No.

In the Supreme Court of the United States

DAIMLERCHRYSLER AKTIENGESELLSCHAFT,

Petitioner,

v.

SCOTT OLSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, AND VICKIE OLSON,

Respondents.

Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a product liability action involving a product exclusively designed for and sold in a foreign market and never placed in any "stream of commerce" flowing into the United States, a State may, consistent with the Due Process Clause of the Fourteenth Amendment, exercise "general" *in personam* jurisdiction over a non-U.S. manufacturer that has no offices, employees, property, books, mailing address, bank account or agent for the service of process in the State, based on a determination that the manufacturer has engaged in "continuous and systematic" activities in the forum by (a) maintaining an Internet website that includes product information and allows email communications with users throughout the world; (b) placing *other*, *different* products into a "stream of commerce," a portion of which flows into the State; (c) filing an unrelated trademark infringement lawsuit in a federal court located in the State; and (d) maintaining a manufacturer-distributor relationship with an indirect, wholly owned U.S. subsidiary that is incorporated (and has its principal place of business) outside of the State and has scrupulously maintained its separate corporate existence.

RULE 29.6 STATEMENT

Petitioner DaimlerChrysler Aktiengesellschaft has no parent corporation, and no other publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Texas Court of Appeals (App., *infra*, 1a-29a) is reported at 21 S.W.3d 707. The orders of the Texas Supreme Court denying the petition for mandamus (App., *infra*, 30a-31a) and dismissing the petition for review (*id*. at 32a-33a) are unreported. The order of the trial court overruling the special appearance (*id*. at 34a-35a) is unreported.

JURISDICTION

The Texas Court of Appeals' judgment was entered on June 15, 2000. On April 5, 2001, the Texas Supreme Court denied the petition for a writ of mandamus and dismissed the petition for review. App., *infra*, 30a-33a. Motions for rehearing with respect to both orders were denied on September 20, 2001. *Id*. at 36a-39a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

This Court has jurisdiction even though "there has not yet been a trial on the merits." *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984) (citing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975)). If this Court were to grant review and reverse the judgment, that action "would be preclusive of any further litigation on the relevant cause of action" because the Texas courts would lack personal jurisdiction over petitioner. *Cox*, 420 U.S. at 482-83. For that reason, and because "a refusal immediately to review the state court decision might seriously erode federal policy" (*id*.), this Court has repeatedly exercised review in "cases presenting jurisdictional issues in this posture." *Calder*, 465 U.S. at 488 n.8 (citing *Rush* v. *Savchuk*, 444 U.S. 320 (1980), *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and *Shaffer* v. *Heitner*, 433 U.S. 186, 195-96 n.12 (1977)).

Moreover, mandamus is an independent legal proceeding whose termination constitutes a "final decision" of the state courts within the meaning of 28 U.S.C. § 1257(a). See *Mt. Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE 108 (7th ed.

1993). Petitioner seeks review, in the alternative, of the Texas Supreme Court's judgment in denying the petition for a writ of mandamus. (For simplicity's sake, we have omitted mention of this alternative basis from the cover of this petition.) This Court has addressed due process challenges to personal jurisdiction on writ of certiorari from mandamus proceedings in the state courts. See *Burnham* v. *Superior Court of California*, 495 U.S. 604, 608 (1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code Ann. § 17.042, are set forth at App., *infra*, 40a.

STATEMENT

This case raises an important issue of federal law that is frequently litigated in state and federal courts: the limits the Due Process Clause places on the power of a State through its long-arm statute to exercise *in personam* jurisdiction over a nonresident defendant. That issue has spawned enormous confusion, and deep conflict, in the lower courts – especially in product liability actions brought against foreign corporations that manufacture products outside of the forum.

The facts of this case present a compelling opportunity for the Court to dispel confusion over the constitutional boundaries of "general" and "specific" jurisdiction. The Mercedes-Benz 500SE at issue was designed for the European market and never sold in the United States. A member of respondents' family purchased it used in Germany and unilaterally brought it to Texas. Respondents argued for a hybrid species of specific jurisdiction based upon a stream of commerce that carried different Mercedes-Benz vehicles to Texas. This unsupported theory should have been rejected because respondents' claims do not "arise out of" any contacts the German manufacturer had with Texas.

The Texas Court of Appeals did not even address respondents' theory, but instead ruled that Texas courts may exercise general jurisdiction over the foreign manufacturer, even though the company had no offices, employees, property, bank account, agent for the service of process or other traditional indicia of presence within the State. To reach that astonishing result, the court relied on several unconventional considerations, such as the maintenance of an Internet website, none of which reflects conduct purposefully directed toward the State of Texas. These factors, moreover, are so broadly applicable to modern businesses that they seriously undermine the guarantee of due process for foreign corporations that happen to be sued in Texas for claims arising anywhere in the world.

A. The Proceedings in the Trial Court

This case arises out of a two-car accident in Temple, Texas, on April 3, 1995. According to the allegations of respondents' complaint, Karen Olson was driving a 1980 Mercedes-Benz 500SE when she was struck by a Ford van owned by the Central Produce Company. Following the collision, the Mercedes-Benz caught fire. Karen Olson died in the accident.

In 1996, respondents, the adult children of Karen Olson, filed a lawsuit against Daimler-Benz Aktiengesellschaft ("Daimler-Benz AG")[1] and Central Produce in the district court for the 169th Judicial District, Bell County, Texas. In addition to advancing a negligence claim against Central Produce, respondents alleged that an unspecified design and/or manufac-

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[1] In December 1998, Daimler-Benz AG ceased to exist as the result of a business combination with Chrysler Corporation. One of the resulting entities was petitioner DaimlerChrysler Aktiengesellshaft ("DaimlerChrysler AG"), a German corporation, which acquired all of the stock of Daimler-Benz AG. (In the 1998 transaction, Chrysler Corporation changed its name to DaimlerChrysler Corporation, and it is now an indirect U.S. subsidiary of DaimlerChrysler AG.) The lower court properly ignored these events because Daimler-Benz AG's amenability to jurisdiction hinged on its activities "in 1996, when the Olsons filed suit, and for a reasonable time before 1996." App., *infra*, 10a; see *id*. at 3a-4a n.2. We accordingly refer to Daimler-Benz AG throughout this petition.

turing defect in the Mercedes-Benz 500SE was a "producing cause" of Karen Olson's death. Daimler-Benz AG filed a special appearance objecting to the trial court's exercise of personal jurisdiction. The parties entered into a stipulation of jurisdictional facts (App., *infra*, 52a-60a). They also submitted other materials, which established that Karen Olson's former husband bought her car used in Germany in 1984 and later brought it to Texas. This Mercedes-Benz model (the 500SE) was never sold in the United States and was designed to European specifications.

