No. 12-574

IN THE

Supreme Court of the United States

ANTHONY WALDEN,
Petitioner,
v.
GINA FIORE AND KEITH GIPSON,
Respondents.

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

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

KATHRYN COMERFORD TODD
JANE E. HOLMAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street N.W.
Washington, D.C. 20062
(202) 463-5337

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
(706) 542-1328
borut@uga.edu

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

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community, including cases involving the constitutional limits on the exercise of personal jurisdiction. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011).

This case raises matters of vital concern to the Nation's business community. The proper construction of the so-called effects test for personal jurisdiction implicates more than just whether two transient gamblers can sue a law enforcement officer in Nevada based on his conduct in Georgia. This test also has been employed in an effort to exercise jurisdiction over businesses for various claims, especially product liability claims. Moreover, though this Court principally has relied on the test to support jurisdiction over defendants for certain libel actions, *see Calder v. Jones*, 465 U.S. 783 (1984), some lower courts have consulted the test to decide whether a company's activities over the Internet supply a basis for personal jurisdiction, *see, e.g., Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). *See generally* 4A Charles A. Wright et al., *Federal Practice & Procedure* §1073.1 (3d. ed. 2002). Determining the contours—and limits—of the so-called effects test provides American businesses essential guidance about the jurisdictional consequences of their decisions regarding how they organize their

affairs, sell their products, and conduct activities over the Internet. The Chamber is uniquely positioned to explain the broader commercial implications of the question of constitutional law presented by this case.

SUMMARY OF THE ARGUMENT

The Due Process Clause requires that the defendant expressly aim his conduct *at the forum state* in order for personal jurisdiction to lie based upon the effects of that conduct.[2] Because the Ninth Circuit instead required that a defendant act merely with the "purpose of affecting a particular forum resident or a person with strong forum connections," Pet. App. 18a, this Court should reverse its judgment. In addition to the reasons given in Petitioner's brief, four additional ones justify this outcome.

First, great care must be exercised in the formulation of the effects test. Unlike some other bases for personal jurisdiction, the effects test does not enjoy a well-established historical pedigree. It was not recognized at the time of the Fourteenth Amendment's adoption and indeed only emerged in the middle of the last century. While historical acceptance is not strictly necessary for a theory of personal jurisdiction to comport with the Due Process Clause, defining the constitutionally acceptable boundaries of personal jurisdiction with a healthy respect for the history ensures that "[f]reeform notions of fundamental fairness divorced from traditional practice [do not]

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[2] *Amicus* confines this brief to the first question on which this Court granted certiorari, namely the Ninth Circuit's analysis of the effects test. This brief does not address the second question, the Ninth Circuit's construction of the federal venue statute. That question presents straightforward issues of statutory interpretation fully addressed in the Petitioner's brief.

transform a judgment rendered in the absence of authority into law." *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).

Second, the Ninth Circuit's decision cannot be reconciled with the underlying purposes of the Fourteenth Amendment or this Court's precedents interpreting that Amendment. The Due Process constraints on personal jurisdiction serve a dual function: they prevent extraordinary assertions of state sovereignty that might impede interstate commerce and ensure defendants are on adequate notice of the constitutional consequences of their conduct. To vindicate these dual interests, this Court consistently has required "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In the specific context of out-of-forum conduct with in-forum effects, these same interests are advanced by a requirement that the defendant "expressly aim[]" his conduct at the forum state. *Calder*, 465 U.S. at 789. Merely requiring some knowledge of a plaintiff's connection with the forum, as the Ninth Circuit has done, can inflame interstate tensions and suck unwitting defendants into unfamiliar forums. Precisely to prevent such results, this Court has never allowed the foreseeability of effects in the forum or the plaintiff's connections to the forum to drive the constitutional analysis.

Third, the Ninth Circuit's test has especially deleterious effects on the business community. It potentially exposes businesses to personal jurisdiction based on commercial conduct never "expressly aimed" at the forum state. Only a more stringent require-

ment of purposeful availment—one that applies with the same stringency regardless of whether the defendant's conduct is "commercial"—averts those consequences.

Finally, to the extent the Court is concerned about the results of a rule that might force some plaintiffs to bring federal claims in the defendant's home forum, it should let Congress make that delicate judgment. With respect to such claims, Congress can control the personal jurisdiction of the federal courts through its enactment of statutes with nationwide or worldwide service of process provisions. Those provisions, according to most lower courts, allow a federal court to consider the defendant's contacts with the United States as a whole. Congress does not always grant such sweeping authorization as to federal claims, including the one at issue here. Such brakes on the personal jurisdiction of the federal courts reflect careful countervailing policy considerations such as the burdens on government officials or federalism principles. The Ninth Circuit's watered-down effects test rips that prerogative from Congress and preempts these sorts of careful policy judgments.

ARGUMENT

I. Jurisdiction Based On The Effects Of A Nonresident Defendant's Out-Of-State Conduct Requires That The Defendant Expressly Aim That Conduct At The Forum.

