that American *exports* would be adversely affected if this Court affirms. None has explained, however, how or why that would actually occur, particularly since the focus of this case is on foreign goods *imported* into the United States through a highly-integrated multinational network run by an American company. Moreover, by encouraging American businesses to take their manufacturing overseas to avoid domestic tort liability, *reversal* of the Court of Appeals' decision is far more likely to damage American exports by insuring that there will simply be fewer manufactured goods available to export.

The Government finally suggests that using tire markings as a key "contact" for jurisdictional purposes "pose[s] a threat to U.S. interests." Government's Brief at 31. The argument assumes first that the Court actually did that. At best, the Court of Appeals used the markings, if at all, to show, "at an absolute minimum, the manufacturer

contemplated that the tire [that caused the accident] might be sold in this country." PA25a.

Moreover, the Government confuses actual compliance with U.S. standards with *advertising* such compliance by stamping information on the face of the tires. The only thing, if anything, that foreign trade partners might refrain from doing then, is stamping their otherwise compliant products.

The remaining *amici* complaints in this area are paens to the sanctity of the corporate form and limited liability. This case, however, addresses jurisdiction, not liability. The standards and policy considerations for determining when a court will disregard the corporate form are less when the only question is whether corporations are amenable to suit in the forum. *See, e.g., Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981) (jurisdictional inquiry for piercing the corporate veil should not require fraud even if test for liability does); *Berry*, 428 F. Supp.2d at 556.

Second, while corporate fragmentation may provide corporations themselves with certain other advantages, viewed in broader economic terms, limiting corporate tort liability is not a universal good. By creating small and relatively judgment-proof subsidiaries, corporations externalize the risks associated with producing defective or dangerous products. All corporate benefits thus come at the expense of victims, taxpayers [through social insurance programs], and third-party insurers. In fact, "such externalization of costs is almost universally regarded as highly undesirable."[28]

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[28] Blumberg, *The Corporate Entity, supra* note 15, *at* 342 (citing Guido Calabresi, *Some Thoughts on Risk Distribution and the*

Worse, because risk-shifting lowers or eliminates the actual cost of negligent behavior, eliminating or shifting tort liability may cause corporations to lose powerful economic incentives to produce safer products. *See, e.g., Schafer v. American Cyanamid Co.*, 20 F.3d 1, 3 (1st Cir. 1994) (Breyer, J.). Thus, dangerous behavior is not sufficiently deterred. In fact, one commentator has suggested that the loss of limited tort liability resulting from merging one corporation's activities with those of a constituent corporation would be advantageous.

> [t]here is widespread agreement that just such an elimination of limited liability would be an advantageous development. The group would then be responsible for all costs of the enterprise being conducted by it and the group would lose its present capacity to externalize some of its costs by limiting its liability for torts of constituent companies. Such a change would dispose of one of the principal criticisms of the economists with respect to limited liability.[29] Further, the availability of insurance for such increased tort exposure

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Law of Torts, 70 YALE L.J. 499, 500-07, 514-17 (1961); Howard Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153, 158 (1976); George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461, 463 (1985)).

[29]*See* Phillip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 616-19 (1986); RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 372 (3d ed. 1986); Frank Easterbrook & Daniel Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 103, 107, 112 (1985); Robert Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 789, 875 (1979).

> provides a ready means for the group to restrict its exposure.

Blumberg, *The Corporate Entity, supra* note 15, at 342. There is, therefore, no sound economic justification for permitting corporations unilaterally to choose whether or where they will be amenable to suit for their tortious acts.

Nor is such special status justified by the need for predictability in making investment decisions. Predictability is not at risk where, as here, the question involves the merger of two or more corporations' acts. Practically speaking, the subsidiary's actions have been initiated and taken by the parent itself. For jurisdictional purposes, the two entities are identical and what is predictable for one is predictable for the other. *See generally* Brilmayer & Paisley, *supra*, at 36-37.

C. Trial Courts Have Adequate Tools to Control Threatened Forum-Shopping

Petitioners and *amici* warn that permitting the exercise of general jurisdiction in this case will result in forum-shopping on a global scale. This Court, however, has explicitly sanctioned forum-shopping – albeit by defendants – a practice reversal here would *increase* as corporations seek the most favorable foreign jurisdictions in which to locate their manufacturing operations. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252-53 n.19 (1981) ("We recognize . . . that [Defendants] may be engaged in *reverse forum-shopping*. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests . . .").

Second, forum-shopping arguments presuppose that there are no other checks on a courts' jurisdiction. In fact, there are many. In *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.,* 549 U.S. 422, 432 (2007), this Court held that courts may dispose of actions by *forum non conveniens* dismissal first, bypassing questions of personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant. Moreover, this Court also held that a foreign plaintiff's choice of forum deserves much less deference in deciding such motions. *Piper Aircraft,* 454 U.S. at 256.

North Carolina, like other states, also has venue rules that restrict suits by outsiders. *See* N.C. GEN. STAT. § 1-80 [Foreign Corporations]. Choice-of-law principles also strongly influence where and whether certain claims may be pursued. As one commentator noted, if one forum attempts to use "an idiosyncratic and expansive attribution or merger rule in the context of the jurisdictional determination, it involves a choice of law decision that much pass muster like any other." Brilmayer & Paisley, *supra,* at 37.

Finally, if these controls provide too little protection against potential forum-shopping, this Court could add to its due process considerations the plaintiff's state of residence.[30] In fact, the Court in *Keeton* noted that "plaintiff's residence may well play an important role in determining the propriety of

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[30] *See World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting) (jurisdictional principles "focus[ed] exclusively on the rights of defendants, may be outdated"); Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 984 (1981); Twitchell, *supra,* at 678 n. 306.

entertaining a suit against a defendant in the forum," but confined that role to enhancing defendant's contacts with the forum 465 U.S. at 780. This Court could reasonably expand that role.

Petitioners' unfounded fear of Taiwanese plaintiffs' suing Indian corporations in North Carolina over employment contracts entered into in Iceland and performed in Israel is, therefore, both overblown and easily assuaged. Such baseless fears, however, do not justify the grim reality of forcing grieving parents to go overseas – again – to hold accountable for the violent death of their child the design and manufacturing arms of an American company that operate seamlessly, continuously, systematically, substantially, and profitably in their home state.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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