Daimler-Benz AG – a German corporation with its principal place of business in Stuttgart – manufactured the vehicle in Germany. *Id*. at 2a, 54a. At the time this lawsuit was filed, Daimler-Benz AG was not qualified, licensed, or authorized to do business in Texas; had no officers, agents, or employees in Texas; did not own, maintain, control, lease, or possess any office, plant, or warehouse in Texas; had no equipment, inventory, or books and records in Texas; had no mailing address, telephone listing, bank account, or other real or personal property in Texas; and had never appointed an agent for service of process in Texas. *Id.* at 10a, 47a-48a, 55a.

During the relevant time period, Daimler-Benz AG had a "wholly owned but separately operated" subsidiary, Daimler-Benz of North America Corporation ("DBNAC"), which was a Delaware corporation with its principal place of business in New York. *Id.* at 3a, 54-55a. DBNAC, in turn, had a "wholly owned but separately operated" subsidiary, Mercedes-Benz of North America, Inc. ("MBNA"), which was a Delaware corporation with its principal place of business in New Jersey. *Id*. at 55a. MBNA served as the authorized distributor of Mercedes-Benz automobiles and parts in North America. *Id*. Under the distribution agreement, MBNA selected models and parts it wished to distribute in the United States, purchased them in Germany, and then imported them into this country, using its own facilities. *Id*. at 10a-11a, 50a, 55a.

The parties stipulated that Daimler-Benz AG never advertised the sale of Mercedes-Benz vehicles in Texas or the

United States; such advertising was conducted only by MBNA and its local dealers. *Id.* at 56a. They also stipulated that Daimler-Benz AG maintained a website with certain features on the Internet. *Id*. at 57a. Finally, Daimler-Benz AG submitted uncontroverted evidence that it had "never participated in the day-to-day conduct of MBNA's business," the parent and indirect subsidiary had their own "officers and directors" as well as "separate corporate existences," and these "distinct and separate existences" had "always been formally maintained, exercised, and observed in all respects." *Id*. at 49a.

After a hearing, the trial court summarily "overruled and denied" Daimler-Benz AG's special appearance. *Id*. at 34a-35a.

B. The Proceedings in the Appellate Courts

A panel of the Texas Court of Appeals for the Third District, at Austin, upheld the trial court's exercise of general *in personam* jurisdiction. After Daimler-Benz AG filed a motion for rehearing, the panel withdrew its opinion and substituted a slightly modified opinion. App., *infra*, 1a-29a. In its substituted opinion, the court noted that it need only consider "whether it is consistent with federal due process for Texas courts to assert personal jurisdiction over Daimler-Benz." *Id.* at 4a. The court explained that, "[u]nder the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if" two preconditions are satisfied: (1) "the defendant has purposefully established minimum contacts with the forum state," and (2) "the exercise of jurisdiction comports with traditional notions of fair play and substantial justice." *Id*.

1. *Minimum Contacts*. The court observed that the minimum contacts analysis has been refined "into two types of jurisdiction – general and specific." *Id*. at 5a. "Specific jurisdiction exists when the cause of action *arises out of or relates to* the nonresident defendant's contacts with the forum state." *Id.* (emphasis added). "General jurisdiction," in contrast, exists without such a connection "when the defendant's contacts with the forum state are *continuous and systematic*." *Id*. (emphasis added). General jurisdiction is "more demanding" and

"requir[es] a showing of *substantial* activities *within* the forum state." *Id*. (emphasis added).

The court of appeals acknowledged that Daimler-Benz AG lacked all the traditional indicia of corporate presence in Texas. *Id*. at 10a. Nonetheless, it concluded that the corporation had "systematic and continuous" contacts with the State and thus was "subject to general jurisdiction." *Id*. at 1a-27a. The court relied principally on four considerations.

First, the court relied on Daimler-Benz AG's "place[ment of] a large volume of vehicles into a stream of commerce destined for the United States." *Id*. at 27a. The court deemed that consideration important even though, as it acknowledged (and the parties stipulated), the car involved in this case did *not* travel to Texas through the stream of commerce. See *id.* at 11a.

Second, the court relied (*id*. at 12a-16a) on the fact that Daimler-Benz AG and its U.S. distributor, MBNA, had filed an unrelated trademark infringement complaint in a federal court in Texas. See *id.* at 61a-75a (reproducing complaint). Among other things, the complaint alleged that a Dallas car dealer had unlawfully used federally registered trademarks and service marks owned by Daimler-Benz AG and licensed to MBNA. The court treated the lawsuit as evidence that Daimler-Benz AG had advertised in Texas (because it alleged that Daimler-Benz AG and MBNA had "expended considerable sums of money using, promoting and advertising said marks and trade names in commerce"). *Id.* at 12a-14a, 65a. The court also read the complaint as "necessarily impl[ying]" that Daimler-Benz AG had "engaged in competition" and "established business relationships and business operations in Texas." *Id*. at 15a.

Third, the court held that it was proper to impute to Daimler-Benz AG the Texas activities and contacts of MBNA, an indirect subsidiary owned though DBNAC. Despite the general rule that "a foreign corporation is not subject to the jurisdiction of the forum state merely because its subsidiary is present or doing business there," the court stated that "the operative question" was "whether MBNA is in fact a mere division or branch of a larger whole." *Id*. at 16a, 17a n.5 (internal

quotations omitted). That standard was satisfied, the court concluded, even though the two entities were "formally separate" and "strictly observed corporate formalities" (*id*. at 20a, 21a), were "separately operated" (*id*. at 24a), and Daimler-Benz AG had submitted evidence showing that it had "never participated in the day-to-day conduct of MBNA's business." *Id*.

Fourth, the court noted that "Daimler-Benz maintains an Internet website by means of which individuals around the world, including those in Texas, can communicate with it electronically" through email. *Id*. Although it "does not offer Mercedes-Benz vehicles for sale to Texas residents over the Internet," and indeed "refers sales inquiries from the U.S. to MBNA," the website does "offer[] Internet users information about Daimler-Benz and its worldwide products and services" and permits those who visit it (including Texas residents) to "register" to receive "direct mailings" electronically. *Id.* at 24a-25a. Applying a "sliding scale" test that originated in *Zippo Mfg. Co.* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the court of appeals ruled that Daimler-Benz AG's website featured a "level of interactivity" that, "standing alone," "might not be enough to subject [it] to jurisdiction in Texas," but would be "consider[ed] * * * a factor, along with the other contacts that exist in this case." App., *infra*, 25a-26a.

2. *Fair Play and Substantial Justice*. Having concluded that minimum contacts existed, the court proceeded to examine "the second prong of the due process test": whether "the assertion of personal jurisdiction by the district court comports with traditional notions of fair play and substantial justice." *Id*. at 26a-27a. In reaching the conclusion that this second requirement was also satisfied, the court examined seven factors employed by the Texas courts in this inquiry. *Id*.