Since this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), inquiries into personal jurisdiction have followed a familiar two-step framework. First, a court must determine

whether a statute authorizes the exercise of personal jurisdiction. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987). In federal courts, like the district court in this case, statutory authorization is essential: Federal courts lack a power under federal common law to authorize personal jurisdiction, even as to claims arising under federal law. *Id.* at 108-11. Second, a court must examine whether the authorized exercise of jurisdiction comports with the Constitution. *Int'l Shoe*, 326 U.S. at 316. At least as to jurisdictional bases that are not "firmly approved by tradition and still favored," *Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 622 (1990) (plurality opinion), this inquiry turns on whether the defendant has "certain minimum contacts" with the forum state such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State."); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

Congress has not enacted a general long-arm statute governing the personal jurisdiction of the federal courts. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 83 (5th ed. 2011). Instead, federal courts have looked to Federal Rule of Civil Procedure 4(k), which links the authorization to exercise personal jurisdiction to the service of a summons (or filing of a waiver of service). In this case, Rule 4(k)(1)(A) supplies the

only possible basis for the Nevada district court's jurisdiction.[3] Therefore, a statutory basis for jurisdiction exists *only* if the petitioner "is subject to the jurisdiction of a court of general jurisdiction in" Nevada. Fed. R. Civ. P. 4(k)(1)(A); *see Omni Capital*, 484 U.S. at 105. Because Nevada has authorized personal jurisdiction to the limits permitted by the United States Constitution, Nev. Rev. Stat. §14.065, the federal court's jurisdiction in this case turns entirely on the constitutional limits imposed on the State of Nevada. *See Omni Capital*, 484 U.S. at 108; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (assessing personal jurisdiction of federal court by reference to constitutional constraints on state long-arm); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984) (same); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713 (1982) (Powell, J., concurring in the judgment).

The panel majority in the Ninth Circuit held that personal jurisdiction in Nevada did not exceed those constitutional limits due to the "effects" in Nevada of the petitioner's conduct in Georgia. In the panel's view, the Constitution required simply that a defendant undertake actions "outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections." Pet.

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[3] The other bases for jurisdiction under Rule 4(k) do not apply. The petitioner is not a "joined" party, *see* Fed. R. Civ. P. R. 4(k)(1)(b); a federal statute does not authorize service for *Bivens* claims, *see* Fed. R. Civ. P. 4(k)(1)(c); and the petitioner is subject to the jurisdiction of the courts of at least one state, namely Georgia, *see* Fed. R. Civ. P. 4(k)(2); *Milliken*, 311 U.S. at 462 ("Domicile in the state alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").

App. 18a. The Court should reject this rule. It runs contrary to history, does not comport with the Court's doctrine, has disastrous commercial consequences, and short-circuits Congress's judgment.

A. The Court Should Narrowly Construe The So-Called Effects Test Due To Its Lack Of Historical Pedigree.

Since this Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877), the constitutional constraints on the exercise of personal jurisdiction emanate primarily from the Due Process Clause. Historical practices inform the meaning of that clause. *See Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."). This is equally true in the personal jurisdiction context. For example, in *Burnham* every Justice agreed that history—in that case, related to establishing personal jurisdiction over nonresident defendants personally served within a state's territory—was "an important factor in establishing whether a jurisdictional rule satisfies due process requirements." 495 U.S. at 629 (Brennan, J., concurring in the judgment); *see also id.* at 622 (plurality opinion); *id.* at 640 (Stevens, J., concurring in the judgment) (citing "the historical evidence and consensus" marshaled by the plurality as part of the reason why *Burnham* presented an easy case). In holding unanimously that in-forum service of process was sufficient to vest general personal jurisdiction over the nonresident defendant, the Court split only over whether long-standing jurisdictional rules automatically fall within the constitutional metes and bounds of due process. *Compare id.* at 622 (plurality opinion) ("[A] doctrine of personal jurisdiction that dates back to the

adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [the constitutional] standard."), *with id.* at 629 (Brennan, J., concurring in the judgment) ("I cannot agree that [history] is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional."). *See also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (noting that the principal opinion in *Burnham* did not independently inquire into the fairness of the basis of personal jurisdiction due to the widespread historical acceptance of in-state personal service).

Unlike the in-state service rule at issue in *Burnham*, other jurisdictional rules, like the so-called effects test, were both strangers to the common law and not well-established at the time of the Fourteenth Amendment's adoption. *See* Restatement (Second) of the Conflict of Laws § 37 cmt. b (1971) (amended 1988) ("The causing of effects in a state by an act done elsewhere was not generally recognized as a basis of judicial jurisdiction at common law. When the question has arisen, the courts have usually held themselves without authority under their local law to exercise jurisdiction on bases not recognized at common law unless authorized to do so by statute."); Willis L.M. Reese & Nina M. Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 260-64 (1959) (describing jurisdiction predicated on "causing consequences" in the forum as "unknown to the common law" and "purely the creature of statute"). Such a lack of historical pedigree does not categorically prohibit this Court from approving a jurisdictional rule designed to account for "the fundamental transformation of our national economy over the years."

McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957). But when this Court does so, it must proceed cautiously in order to ensure that "[f]reeform notions of fundamental fairness divorced from traditional practice [do not] transform a judgment rendered in the absence of authority into law." *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).

At common law, "[t]he foundation of jurisdiction [wa]s physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). From this followed the territorial notion of state adjudicative authority embraced most famously in *Pennoyer*. *See* 95 U.S. at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). No state could compel a nonresident defendant to appear in a proceeding *in personam*, even if the harm that would support a judgment occurred in the forum state. Austin W. Scott et al., *Jurisdiction over Nonresidents Doing Business Within a State*, 32 Harv. L. Rev. 871, 872-73 (1919). Only control over the defendant would support jurisdiction. The historical hallmarks of control were service of process upon a defendant present in the state, consent, and state citizenship. *Id.* at 873-74. *See generally* Restatement (First) of the Conflict of Laws §§ 77-86 (1934) (describing early twentieth-century bases for judicial jurisdiction over individuals); 1 Robert C. Casad & William B. Richman, *Jurisdiction in Civil Actions* § 2-2, at 68 (3d ed. 1998) (same); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241 (discussing common-law history of constraints on adjudicatory jurisdiction); *Developments in the Law—State Court Jurisdiction*, 73 Harv. L. Rev. 909, 915-16 (1959-1960) (same).

Common-law bases for jurisdiction over non-resident corporations were even more austere. While the state of incorporation enjoyed jurisdiction over the company, other states generally did not. In such cases, personal jurisdiction depended upon their consent. *See generally* Restatement (First) of the Conflict of Laws §§ 87-93 (1934) (describing early twentieth-century bases for judicial jurisdiction over corporations). In-forum personal service was impossible, even upon principal corporate officers, because their corporate functions and authority stopped at the state of incorporation's border. *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819); *Peckham v. North Parish*, 33 Mass. (16 Pick.) 274, 286 (1834); *see also Goldey v. Morning News of New Haven*, 156 U.S. 518, 521-22 (1895) (noting that state court judgments "against a corporation neither incorporated nor doing business within the state" are invalid and unenforceable, "unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with *any* business of the corporation there").

As a result, states passed statutes authorizing jurisdiction over foreign corporations "doing business" within the state. *See generally* Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 Rev. Litig. 239, 247-48 & nn.27, 29 (1988). While determining when a corporation was "doing business," like applying all shorthand descriptors, proved difficult, *see* Restatement (First) of the Conflict of Laws § 167 (1934), the basic rule was that the nature and character of the corporation's in-forum business must be sufficient "to warrant the inference that the corporation has subjected itself to the local jurisdic-

tion, and is by its duly authorized officers or agents present within the state or district where service is attempted," *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918). *See generally* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958) (discussing historical categories of adjudicatory jurisdiction over corporations during *Pennoyer* era). Such "doing business" jurisdiction generally did not support jurisdiction in products-liability actions based on the effects of out-of-state conduct absent some in-state activity such as solicitation, sales, or delivery. *See* David P. Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 547.

Encouraged by this Court's decision in *Hess v. Pawolski*, 274 U.S. 352, 357 (1927), rejecting a Fourteenth Amendment due process challenge to a Massachusetts' nonresident-motorist statute, states began to enact broader "long-arm" or "single-tort" statutes. *See generally* 4 Charles A. Wright et al., *Federal Practice and Procedure* § 1068 (3d ed. 2002) (discussing the proliferation and increasingly broad aspects of these statutes). Illinois became the first state to enact a comprehensive long-arm statute in 1955. *See generally* Currie, 1963 U. Ill. L.F. 532 (discussing the history of the Illinois long-arm statute). Other states followed suit. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. Rev. 491, 494-98 (2004); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. Rev. 33, 52 (1978).

What began as a way for states to protect their citizens by ensuring that nonresident motorists could not escape liability for their *in-forum* tortious conduct by retreating to their home states later became a means by which states (or federal courts standing in the shoes of state courts) could assert jurisdiction over certain *out-of-forum* tortious conduct that has effects in the forum state. As with the above-described "doing business" fiction, this basis for extraterritorial assertions of state adjudicative authority was entirely statutory. Restatement (Second) of Conflict of Laws § 37 cmt. b (1971) (amended 1988).

An early example of a long-arm statute reaching out-of-state conduct with adverse in-forum effects is *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961). There, the Illinois Supreme Court interpreted that state's long-arm statute and found that its courts did not violate due process by reaching a nonresident corporation whose only state contact was the manufacture of a part in Ohio that was incorporated by a third party into a product in Pennsylvania, which, in turn, was sold to an Illinois customer. *Id.* at 764, 767. The state supreme court concluded that due process would not be offended by exercising personal jurisdiction over the nonresident part manufacturer because: Illinois law applied to the substantive questions, *id.* at 766-67; Illinois provided likely provided the most convenient forum, *id.* at 767; it was reasonable to infer that the nonresident part manufacturer's "commercial transactions . . . result in substantial use and consumption in [Illinois]," *id.* at 766; and insofar as the nonresident part manufacturer directly benefited from in-state commercial transactions, it "undoubtedly benefited, to a degree" from Illinois' marketing laws, however indirect that benefit may

have been, *id*. Construed as the *Gray* court did, the reach of a state long-arm statute is indeed long.