On July 31, 2000, Daimler-Benz AG sought review of the court of appeals' decision by filing petitions for review and for a writ of mandamus in the Texas Supreme Court, which subsequently directed the parties to file briefs on the merits. On April 5, 2001, the Texas Supreme Court denied the petition for a writ of mandamus and dismissed the petition for review. *Id*.

at 30a-33a. Motions for rehearing with respect to both orders were denied on September 20, 2001. *Id*. at 36a-39a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve important conflicts in the lower courts and dispel widespread confusion over the limits imposed by the Due Process Clause on the power of a State to exercise *in personam* jurisdiction over a non-resident defendant. That issue has "become one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (more than 2300 cases involving "minimum contacts" test in 1990-95). The reasons are straightforward: most States have enacted long-arm statutes that reach as far as the Due Process Clause permits; this Court's most recent decisions involving the "minimum contacts" test are a decade old and were sharply divided, in reasoning if not in result; and the rapid growth of the Internet, with its potential to support new claims of corporate "contacts" with distant fora, has fueled litigation and created even greater doctrinal uncertainty.

In the decision below, the Texas Court of Appeals has upheld the exercise of *in personam* jurisdiction over a foreign manufacturer on the basis of considerations – such as the maintenance of a website not specifically directed at the forum and not used to make sales – that apply with equal force to a broad array of foreign corporations. Worse yet, the court below approved the assertion of "general" jurisdiction, even though Daimler-Benz AG lacked all of the traditional indicia of corporate presence in the State. As a consequence, Daimler-Benz AG (and others with equally tenuous connections) now can be haled into Texas courts to defend lawsuits that are wholly unrelated to any contacts with Texas they may have. If permitted to stand, the decision below will seriously undermine the "degree of predictability to the legal system" that is necessary to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." *World-Wide*

Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 297 (1980) (internal quotations omitted). This Court should grant review to prevent that result as well as to resolve the various conflicts created or exacerbated by the decision below, including several conflicts between the Texas courts and the Fifth Circuit. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (resolving conflict between state court and federal circuit in which it is located to prevent forum-shopping).

I. The Court of Appeals' General Jurisdiction Analysis and Holding Conflict with the Decisions of Other Courts and Raise Important and Recurring Issues

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny, this Court has held that the Due Process Clause imposes significant limits on the power of a State to assert *in personam* jurisdiction over a nonresident defendant. The defendant must have "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id*. at 316 (internal quotations omitted).

When the cause of action does not arise out of or relate to the defendant's activities in the forum, those activities must be sufficiently "continuous and systematic" to make the assertion of *in personam* jurisdiction reasonable. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). This Court has distinguished such "general" jurisdiction from "specific" jurisdiction, which requires a lesser showing of contacts and may be asserted if the plaintiff's claims "arise out of or relate to" the defendant's forum contacts. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984).

A. This Court's General Jurisdiction Decisions

Since *International Shoe*, most of this Court's "minimum contacts" decisions have been resolved on the basis of "specific" jurisdiction. In only two cases – *Perkins* and *Helicopteros* – has this Court resolved questions concerning the assertion of

general jurisdiction over corporate defendants.[2] Further guidance from this Court in this important area of law is needed.

Perkins involved a suit in the Ohio courts by a shareholder of a mining concern organized under the laws of the Philippines. The company's mining operations were in the Philippines but had been "completely halted during the occupation of the Islands by the Japanese." 342 U.S. at 447. During that suspension, the company's president had returned to Ohio, where he "maintained an office," "kept the office files of the company," carried on "correspondence relating to the business * * * and to its employees," "drew and distributed" salary checks for himself and two secretaries "who worked there with him," "used and maintained" two active bank accounts "carrying substantial balances of company funds," used another bank as transfer agent for the company's stock, held several directors' meetings, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines," and "dispatched funds to cover purchases of machinery for such rehabilitation." *Id*. at 447-48. Because these activities in Ohio amounted to the "continuous and systematic supervision of the necessarily limited wartime activities of the company," they were a sufficient basis for the exercise of general jurisdiction. *Id*.

In *Helicopteros*, the Court reversed a decision of the Texas Supreme Court upholding the exercise of general jurisdiction over a Colombian corporation with its principal place of business in Bogota. The defendant, which provided helicopter transportation for oil and construction companies in South America, was sued after a helicopter it owned crashed in Peru, killing four U.S. citizens. After noting that the defendant lacked all of the traditional characteristics of corporate "presence" within Texas (such as offices, employees, or operations), this Court rejected the argument that Texas could nevertheless assert gen-

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[2] In *Burnham* v. *Superior Court of California*, 495 U.S. 604 (1990), this Court unanimously upheld the assertion of general jurisdiction over an *individual* defendant based on temporary presence in the forum. The Court divided sharply (4-4-1) as to the proper rationale, however.

eral jurisdiction because the defendant (1) purchased 80% of its helicopters, spare parts and equipment worth more than $4 million, and training services from a company located in Texas; (2) sent its CEO to Texas for a contract-negotiation session; (3) sent personnel to Texas for training; and (4) accepted into its New York bank account checks drawn on a Texas bank. 466 U.S. at 410-11, 416-19. The Court reaffirmed (*id*. at 417-18 & n.12) a pre-*International Shoe* decision involving a corporate defendant, *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923), which held that purchases and related trips are not a sufficient basis for a State's assertion of jurisdiction over a foreign corporation that lacked an established place of business in the forum and never regularly carried on business there.

Perkins, *Helicopteros*, and *Rosenberg Bros.* confirm the requirement of traditional indicia of corporate presence within a State. In the only case where general jurisdiction was upheld – *Perkins* – many of those indicia were present, whereas in both cases where the assertion of jurisdiction was invalidated they were absent. In this case, the parties stipulated that petitioner similarly lacked all of the traditional indicia of corporate presence within Texas. See App., *infra*, 10a-11a.

Nevertheless, the court of appeals ruled that petitioner had engaged in such "continuous and systematic" activities within Texas that it could be haled into Texas courts to answer even claims wholly unrelated to any contacts Daimler-Benz AG might have with the State. To reach that result, the court of appeals relied on a variety of nontraditional considerations, including Daimler-Benz AG's placement of *other*, *different* products into a "stream of commerce," part of which flows into Texas; its maintenance of an Internet website; and Daimler-Benz AG's entry into an ordinary, exclusive distributorship agreement with an indirect U.S. subsidiary. But see *Bedrejo* v. *Triple E Canada, Ltd.*, 984 P.2d 739, 741-72 (Mont. 1999) (rejecting general jurisdiction over foreign manufacturer of mobile home sold outside of State; reasoning that absence of traditional indicia of presence was "significant"; and rejecting argument based on website and other nontraditional factors). As

we explain below, the lower court's analysis and holding conflict in multiple respects with the decisions of other courts and raise important issues warranting this Court's review.[3]

B. The Court of Appeals' Reliance on Daimler-Benz AG's Placement of Other, Different Products into a "Stream of Commerce" Flowing into Texas

In upholding the assertion of general jurisdiction, the court relied on Daimler-Benz AG's placement of "a large volume of vehicles into a stream of commerce destined for the United States." App., *infra*, 27a; see also *id.* at 3a, 11a. That analysis conflicts with the decisions of other courts and presents a valuable opportunity to address the pervasive confusion concerning the meaning of the "stream of commerce" theory.