But not all long-arm statutes applied so broadly. A year after *Gray*, the National Conference of Commissioners on Uniform State Laws approved the Uniform Interstate and International Procedure Act. Though later withdrawn, *see* McFarland, 84 B.U. L. Rev. at 495-96 & nn.14-15, the Uniform Act repudiated the *Gray* court's approach to effects-based jurisdiction. Under the Commissioners' chosen language:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's . . . causing tortious injury in this state if he regularly does or solicits business, or engaged in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.

Unif. Interstate & Int'l Pro. Act § 1.03(a)(4) (withdrawn 1977). In the comments accompanying the model statute, the Commissioners noted that the model language was based on Wisconsin's long-arm statute. *Id.* cmt. They also underscored that this "rule [wa]s more restrictive than the Illinois statute, as interpreted in *Gray*." *Id.* This is because the model statute requires "some other reasonable connection between the state and the defendant" besides in-forum harm to a forum resident, but that additional in-forum conduct need not be related to the act or omission that caused the harm. *Id.* By framing the statute this way, the Commissioners ensured that the state's adjudicative authority could reach the nonresident corporation consistent with the require-

ments of due process encapsulated by the *International Shoe* standard for at least some conduct *before* adding an additional circumstance where jurisdiction was possible.

The upshot of this historical survey is clear. At the time of the Fourteenth Amendment's adoption, the so-called effects test was not well-established. Even as the demarcations set by *Pennoyer* began to change in the early twentieth century, personal jurisdiction based solely on the in-forum effects of out-of-forum conduct was not widely embraced. When it finally began to emerge in the middle of the twentieth century, there was hardly widespread consensus on its contours. This relatively recent genesis of the effects test counsels great caution in the Court's construction of it.

B. The Ninth Circuit's Formulation Of The Effects Test Does Not Comport With The Due Process Limits On The Exercise Of Personal Jurisdiction.

Although this Court first upheld personal jurisdiction based on the effects of out-of-state conduct barely thirty years ago, *see Calder*, 465 U.S. 783 (1984), the Ninth Circuit displayed none of the caution required when applying a personal jurisdiction test of relatively recent vintage. Instead, the panel majority derived a test that sapped the constitutional constraints of any meaning. Specifically, the court below eviscerated the fundamental requirement of purposeful availment and replaced it with a conception of "effects" irreconcilable with this Court's prior precedents.

1. The purposeful availment requirement serves the dual purpose of constraining assertions of state sovereignty burdening interstate commerce and protecting the liberty of nonresident defendants.

While the contours of the constitutional constraints have shifted from a focus on concepts such as "presence," "consent," or "doing business," *see, e.g., Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), to a focus on the defendant's "contacts" with the forum, the underlying *purposes* served by those constraints remain unchanged. At bottom, those purposes are twofold. First, the Fourteenth Amendment "acts to ensure that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Woodson*, 444 U.S. at 292; *see also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (Due Process constraints "are a consequence of territorial limitations on the power of the respective States."). This first purpose helps to ensure that aggressive assertions of state jurisdiction do not frustrate the "economic interdependence of the States" or the development of the Nation as a "common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *Woodson*, 444 U.S. at 293; *see also Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988) (describing significant burden on interstate commerce posed by exorbitant assertions of personal jurisdiction under state law); *McGee*, 355 U.S. at 222-23 (describing relationship between constitutional constraints on personal jurisdiction and economic development of the Nation). Second, the Fourteenth Amendment protects the liberty of the nonresident

defendant over whom the forum asserts its authority. *See Nicastro*, 131 S. Ct. at 2787 (plurality opinion); *Ins. Corp. of Ireland*, 456 U.S. at 702-03 & n.10. This protection enables the defendants to organize their affairs in a manner so that they do not unwittingly bear "the burdens of litigating in a distant or inconvenient forum." *Woodson*, 444 U.S. at 292; *see also Burger King*, 471 U.S. at 475-76.

To vindicate these dual interests, this Court has repeatedly required "some act by which the defendant purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253 (emphasis added); *see also Kulko v. Superior Court of Cal., City & Cnty. of S.F.*, 436 U.S. 84, 94 (1978); *Burger King*, 471 U.S. at 474-75; *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 109 (1987) (plurality opinion); *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).[4] To be sure, the constitutional boundaries of personal

[4] The requirement of purposeful availment has arisen in the context of specific jurisdiction, that is, cases where the plaintiff's claims bear a sufficient relation to the defendant's contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). This contrasts with general jurisdiction where the defendant by virtue of some status (such as citizenship or domicile) or conduct (such as consent) is amenable to jurisdiction in the forum state irrespective of any relationship between the plaintiff's claim and the defendant's contacts. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011). This case does not involve principles of general jurisdiction but, instead, turns entirely on principles of specific jurisdiction. *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-64 (1966) (explicating the difference between general and specific jurisdiction).

jurisdiction have not always turned on whether the defendant actually engaged in conduct in the forum state. In *McGee*, this Court approved the California court's assertion of jurisdiction over a Texas insurance corporation that had solicited by mail renewal of an insurance policy. *See* 355 U.S. at 223-24; *see also Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 648 (1950). Likewise, in *Burger King*, this Court held that personal jurisdiction could constitutionally lie in Florida where the defendant "deliberately reached out beyond Michigan" and negotiated a long-term contract with a Florida corporation that "envisioned continuing and wide-reaching contacts with Burger King *in Florida*." 471 U.S. at 480 (emphasis added). *McGee* and *Burger King* thus establish that out-of-state conduct can satisfy the purposeful availment requirement when that conduct is expressly directed *at the forum state*.

By contrast, this Court has been unwilling to approve an exercise of personal jurisdiction where the defendant did not expressly aim its conduct *at the forum state*. For example, in *Hanson*, this Court held that the Due Process Clause did not support personal jurisdiction over a Delaware-based trustee where the trustee did not "perform[] any acts *in Florida* that bear the same relationship to the [trust] agreement as the solicitation in *McGee*." 357 U.S. at 252 (emphasis added). Likewise, in its decisions addressing the stream-of-commerce theory, the Court made clear that the purposeful availment requirement remains fully applicable. Just like cases predicated on effects jurisdiction, those cases involved situations where the defendants had engaged in conduct elsewhere that eventually had some effect in the forum state. *See Goodyear*, 131 S. Ct. at 2855.

In *Woodson*, this Court found that the purposeful availment requirement was not satisfied because the defendants did not sell products in Oklahoma, perform services there, solicit business there, or advertise there. 444 U.S. at 295. In *Asahi*, the plurality found that requirement not satisfied because the third-party defendant did not engage in "[a]dditional conduct" that "indicate[d] an intent or purpose to serve the market in the forum State" such as designing products for the forum state, advertising in the forum state, advising customers in the forum state, or indirectly marketing in the forum state. 480 U.S. at 112; *see also id.* at 122 (Stevens, J., concurring in part and concurring in the judgment). Finally, in *Nicastro*, a majority of this Court found that the purposeful availment requirement was not satisfied. *See* 131 S. Ct. at 2790 (noting that defendant did not "engage[] in conduct purposefully directed at" the forum state); *id*. at 2793 (Breyer, J., concurring in the judgment and joined by Alito, J.) (finding "no specific effort by the [defendant] to sell in [the forum state]").

2. The "metaphor" of the effects test, just like the "metaphor" of the stream-of-commerce theory does not alter the purposeful availment requirement.

These "stream of commerce" decisions serve as an important reminder that a "metaphor," *Goodyear*, 131 S. Ct. at 2855, does not water-down the requirements of the Due Process Clause or otherwise "amend the general rule of personal jurisdiction," *Nicastro*, 131 S. Ct. at 2788 (plurality opinion). Even where the defendant engages in conduct outside the forum state, the constitutional requirement of pur-

poseful availment endures. As the *Asahi* plurality explained, "[t]he substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." 480 U.S. at 112 (citation and internal quotations omitted).

Much like the stream-of-commerce theory, the so-called effects test has assumed a metaphor-like quality. That quality has "its deficiencies as well as its utility." *Nicastro*, 131 S. Ct. at 2788 (plurality opinion). It supplies a helpful bit of terminology to describe a particular class of cases—a nonresident defendant's tortious conduct outside the forum having an effect in the forum state. But just like the stream of commerce "metaphor," the effects "metaphor," however useful as a shorthand, does not "amend the general rule of personal jurisdiction." *Id.* Two cases, both arising from the California courts, establish this proposition.

In *Kulko*, this Court considered whether a California court could constitutionally exercise personal jurisdiction over a child support and child custody dispute brought by a California mother against the father, a resident of New York. The California court had permitted the exercise of jurisdiction based on the "effects" of the father's decision to send their child to live with her mother in California. On review, this Court first concluded that the father's conduct did not satisfy the purposeful availment requirement of the Due Process Clause. 436 U.S. at 92-96. Having so concluded, this Court then quickly disposed of the California court's reliance on the effects test. It found the California court's reliance on the effects test "misplaced" precisely because the defendant's

conduct could not independently satisfy this Court's purposeful availment requirement. *Id.* at 96. *Kulko*, thus, makes clear that the effects "metaphor" does not replace the requirement of purposeful availment.