The decision below conflicts with a line of cases holding that the "stream of commerce" theory is a basis for *specific* jurisdiction, but cannot be used to support *general* jurisdiction. See, *e.g.*, *Alpine View Co.* v. *Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000); *Bearry* v. *Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987); *Williams* v. *Wilson*, 939 F. Supp. 543, 549 (W.D. Tex. 1995), aff'd, 95 F.3d 1149 (5th Cir. 1996); *Kern* v. *Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 536 (S.D. Tex. 1994); *Regent Lighting Corp.* v. *American Lighting Concept, Inc.*, 25 F. Supp. 2d 705, 711-12 (M.D.N.C. 1997).

The court of appeals' failure to grasp this fundamental limitation on the "stream of commerce" theory may well be attributable to the serious and long-standing confusion surrounding that theory, which only this Court can resolve. The

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[3] Although *Helicopteros* and *Perkins* "provide some guidance, the exact status and boundaries of general jurisdiction remain uncertain" and have produced "discordant results." Brilmayer, Haverkamp & Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 724 (1988). For example, it is not clear whether the "continuous and systematic" test focuses on "the quantity of activities in the forum, the quality or nature of the activities in the forum, or other considerations." Comment, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 597 (1992).

theory was first discussed in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), which held that the Oklahoma courts could not exercise jurisdiction over a nonresident retailer (World-Wide) and its wholesale distributor based on the fact that an automobile sold by the retailer in New York to New York residents was later driven to Oklahoma (where it was involved in an accident). Although the automobile's foreign manufacturer (Audi) and its U.S. importer (Volkswagen of America) were not parties before this Court in *World-Wide Volkswagen*, the Court nonetheless offered this observation:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that *delivers its product into the stream of commerce* with the expectation that they will be purchased by consumers in the forum State.

444 U.S. at 297-98 (emphasis added). "[B]ecause the example used by the Court was directed at manufacturers and distributors," but "only the retail dealer and regional distributor were contesting jurisdiction," this passage "is dicta." *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So.2d 881, 887, 889 (La.), cert. denied, 528 U.S. 1019 (1999).

In *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987), this Court sought to clarify the *World-Wide Volkswagen* dicta. Four Members of this Court were of the view that the "placement of a product into the stream of commerce, without more, is *not* an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112 (opinion of O'Connor, J.) (emphasis added). According to the plurality, "[a]dditional conduct of the defendant" must be shown before *in personam* jurisdiction may be asserted. *Id.*

Another bloc of four Justices, however, took the contrary view that the mere placement of a product into the stream of commerce is enough to satisfy due process (as long as the stream of commerce is understood to mean "the regular and anticipated flow of products from manufacture to distribution to retail sale"). *Id*. at 117 (opinion of Brennan, J.). Finally, Justice Stevens wrote a separate concurrence stating that there was no need to decide the issue of minimum contacts because California's exercise of jurisdiction was unreasonable. *Id*. at 121-22.

The Court's 4-1-4 decision in *Asahi* has generated substantial confusion, and conflict, in the lower federal and state courts. Some courts have adopted the approach of Justice O'Connor's plurality opinion, *e.g.*, *Lesnick* v. *Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995); *Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992), whereas others have endorsed the approach of Justice Brennan's opinion, *e.g.*, *Dehmlow* v. *Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992). Still other courts, in the face of the *Asahi* vote, "have continued to apply" the dicta in *World-Wide Volkswagen*. *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1548 n.17 (11th Cir.), cert. denied, 508 U.S. 907 (1993) (collecting cases); *e.g.*, *Irving* v. *Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.), cert. denied, 493 U.S. 823 (1989). Compare also *Ruston Gas Turbines, Inc.* v. *Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993) (refusing to follow Justice O'Connor's *Asahi* plurality and adhering to *World-Wide Volkswagen*'s stream-of-commerce rule) with *CCMC* v. *Salinas*, 929 S.W.2d 435, 439-40 (Tex. 1996) (preferring Justice O'Connor's *Asahi* formulation). And the Louisiana Supreme Court has treated the continuing validity, and meaning, of the "stream of commerce" theory as an open issue since there is "no Supreme Court precedent that guides us." *Ruckstuhl*, 731 So.2d at 889. This disarray has been widely acknowledged. See, *e.g.*, *id*. at 887 n.5; *Pennzoil Products Co.* v. *Colelli & Assocs., Inc.*, 149 F.3d 197, 205-06 (3d Cir. 1998); *Lesnick*, 35 F.3d at 945 & n.1.

C. Daimler-Benz AG's Maintenance of a Website

The court of appeals also relied on Daimler-Benz AG's maintenance of a website. App., *infra*, 24a-26a. Employing a "sliding scale" that focuses on "the nature and quality of commercial activity * * * conduct[ed] over the Internet" (*Zippo Mfg.*, 952 F. Supp. at 1124), the court of appeals examined the website to determine where it fell along a "continuum of Internet activities" that "is divided into three categories for purposes of personal jurisdiction." App., *infra*, 25a. The court asserted that Daimler-Benz AG's website did not fall into the first category of "passive" sites that do "no more than make information available to Internet users"; nor was it a site at the other extreme used to "make contracts with residents of other jurisdictions." *Id*. Instead, the website fell into the middle category of "interactive" websites where "the exercise of jurisdiction depends *on the level of interactivity* between the parties on the web site." *Id*. (emphasis added).

The court concluded that the Daimler-Benz AG website was "interactive" because it "allow[s] Texas residents to submit comments and questions to Daimler-Benz representatives and to receive electronic mailings from Daimler-Benz." *Id*. The court reached that conclusion even though Daimler-Benz AG "makes no sales or other contracts" through the website and indeed "refers" any "sales inquiries from the U.S. to MBNA," which "maintains an independent web site." *Id*. at 24a, 25a.

That analysis conflicts with the decisions of other courts in at least two ways. First, although other courts have adopted (or approvingly cited) the *Zippo* framework for analyzing Internet contacts,[4] the D.C. Circuit has effectively rejected that framework. In *GTE New Media Services Inc.* v. *BellSouth Corp.*, 199 F.3d 1343, 1347-50 (D.C. Cir. 2000), the district court had applied the *Zippo* framework and upheld the exercise of juris-

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[4] See, *e.g.*, *Mink* v. *AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc.* v. *Cybersell, Inc.*, 130 F.3d 414, 418-19 (9th Cir. 1997) (citing *Zippo* and agreeing with its focus on the "nature and quality of commercial activity that an entity conducts over the Internet") .

diction over regional telephone companies that operated Internet yellow pages services on the ground that the defendants' websites, which were accessible to residents of the District of Columbia, were "highly interactive" and "significantly commercial" in quality and nature. 21 F. Supp. 2d 27, 38 (D.D.C. 1998). The D.C. Circuit reversed, rejecting as "far-fetched" the notion that personal jurisdiction could be based "solely on the ability of District residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants *in the District*." 199 F.3d at 1349-50 (emphasis added). "Access to a website" – even one highly interactive and commercial in nature – "reflects nothing more than a telephone call by a District resident to the defendants' computer servers." *Id.* Had the lower court in this case applied the D.C. Circuit's approach, Daimler-Benz AG's website would have been accorded no weight in the jurisdictional calculus.

This conflict has been widely acknowledged. *E.g.*, Schmitt & Nikolai, *Application of Personal Jurisdiction Principles to Electronic Commerce: A User's Guide*, 27 WM. MITCHELL L. REV. 1571, 1580 (2001) (D.C. Circuit "rejected the sliding-scale interactivity test in favor of a purposeful availment test"); Recent Case, *Civil Procedure – D.C. Circuit Rejects Sliding Scale Approach to Finding Personal Jurisdiction Based on Internet Contacts*, 113 HARV. L. REV. 2128 (2000) (same); Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 668 (1999) ("the federal circuits are employing different standards"). Moreover, the D.C. Circuit's approach and the *Zippo* framework are not the only approaches endorsed by courts and commentators to the handling of Internet website "contacts." Some jurisdictions have taken an *even more expansive* approach than *Zippo* and have upheld the assertion of personal jurisdiction based on passive websites. See, *e.g.*, *State* v. *Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 717-21 (Minn. App. 1997) (citing *Inset Instruction Sys., Inc.* v. *Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996)), aff'd by an equally divided court, 576 N.2d 747 (Minn. 1998). See generally Rollo, 51 FLA. L. REV. at

678-94 (canvassing different approaches taken by courts); Recent Case, 113 HARV. L. REV. at 2128 & nn.1-3 (same for academic commentators).

The decision below also conflicts with how other courts have *interpreted* the *Zippo* framework. In *Mink* v. *AAAA Development LLC*, 190 F.3d 333 (1999), the Fifth Circuit categorized a website that was functionally indistinguishable from Daimler-Benz AG's as "passive" under the *Zippo* framework and thus incapable of providing a basis for jurisdiction. Like the website here, the website in *Mink* "post[ed] information about" the company's "products and services" and "provide[d] an e-mail address that permits consumers to interact with the company." *Id*. at 336-37. As in this case, there was "no evidence that" the defendant made sales over the Internet. *Id* at 337. Had this case been brought in a *federal* court in Texas, Daimler-Benz AG's passive website would have been accorded no weight in the jurisdictional calculus under *Zippo*.

This case provides an excellent vehicle for resolving these conflicts. The question of how websites should be treated in the due process analysis in personal jurisdiction cases is undoubtedly "important." *Christian Science Bd. of Directors* v. *Nolan*, 259 F.3d 209, 218 (4th Cir. 2001). It also arises with great regularity, which is hardly surprising given the "extraordinary growth" of the Internet in recent years. *Reno* v. *ACLU*, 521 U.S. 844, 850 (1997) (internal quotations omitted); see also Weber, *Jurisdictional Issues in Cyberspace*, 36 TORT & INS. L.J. 803, 803 (2001) (Internet users grew to 200 million in 1999 from 40 million in 1996 and 90,000 in 1989).

D. Daimler-Benz AG's Filing of an Unrelated Trademark Infringement Lawsuit in Federal Court

The court of appeals also attached jurisdictional significance to various allegations made by Daimler-Benz AG and MBNA in a trademark infringement complaint filed in a federal court in Texas. The court's view that licensing a trademark to business partners in a State, and manufacturing goods bearing that trademark that are later sold within that State, is tantamount to conducting direct advertising in the forum – and has jurisdic-

tional significance – is inconsistent with the decisions of other courts. Several federal courts have recognized that "[t]he use of a trademark by a corporation's subsidiary is *not* a transaction of business by the parent company." *Williams* v. *Canon, Inc.*, 432 F. Supp. 376, 380 (C.D. Cal. 1977) (emphasis added); *Ameritec Corp.* v. *Ameritech Corp.*, 1986 WL 10702, at *6 (C.D. Cal. 1986) (use of trademark in national advertising, and potential to enforce trademark rights in forum, do not amount to "purposeful availment"); *General Motors Corp.* v. *Lopez de Arriortua*, 948 F. Supp. 656, 666 n.9 (E.D. Mich. 1996). Other courts, moreover, have held that national advertising "is insufficient to support a finding of transaction of business." *San Antonio Tel. Co.* v. *American Tel. & Tel. Co.*, 499 F.2d 349, 351 n.5 (5th Cir. 1974); accord *Consolidated Development Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000); *Armstrong* v. *Aramco Services Co.*, 746 P.2d 917, 922-23 (Ariz. App. 1987).

E. The Imputation to Daimler-Benz AG of MBNA's Texas Contacts

At all relevant times, MBNA was a "wholly owned but separately operated" U.S. subsidiary of DBNAC, which in turn was a "wholly owned but separately operated" U.S. subsidiary of Daimler-Benz AG. App., *infra*, 54a-55a. The court of appeals recognized that these entities were "formally separate" and "strictly observed corporate formalities" (*id.* at 20a, 21a); that the parties had stipulated that the corporations were "separately operated" (*id*. at 24a); that the distribution agreement between them expressly "disclaims an agency relationship" (*id*. at 23a); and that Daimler-Benz AG had submitted evidence showing that it had "never participated in the day-to-day conduct of MBNA's business." *Id*. at 24a; see also *id*. at 18a. Nevertheless, the court chose to impute to Daimler-Benz AG the activities of MBNA, relying largely on evidence of Daimler-Benz AG's corporate structure and "inter-corporate relations." App., *infra*, 18a-21a. That analysis raises additional conflicts deserving of this Court's attention.

As the court of appeals acknowledged, only if "the parent corporation exerts *such dominance and control* over its subsid-

iary that the subsidiary is *simply a conduit* through which the parent conducts its business" – a "degree of control" that is "greater than that normally associated with common ownership and directorship" – may a foreign parent company "be considered to be doing business through the local activities of its subsidiaries." App., *infra*, 16a (emphasis added). Courts traditionally examine a "variety of factors" to determine whether to pierce the corporate veil and treat one corporation as the "alter ego" of the other. *Id.* at 16a-17a (*e.g.*, adequate capitalization, separate books and records, separate "daily operations," and separate meetings of directors and shareholders).

Having acknowledged those traditional principles, however, the court of appeals proceeded to depart from them. It held that "the determination whether two corporate entities are one and the same" in the jurisdictional context is "distinct" from the alter ego inquiry in the context of imputed *liability*. App., *infra*, 17a n.5. The "operative question" in the context of personal jurisdiction, the court held, was "whether MBNA is in fact a mere 'division' or 'branch' of a larger whole." *Id.* (citing *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.1977)). Applying that standard, the court held that the separate corporate identities should be disregarded because Daimler-Benz AG is "devoted to selling its cars worldwide, including in Texas" and "[t]o achieve this goal" has "established subsidiaries in important markets around the globe"; because "MBNA essentially connects" Daimler-Benz AG "to markets in the U.S., including Texas"; and because Daimler-Benz AG and MBNA "form a functional whole in promoting and marketing vehicles in Texas." *Id*. at 20a-21a.