Six years later, the Court returned to the constitutionality of California's effects test in *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* involved libel and other common-law intentional tort claims brought in California court against two Florida residents, a reporter and an editor of a nationally circulating periodical; the claims stemmed from the publication of an article in the periodical. Unlike in *Kulko*, the Court in *Calder* found that the nonresident defendants had sufficient minimum contacts and thus satisfied the *International Shoe* standard. 465 U.S. at 790 (acknowledging the need for individual assessment of each defendant's forum-state contacts under the *International Shoe* standard before holding that jurisdiction over the defendants was proper under the circumstances). The Court stressed that the mere "foreseeability" of an effect in California would be insufficient to support personal jurisdiction under the Due Process Clause. *Id.* at 789. Rather, critical in the Court's view was that the defendants' "intentional, and allegedly tortious, actions were *expressly aimed at California*." *Id.* (emphasis added). The Court anchored this conclusion in several critical facts: the allegedly libelous story "concerned the California activities of a California resident;" it "impugned the professionalism of an entertainer whose television career was centered in California;" it was drawn from California sources;" and "the brunt of the harm . . . was suffered in California." *Id.* at 788-89.

Read together, *Kulko* and *Calder* make clear that the so-called effects test, just like the stream-of-commerce theory, still requires the requisite degree of purposeful conduct directed *at the forum state*. *See also* Pet. App. 82a-84a (O'Scannlain, J., dissenting from the denial of rehearing en banc and joined by four other circuit judges) (explaining the conflict between the panel opinion and *Calder*). In holding otherwise, the panel majority in the Ninth Circuit fell into the trap of focusing on the "metaphor" of effects rather than this doctrinal requirement of purposeful availment. While initially citing the proper requirement—that the plaintiff must have "expressly aimed at the forum state," Pet. App. 16a—the panel majority promptly ignored it. Instead, it held that due process was satisfied where the defendant undertook actions "outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections." Pet. App. 17a-18a. In the court's view, it was entirely immaterial whether the plaintiffs "were legal residents of [the forum state] or whether they simply had a significant connection to the forum." Pet App. 22a-23a. Nor was it "relevant who *initiated* the contacts with [the forum]." Pet. App. 24a. As Judge Ikuta recognized in his dissent, this view "unwisely broadens the scope of personal jurisdiction." Pet. App. 58a; *see also* Pet. App. 77a (O'Scannlain, J., dissenting from the denial of rehearing en banc and joined by four other circuit judges).

Specifically, the decision flouts several well-established principles of this Court's constitutional jurisprudence. First, as the seven judges dissenting from the denial of en banc review recognized, the panel majority's decision attempts to return "to a discredited era of specific personal jurisdiction, where

foreseeability reigns supreme and purposeful direction is irrelevant." Pet. App. 91a. This Court consistently has held that the mere foreseeability that the defendant's conduct might have an effect in another state does not satisfy the strictures of the Due Process Clause. *Woodson* stated this most clearly when it declared that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 444 U.S. at 295. The Court found support for this principle in both *Hanson* and *Kulko*:

> In *Hanson* . . . it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally exercise jurisdiction over a Delaware trustee that had no other contacts with the forum state. In *Kulko* . . . it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

444 U.S. at 295-96. After *Woodson*, members of this Court again relied on this rule to reject jurisdiction in the stream-of-commerce cases that, as noted above, depended ultimately on claims that conduct undertaken outside the forum state made the defendant amenable to personal jurisdiction based on the felt effects of that conduct in the forum state. *See Nicastro*, 131 S. Ct. at 2783-84 (plurality opinion); *Asahi*, 480 U.S. at 112-13 (plurality opinion).

Paying lip service to the foreseeability rule, Pet. App. 18a, the panel majority attempts to evade the undeniable conflict by claiming that "the critical factor is whether [the defendant], knowing of the [plaintiffs'] significant connections to [the forum state], should be taken to have intended that the consequences of his actions would be felt by them in that state," Pet. App. 24a. But this "critical factor," just like the foreseeability rule urged by the plaintiffs in *Woodson* (and rejected there by the Court), also cannot be squared with *Hanson* and *Kulko*. The trustee in *Hanson knew* that the settlor, Mrs. Donner, was a resident of the forum (Florida) for part of the time it was managing the trust. *See* 357 U.S. at 252 (noting that trustee remitted income to settlor in Florida). The actions it undertook in Delaware—maintenance of the trust funds and remittance of trust funds—unquestionably had the "purpose of affecting" a specific individual (Mrs. Donner) at the time she was a known forum resident. Despite these facts, the *Hanson* Court concluded that the Due Process clause did not support the exercise of personal jurisdiction. *Kulko* is to the same effect. The father in *Kulko*, just like the trustee in *Hanson*, *knew* that the plaintiff, his ex-wife, was a resident of the forum (California) for the period following their divorce. *See* 436 U.S. at 87 (noting that daughter told father she wanted to remain with mother in California). The actions he undertook in New York—sending his child to California in fulfillment of her wishes to live with her mother—also had the "purpose of affecting" a specific individual (his wife) at the time she was a known forum resident. Here too, though, the *Kulko* Court declined to find the state court's exercise of personal jurisdiction comported with the Due Process Clause.

Second, the Ninth Circuit panel majority's emphasis on the plaintiffs' "strong forum connections" gives relevance to the unilateral activities of the plaintiff, contrary to the principle that the plaintiffs' contacts with the forum state do not drive the Due Process analysis. This Court's decision *Helicopteros Nacionales de Colombia, S.A. v. Hall* made that point crystal clear: "Unilateral activity of another party or a third person [is] not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." 466 U.S. 408, 417 (1984). While the *Helicopteros* Court articulated this principle in a case involving general jurisdiction, this Court's decisions involving specific jurisdiction rest on that same principle. Indeed, *Helicopteros* cited several specific jurisdiction decisions to support the proposition. *Id.* For example, *Hanson* made this point most clearly when it declared that "[t]he unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum state." 357 U.S. at 253. *Kulko* did likewise when it declined to uphold personal jurisdiction based on the mother's decision to move to California. 436 U.S. at 94. *Woodson* reaffirmed the principle in the commercial context when it rejected any claim that the Oklahoma courts could exercise personal jurisdiction over the New England-based defendants for the purchaser's act of driving the automobile onto highways in Oklahoma. 444 U.S. at 298. Following *Hanson*, *Kulko*, and *Woodson*, numerous other decisions of this Court repeatedly emphasize that it is the defendant's conduct, not the plaintiff's, that supplies the relevant source material for the jurisdictional inquiry. *See Burger King*, 471 U.S. at 475 ("Jurisdiction is proper

. . . where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum state.") (internal quotations omitted); *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) ("It cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable"); *cf. Keeton*, 465 U.S. at 779 ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant.").

In sum, consistent with the caution used to assess theories of personal jurisdiction that lack a well-established historical pedigree, this Court should reaffirm that the so-called effects test does not alter the constitutional requirement of purposeful availment. In the context of out-of-state conduct, this requirement means that the defendant must expressly aim that conduct *at the forum state*. The contrary conclusion of the Ninth Circuit's panel majority—permitting personal jurisdiction whenever the defendant targets a plaintiff with significant forum connections—cannot be squared with this Court's precedents or their underlying purposes.

C. The Constitutional Standard For The Effects Test Does Not Depend On Whether The Defendant Is Engaged In Commercial Activity.

Personal jurisdiction based on the effects test matters for a variety of commercial activities. These include such everyday matters as product sales, internet exchanges, publishing, and shareholder relations. *See* Petr's Brief at 37-40; *Wolstenholme v. Bartels*, No. 11-3767, 2013 WL 209207 (3d Cir. Jan.

18, 2013) (unpublished decision). Given this variety of activities implicated by the effects test, it is especially important that this Court announce a clear rule not dependent on the precise factual scenario presented by this case.

Specifically, this Court should make clear that the constitutional requirements of the effects test do not depend on whether the underlying activity is "commercial" or "noncommercial." In *Kulko*, the Court traced California's effects test to Section 37 of the Restatement (Second) of the Conflict of Laws and read the Restatement's examples to suggest that its formulation "was intended to reach . . . commercial activity affecting state residents." 436 U.S. at 96. Neither the language of Section 37 nor its official commentary actually distinguishes between "commercial" and "noncommercial" activity. *See* Restatement (Second) of the Conflict of Laws (1971) (amended 1988). But even if *Kulko* correctly interpreted Section 37, the Restatement "is not binding on this Court," 436 U.S. at 96, and any interpretation resting on the distinction between "commercial" and "noncommercial" activity should be rejected for several reasons.

First, the text of the Fourteenth Amendment surely does not lend itself to any such distinction. It speaks simply in terms of a prohibition against a State depriving a person of property without due process of law. Elsewhere, the drafters of the Constitution indicated their awareness of how to single out commercial conduct for a separate set of rules. *See, e.g.*, U.S. Const. Art. I, § 10 (prohibiting state interference with the obligations of contract). Their failure to do so here counsels against this Court grafting a

separate set of "commercial" rules onto the effects test.

Second, to lower the bar on the effects test for commercial transactions runs contrary to the purposes of the constitutional constraints on personal jurisdiction. As noted above, a core purpose of the constitutional constraints on the exercise of personal jurisdiction is to prevent state assertions of jurisdiction over nonresident defendants from engendering antagonisms between the states and interfering with a fully integrated commercial republic. *See supra* at 16-17. Indeed, this Court in a series of opinions by Justice Brandeis found some exercises of personal jurisdiction under state law to be so burdensome as to amount to an unconstitutional interference with interstate commerce. *See, e.g., Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492, 495-96 (1929); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101, 103-04 (1924); *Davis v. Farmers' Co-Op. Equity Co.*, 262 U.S. 312, 315-17 (1923). And this line of precedent may have "continuing vitality." *Scanapico v. Richmond, Fredericksburg & Potomac R.R. Co.*, 439 F.2d 17, 25-26 (2d Cir. 1970) (en banc) (Friendly, J.). *Compare Bendix Autolite*, 486 U.S. at 893 (recognizing the burdens on interstate commerce posed by excessive assertions of personal jurisdiction under state law), *with Calder*, 465 U.S. at 790-91 (rejecting "the suggestion that First Amendment concerns enter into the jurisdictional analysis"). *See generally* Restatement (Second) of Judgments § 4 cmt. e & Reporter's Note (1982) (noting debate over whether other constitutional provisions apart from the Due Process Clause limit the exercise of personal jurisdiction under state law). To make it easier to assert personal jurisdiction over the effects of commercial transactions—as opposed to noncommercial ones—