That analysis is squarely at odds with this Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925). The plaintiff in *Cannon* (a North Carolina company) initially sued a Maine corporation in North Carolina state court by for breach of contract. Plaintiff served a wholly owned subsidiary of the Maine corporation, which had an office in North Carolina and was "the instrumentality employed to market [the parent's] products in the state" (the subsidiary did

not market the product "as [the parent's] agent" but rather, like MBNA, purchased it from the parent and then sold it to dealers). *Id*. at 251. Although the parent "dominate[d]" the subsidiary "*immediately and completely*," this Court refused to disregard the "corporate separation" so "carefully maintained" through the keeping of separate books and the observation of all formalities of separate corporate existence. *Id.* at 251 (emphasis added). "The corporate separation," this Court reasoned, "though perhaps merely formal, was real. *It was not pure fiction*." *Id.* (emphasis added).

Although decided before *International Shoe* and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and based on federal common law rather than the Due Process Clause, *Cannon* has been followed by some courts faced with the issue of how to analyze whether a parent company can be haled into a distant forum where it does not do business based on the activities of a corporate subsidiary. See, *e.g*., *Consolidated Development Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000) (applying *Cannon* rule); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983); *McPheron* v. *Penn Central Transp. Co.*, 390 F. Supp. 943, 948-56 (D. Conn. 1975) (applying *Cannon* rule and refusing to apply more lenient veil-piercing approach); see also *Gallagher* v. *Mazda Motor of Am.*, 781 F. Supp. 1079, 1083-84 & n.9 (E.D. Pa. 1992) (citing numerous cases that have followed *Cannon* and refused to impute contacts where "corporations observe and respect the corporate form").

Other courts, in contrast, have ruled that the *Cannon* standard was superseded by this Court's decision in *International Shoe*, see *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d 292, 296-97 (6th Cir. 1964), or by the dicta quoted above from *World-Wide Volkswagen*, see *In re Telectronics Pacing Systems, Inc*., 953 F. Supp. 909, 917-18 (S.D. Ohio 1997) (citing cases). Some of these courts – including the Fifth Circuit – have applied traditional "alter ego" principles in examining whether to pierce the corporate veil between parent and subsidiary in determining issues of personal

jurisdiction. See, *e.g.*, *Alpine View Co.* v. *Atlas Copco AB*, 205 F.3d 208, 218-19 (5th Cir. 2000). See also Comment, *Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 925-37 (1988) (discussing additional "alter ego" cases and acknowledging divergence in approach used by lower courts). This Court recently reaffirmed that these "bedrock" principles of corporate law – including stringent standards governing piercing of the corporate veil – are "deeply ingrained in our economic and legal system" and should not lightly be disregarded. *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998).

The Texas Court of Appeals' decision conflicts with both of these lines of cases. It conflicts with *Cannon* because it pierces the corporate veil even though the formal separation between Daimler-Benz AG and MBNA was scrupulously maintained. And it conflicts with cases applying the "alter ego" doctrine because, as the lower court noted (App., *infra*, 17a n.5), those cases impose a *more stringent* standard than asking whether one corporation is a "mere 'division' or 'branch' of a larger whole." *Id*. Compare Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 40 (1986) ("to the extent that different standards should be used for jurisdictional standards than for substantive purposes, these standards should be more restrictive, not more lenient"). Indeed, the "alter ego" standards employed by Texas courts, under which the corporate veil could not possibly have been pierced in this case, appear to be far more exacting. In contrast, it is difficult to imagine *any* subsidiary corporation engaged in business relations with its parent company that would not qualify as a "division" or "branch" under the lower court's far-reaching logic.

Finally, the court's reliance on specific features of Daimler-Benz AG's "corporate structure" creates additional conflicts. For example, the court attached significance to the parent's use of "consolidated financial statements" that included MBNA's results. App., *infra*, 19a. But "[t]he cases are

unanimous that consolidated reporting is standard business practice and will not support jurisdiction in the absence of evidence establishing an agency relationship." *Sonora Diamond Corp.* v. *Superior Court*, 99 Cal. Rptr. 2d 824, 844 (Cal. App. 2000) (citing multiple cases). To resolve the foregoing conflicts, and bring greater clarity to an area of law where "[t]he lower courts are understandably confused" (Brilmayer & Paisley, 74 CALIF. L. REV. at 4), review should be granted.[5]

F. Fair Play and Substantial Justice

In evaluating "the second prong of the due process test," the Texas Court of Appeals applied a seven-factor test, examining: (1) "the burden on the defendant"; (2) "the interests of the forum state in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; (5) "the shared interest of the several states in furthering fundamental substantive social policies"; (6) "the procedural and substantive policies of other nations whose interests are affected"; and (7) "the federal government's interest in its foreign relations policies." App., *infra*, 26a-27a; see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476-77 (1985) (stating that courts "may evaluate" factors 1-5 in "appropriate case[s]"). The last two factors apply because the defendant is a resident of another nation. See *Guardian Royal Exch. Assurance, Ltd.* v. *English China Clays,*

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[5] In imputing MBNA's activities to petitioner, the court of appeals also relied on the distribution agreement "in effect between Daimler-Benz [AG] and MBNA at the time of Karen Olson's accident." App., *infra*, 21a; see *id*. at 21a-24a; *id*. at 76a-94a. As explained below, however, the distribution agreement is a nothing more than a garden-variety exclusive distributorship contract. See pages 27-28, *infra*. For that reason, the court's decision to rely on the terms of the agreement conflicts, in result, with the many decisions holding that, "in the absence of an agency relationship, the acts of a distributor are not ordinarily attributable to a foreign manufacturer for purposes of establishing *general* jurisdiction." *Kuenzle* v. *HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 459 (10th Cir. 1996) (citing cases) (emphasis added).

P.L.C., 815 S.W.2d 223, 228-29 (Tex. 1991); see also *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 113-115 (1987). Applying this test, the Texas Court of Appeals concluded that the assertion of jurisdiction over Daimler-Benz AG comports with "fair play and substantial justice."

The court of appeals' analysis is inconsistent with *Asahi* and with the decisions of other courts. Other jurisdictions do not apply the same factors used by the Texas courts in evaluating "fair play and substantial justice." See 1 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2.6, at 87 (1998) ("The circuits differ in their application of the relatedness analysis."); *Metropolitan Life Ins. Co.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 577-78 (2d Cir.) (Walker, J., dissenting) ("The sprouting like weeds of multi-pronged tests for the reasonableness inquiry in the circuits * * * has left this legal garden in disarray.") (citing cases), cert. denied, 519 U.S. 1006 (1996). For example, the Eleventh Circuit applies only three factors: (1) the burden on the defendant; (2) the interests of the forum; and (3) the plaintiff's interest in obtaining relief. *SEC* v. *Carrillo*, 115 F.3d 1540, 1547 (1997). The Eighth Circuit considers only two factors: (1) the interest of the forum State in providing a forum for its residents; and (2) the convenience of the parties. *Digi-Tel Holdings, Inc.* v. *Proteq Telecomm. (PTE), Ltd.*, 89 F.3d 519, 522-23 (1996). The Ninth Circuit applies a multi-factor test, which unlike the Texas test includes "the extent of [the defendant's] purposeful interjection" and "the existence of an alternative forum." *Amoco Egypt Oil Co.* v. *Leonis Navigation Co.*, 1 F.3d 848, 851 (1993).

The decision below is also inconsistent with this Court's decision in *Asahi* – and decisions of the federal circuits – in its cavalier treatment of the "procedural and substantive policies of other nations" and the "unique burdens" imposed on a non-U.S. corporation forced to defend litigation in a distant State. In *Asahi*, this Court instructed that "[i]n every case" involving an alien defendant, the interests of other countries "as well as the Federal interest in Government's foreign relations policies, will

be best served by *a careful inquiry* into the reasonableness of the assertion of jurisdiction." 480 U.S. at 115 (emphasis added); see also *id*. ("*Great care and reserve* should be exercised when extending our notions of personal jurisdiction into the international field.") (emphasis added) (internal quotations omitted); *id*. at 114-15 (burdens placed on alien defendant must be given "substantial weight"); accord, *e.g.*, *Amoco Egypt Oil Co.*, 1 F.3d at 852 ("the sovereignty barrier is high"). The Texas Court of Appeals, however, completely ignored the relevant comity concerns identified by Daimler-Benz AG: (1) Germany, not Texas, has an interest in determining the safety standards applicable to cars designed and contructed for the German market by a German manufacturer (and never sold in the United States); and (2) Germany takes a vastly different approach to product liability law, civil discovery, and civil trials (and has entered into several international conventions to shield its citizens from the burdens imposed by the American system).

Instead of evaluating these considerations, the court of appeals offered the following explanation:

> The federal government's foreign policy interests are not hindered when individual states ensure that large international companies operate in an equitable business environment in which wrongs are redressed by those responsible.

App., *infra*, 27a. The court also emphasized that Daimler-Benz AG "maintains * * * products liability insurance[] covering claims made against it worldwide," which the court presumed was "consonant with business policies in Germany." *Id*. The problem with this logic is that it simply knows no limits. The same can be said for *any* large foreign manufacturer. Indeed, even manufacturers who do not place *any* products into a stream of commerce terminating in Texas would be ill-advised, after the decision below, not to insure against product liability lawsuits brought against them in the Texas courts.

II. The Decision Below Is Incorrect

In addition to being inconsistent with the decisions of other courts, the Texas Court of Appeals' general jurisdiction

analysis and holding are seriously flawed. At every turn, the court relied on rationales that should invite skepticism for the simple reason that they have extremely broad applicability (and thus threaten to work a substantial and unwarranted expansion of state power over foreign corporations). The lower court's decision is wrong in multiple respects.

First, it erroneously treats the placement of products into a stream of commerce flowing into a State as *systematic and continuous* activity *within* the State. The "stream of commerce" theory, however, cannot be used to establish general (as opposed to specific) jurisdiction.

Second, the lower court incorrectly relied on Daimler-Benz AG's maintenance of a website that provides basic information about the company and its products, allows users anywhere in the world to send and receive email communications, but is not in any way specifically directed toward Texas consumers or used to transact sales of products to Texas residents. Contrary to the lower court's conclusion, the maintenance of what is by today's standards a rudimentary business website cannot possibly demonstrate – even in part – that a nonresident defendant is engaged in "continuous and systematic" activities within a State or purposefully availed itself of the benefits of the State's market. See *GTE New Media Services Inc.* v. *BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000).[6]

With the rapid worldwide growth of the Internet and evolution of website technologies, moreover, "an increasing number of Web sites will necessarily adopt interactive features."

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[6] Perhaps sensing the potential of its logic to erase all due process limits on state jurisdiction, the court of appeals stated that, although the "level of interactivity" of the Daimler-Benz AG website "*might* not be enough" – "standing alone" – "to subject Daimler-Benz to jurisdiction in Texas," the court would "consider it a factor, along with the other contacts that exist in this case." App., *infra*, 25a (emphasis added). That equivocal assurance is cold comfort indeed. Not only does it leave open the possibility that a website of this kind *would* subject a nonresident defendant to general jurisdiction in Texas, but it essentially invites litigants in Texas to raise the issue in almost every case where general jurisdiction could conceivably be asserted.

Siddiqi, *Welcome to the City of Bytes?*, 14 N.Y. INT'L L. REV. 43, 73-74 (2001). For that reason, the *Zippo* "sliding scale" framework for analyzing Internet "contacts" – especially its intermediate category, where "the exercise of jurisdiction depends on the *level of interactivity*" (App., *infra*, 25a (emphasis added)) – is seriously flawed. See also American Bar Ass'n, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1853-54 (2000) (criticizing *Zippo*); Siddiqi, 14 N.Y. INT'L L. REV. at 73-74 (noting that "the commercial value of a Web site is not necessarily dependent on [its] interactivity"). Unless corrected by this Court, the widespread use of this framework in Texas and other jurisdictions has the potential to eliminate all remaining due process limits on state adjudicatory authority over nonresident businesses.

Were other countries to assert *general* jurisdiction over U.S. companies on the same basis, there can be little doubt that Americans forced to litigate unlimited issues in foreign venues would cry foul. It is possible, for example, to access the website of Alderson Reporting <www.aldersonreporting.com>, from which transcripts of arguments before this Court can be ordered interactively, in Afghanistan, but one would hardly think that that fact supports an assertion of Afghani jurisdiction over Alderson in a lawsuit that is wholly unrelated to any contacts the company might have with that country.

Third, the court of appeals was wrong to rely (App., *infra*, 12a-16a) on the filing by Daimler-Benz AG and MBNA of an unrelated trademark infringement complaint in federal court in Texas several years after this case was initiated. Reliance on this consideration seriously interferes with the assertion of federal rights and frustrates the fundamental purposes underlying the Lanham Act, which include protection of the public from pawning off and other forms of consumer fraud. See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:333 (1999). States may not exact as a "price" for asserting or enforcing federal rights that a party submit to the general jurisdiction of the state courts. See *Felder* v. *Casey*, 487 U.S.

131, 150-51 (1988) (holding similarly burdensome state rule preempted by federal law).[7]

Moreover, the act of filing a lawsuit is not "systematic" or "continuous" conduct. Nor is licensing trademarks to an indirect subsidiary for use with the subsidiary's sale of products pursuant to a nationwide distribution agreement. If the court of appeals were right that the mere "use" of a trademark (*i.e.*, the association of the mark with a product) is tantamount to "doing business" in Texas, then jurisdiction truly would follow the trademarked product wherever it traveled (a "stream of commerce" theory broader than that endorsed by *any* Member of this Court in *Asahi*).