thwarts, rather than facilitates, this purpose of the due process constraints on personal jurisdiction. *See* Russell J. Weintraub, *Commentary on the Conflict of Laws* 287-91 (6th ed. 2010) (noting that burdens on commerce of an assertion of judicial jurisdiction under state law may appropriately tip the scales in the due process inquiry).

Finally, establishing a separate rule for commercial transactions flies in the face of this Court's precedents. Certainly since the time of *International Shoe*, and even earlier, this Court's articulation of the due process limits on judicial jurisdiction has not differentiated between commercial and noncommercial conduct. *International Shoe* itself involved the effects a commercial transaction consummated elsewhere—the sale of shoes by contract formed in Missouri—and nothing in the Court's opinion suggests that its formulation of the minimum contacts test was meant to vary with the nature of the transaction. On the contrary, *International Shoe* made clear that the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual *or corporate defendant* with which the state has no contact, ties, or relations." 326 U.S. at 319 (emphasis added) (citing *Pennoyer v. Neff* and *Minn. Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923)). Since *International Shoe*, this Court's precedents on the constitutional limits on personal jurisdiction have not held—much less hinted at—distinct rules for commercial and noncommercial conduct. *Compare Calder*, 465 U.S. at 789-90, *with Woodson*, 444 U.S. at 291-94.

To hold that effects test differentiates between commercial and noncommercial conduct runs directly

contrary to this Court's precedents involving the stream-of-commerce theory. As noted above, those precedents all involved the same underlying fact pattern at issue here—out-of-state conduct allegedly having an effect in the forum state. *See supra* at 18-19. That conduct, of course, occurred in the context of commercial transactions. Yet in each case, when it held that the Constitution did not support the exercise of personal jurisdiction, the Court nowhere intimated that the test had somehow been watered-down by virtue of the fact that a commercial transaction was at issue.

At bottom, then, the constitutional contours of the effects test should not be any weaker in cases where the defendant's out-of-state conduct happens to involve commercial activity.

D. The Prerogative To Expand Available Federal Forums Lies With Congress, Which Has Declined To Authorize The Sweeping Theory Of Jurisdiction Employed By The Ninth Circuit.

It may be complained that requiring express aiming at the forum state will frustrate plaintiffs' efforts to obtain relief in a local forum and will undermine their home states' interests in making that forum available. But that complaint is more appropriately addressed to Congress, not to the courts.

Congress surely has the power to authorize personal jurisdiction over claims arising under federal law, *see Omni Capital*, 484 U.S. at 104-08, and "knows how to authorize nationwide service of process when it wants to provide for it," *id.* at 411. When Congress has enacted a statute authorizing nationwide or worldwide service of process, lower

courts generally have held that they may consider the defendant's contacts with the United States as a whole. *See* Born & Rutledge, *International Civil Litigation in United States Courts*, at 203-15. Though never officially approved by a majority of this Court, *see Asahi*, 480 U.S. at 113 n.*, these nationwide contacts tests illustrate the truism that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," *Nicastro*, 131 S. Ct. at 2789 (plurality opinion); *see also Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) ("[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court.").

Yet in many other cases, including both the *Bivens* claim at issue here and state-law tort claims, Congress has not sought to authorize such a sweeping exercise of personal jurisdiction. This cautious approach may reflect an awareness of the special burdens put upon government officials if they are forced to defend themselves in unfamiliar forums. *See Stafford*, 444 U.S. at 544 (majority opinion). It may reflect a strong form of federalism—namely that federal district courts located in a state should not be available to hear claims when the Constitution precludes the exercise of personal jurisdiction by local trial courts in that same state. *See Insurance Corp. of Ireland*, 456 U.S. at 711-12 & n.3 (Powell, J., concurring in the judgment). Whatever the reason, these are delicate judgments made, in the first instance, by Congress, and there is no reason for the federal courts to short-circuit those careful policy determinations about the scope of personal jurisdiction.

CONCLUSION

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

Respectfully submitted,

KATHRYN COMERFORD TODD
JANE E. HOLMAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street N.W.
Washington, D.C. 20062
(202) 463-5337

PETER B. RUTLEDGE
Counsel of Record
215 Morton Avenue
Athens, GA 30605
(706) 542-1328
borut@uga.edu

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