Fourth, the court incorrectly imputed to Daimler-Benz AG the activities of its indirect subsidiary, MBNA. There is no valid basis to do so under this Court's decision in *Cannon* or the traditional alter ego doctrine. Internationalist rhetoric in a company's annual reports – such as Daimler-Benz AG's self-description "as an international company" which "does business in all corners of the globe" (App., *infra*, 19a-20a) – is not evidence of "continuous and systematic" activities in Texas. See <http://www.aldersonreporting.com/About/index.asp> (website of Alderson Reporting boasts that it is "the largest independent, woman-owned **worldwide** court reporting firm") (boldface in original). Equally mistaken was the court of appeals' reliance on MBNA's distribution agreement, which the court misread as reflecting an extraordinary degree of control by Daimler-Benz AG. In fact, the agreement contains many provisions conferring rights on MBNA, and the provisions favoring Daimler-Benz AG are routinely included in exclusive

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[7] The allegations relied on by the Texas Court of Appeals as a basis for asserting general jurisdiction were essential allegations of a Lanham Act claim that only petitioner, as the owner of federally registered trademarks, had standing to assert. See 1a GILSON, TRADEMARK PROTECTION AND PRACTICE § 8.03[1][a] (1990); 5 MCCARTHY, *supra*, § 32:3 (only trademark owner, not licensee, may sue for infringement). Unless a trademark owner vigorously asserts and defends its trademark rights, the owner may be found to have abandoned them. See 15 U.S.C. § 1114.

distributorship agreements. Compare *id.* at 21a-23a, 76a-94a with 1 GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE §§ 1.11, 3.58 (1990) and GOLDSCHEIDER, ECKSTROM'S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS PRACTICE §§ 3.1 to 3.39 (2001).

III. This Case Also Provides a Valuable Opportunity to Clarify the Scope of "Specific" Jurisdiction

In upholding general jurisdiction, the lower court did not reach respondents' argument that due process would permit "specific" jurisdiction in this case. App., *infra*, 26a. As noted above, "specific" jurisdiction may be exercised if the claims asserted "arise out of or relate to" the defendant's contacts with the forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984). If review is granted, respondents will no doubt seek to defend the judgment below on this basis.

Respondents' far-reaching theory of "specific" jurisdiction *itself* raises an issue on which the circuits have long been in conflict. Respondents argued below that specific jurisdiction was appropriate because Daimler-Benz AG manufactured thousands of vehicles each year that were interjected into the "stream of commerce" flowing into Texas, and some of those other vehicles contained "presumably similar gas tanks" to the one used in the 500SE. Respondents argued that their "cause of action (about the gas tank's design) is at least '*related to*' all of the other contacts (the other cars and gas tanks) the defendant has with the forum)." Resp. Post-Submission Ltr. Br. 1.

Respondents' theory of "specific" jurisdiction hinges on an expansive understanding of the minimum nexus required between claims and forum contacts before specific jurisdiction may be exercised. In *Helicopteros*, this Court identified – but "decline[d] to reach"– this question as well as several related questions. See 466 U.S. at 415 n.10 (noting as well the questions whether "related to" is broader than "arising out of" and, if so, whether it is a proper basis for "specific" jurisdiction).

Following *Helicopteros*, substantial confusion arose in the lower courts over the meaning of this nexus requirement. This

confusion was already so great a decade ago that this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), to resolve a circuit conflict over it but disposed of the case on another ground. *Id*. at 588-89; No. 89-1647 Pet. for a Writ of Certiorari, at i; *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201, 206 (1st Cir. 1994). As the Second Circuit recently noted, the conflict in the lower courts has persisted, with "[s]ome Circuits" holding that "the conduct must be a proximate cause of the plaintiff's injury" whereas "[o]thers have held that it is sufficient if the defendant's conduct in the state is a 'but for' cause of the plaintiff's injury." *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir.), cert. denied, 525 U.S. 948 (1998); see also 1 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2.6, at 87 (1998) ("The circuits differ in their application of the relatedness analysis."). Many state courts have also struggled with this issue. See, *e.g.*, *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549, 552-54 (Mass. 1994).

In recent years, moreover, several state high courts have endorsed *even broader* definitions of "relatedness" that go beyond both the "proximate cause" and "but for" tests. *E.g.*, *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-36 (D.C.) (en banc) (adopting broad "substantial connection" test and upholding jurisdiction where "proximate cause" and "but for" tests could not be satisfied), cert. denied, 530 U.S. 1270 (2000); *Vons Cos.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1096, 1102-12 (Cal. 1996) (adopting "substantial connection" test after rejecting "proximate" cause and "but for" approaches), cert. denied, 522 U.S. 808 (1997); *Domtar, Inc.* v. *Niagara Fire Ins. Co.*, 533 N.W.2d 25, 31 (Minn.) (adopting "substantial connection" test), cert. denied, 516 U.S. 1017 (1995). But see *Williams* v. *Lakeview Co.*, 13 P.3d 280, 283-85 (Ariz. 2000) (holding that assertion of personal jurisdiction in absence of "causal nexus" between defendant's contacts and plaintiff's claims violates due process, and rejecting *Moreno*); *id*. at 284 (noting that contrary holding would "obliterate the distinction between general and specific jurisdiction").

Commentators have also engaged in extended analysis of this issue. See, *e.g.*, Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 591-93 (2001) (summarizing debate). Indeed, two prominent scholars have even debated a hypothetical example closely analogous to this case: whether a State could exercise jurisdiction over a nonresident auto manufacturer whose cars are sold through a distributor in the State, in a case where the accident vehicle was purchased in a *different* State. Compare Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 660 (1988) (arguing that jurisdiction could be asserted because the manufacturer's forum conduct "is similar to, but not causally related to, the conduct that forms the basis for the cause of action"), with Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1459-64 (1988) (rejecting that approach as inconsistent with this Court's cases and riddled with administrative difficulties such as how to define product "similarity").

This case is an excellent vehicle for addressing this conflict. Because respondents' product liability claim does not "arise out of" any contacts between Daimler-Benz AG and Texas, it obviously flunks the "substantive relevance" test. Indeed, respondents may invoke specific jurisdiction only if "related to" is broader than "arises out of" *and* if the extremely broad interpretation adopted by certain lower courts ("substantial connection") is correct. See page 29, *supra*. This case accordingly provides a good opportunity to choose among the competing formulations, as well as to decide the questions that were expressly reserved in *Helicopteros* and left unresolved in *Shute*. Finally, the opportunity to address these questions in a case that *also* raises not only issues concerning the "stream of commerce" theory (whose limits would be largely erased by respondents' theory of "relatedness") but also issues of general jurisdiction makes this case an ideal vehicle for bringing greater uniformity and coherence to this vitally important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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