No. 04-222

In the Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief is most notable for what it does not say. It does not seriously dispute any of the following key points:

- The Eighth Circuit squarely rejected a "veil-piercing" rule for attributing a subsidiary's activities to its parent company for purposes of determining minimum contacts (Pet. 6, 12; Pet. App. 4a-5a).
- The Eighth Circuit's rejection of this rule creates a clear conflict with those courts applying it, including other circuits, state supreme courts, the district court in this case, and the Western District of Michigan in a related case (Pet. 3, 5, 13-15).
- Under this Court's cases, and the decisions of other circuits, a court must separately examine whether "specific" and "general" jurisdiction exist, as well as give substantial weight to the burdens imposed on non-U.S. corporations – but the Eighth Circuit did neither (Pet. 6, 8, 18-19, 21).
- The multi-factor balancing "test" used by the Eighth Circuit is inconsistent with the approach used in the Fourth, Sixth, Seventh, and Ninth Circuits, and in certain state supreme courts, although consistent with the approach used by other courts (Pet. 18-19, 22).
- Each of the two constitutional issues raised by this case is recurring and vitally important (Pet. 23-24).

Although respondent does repeatedly *assert* that some of the serious conflicts documented in the petition (and confirmed by numerous judges and commentators) are nonexistent (Opp. 1, 10, 16, 20), her limited efforts to back up those assertions are wholly unpersuasive.

Equally unavailing are respondent's attempts to justify the result below on several grounds that the Eighth Circuit *itself* declined to invoke – either because they are meritless or (as in the case of respondent's repeated assertion that Falcon Jet was

Dassault's "agent") because they were never raised below and lack any support in the record. For the reasons set forth below and in the petition, review by this Court is warranted.

1. *The Conflict Over The Proper Rule Of Attribution*. The court below held that *Falcon Jet*'s contacts with Arkansas provide a basis for asserting personal jurisdiction over *Dassault*, even though the two corporations are separate and have "nothing more than a typical" parent-subsidiary relationship. Pet. App. 19a. Prior to the decision below, there was already a clear conflict between three lines of cases: (1) this Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), and the lower court decisions that have applied the stringent *Cannon* standard in determining attribution issues; (2) the decisions of other courts applying an "alter ego" test to attribution issues; and (3) the decisions of still other courts in allowing attribution even where the *Cannon* and "alter ego" tests would forbid it. Pet. 12-17. The Eighth Circuit's holding that attribution is appropriate where there is a "synergistic" or "symbiotic" relationship between corporate affiliates (Pet. App. 5a, 9a) adds to this irreconcilable conflict in the lower courts.

In response, respondent first claims that the Eighth Circuit never actually ruled on the attribution issue. Opp. 4 ("the Eighth Circuit found it unnecessary to even consider whether or not the subsidiary was in fact Petitioner's 'alter ego'"). That assertion is easily refuted. The Eighth Circuit acknowledged that the relationship between Dassault and Falcon Jet "is not an abuse of the corporate organizational form," but expressly "agree[d] with" respondent that "piercing * * * Falcon Jet's corporate veil" was not "required" before Falcon Jet's contacts could be imputed to Dassault. Pet. App. 5a; see also *id.* at 4a-5a (rejecting the district court's "alter ego" rule).

Next, respondent attempts to minimize the conflicts by arguing that *Cannon*, and other selected lower court cases we have cited, stand only for the proposition that "mere ownership" of a subsidiary is an insufficient basis for exercising jurisdiction over the parent company. Opp. 10-11, 13. That argument is

also wide of the mark. It confuses the issue of *overall sufficiency* of a defendant's forum contacts with *the legal test for attribution*. *Cannon* and some of its progeny do not simply hold that "mere ownership" is an insufficient basis for exercising personal jurisdiction; they *also* set forth a rule of attribution that determines *when* the contacts of a subsidiary *may not be imputed* to its shareholder (the parent). See Pet. 13; *Cannon*, 267 U.S. at 337-38; *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (*Cannon* "stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state *may not be attributed* to the other") (emphasis added).

The Eighth Circuit's decision in this case is inconsistent with *Cannon*'s rule of attribution. Respondent falls back on the argument that "[i]t is questionable" whether *Cannon* remains good law. Opp. 11 n.4. But, as we explained in the petition (at 13-14), the confusion in the lower courts over *Cannon*'s status after *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), provides an *additional* reason why this Court's guidance is needed. In any event, there is no denying the conflict between the Eighth Circuit's decision and the "alter ego" approach it expressly rejected.[1]

Because of the national importance of the attribution issue, two of the largest business organizations in this country have filed an *amicus* brief urging this Court to grant review. As

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[1] Respondent suggests (Opp. 4, 10) that the entire petition rests on the "false[] premise that the Eighth Circuit concluded that jurisdiction was present merely upon the basis of Dassault's ownership of a subsidiary that is present and active in the forum state." Although the premise is not false – the Eighth Circuit *did* rely almost exclusively on Falcon Jet's contacts in upholding jurisdiction over Dassault (see Pet. 7; Pet. App. 3a) – it would hardly moot the petition if the Eighth Circuit relied on other "contacts" of Dassault as well. Thus, if the Court were to grant review of only the first question presented, decide that the *Cannon* or "alter ego" approach to attribution is correct, and reverse the Eighth Circuit's contrary holding, it would be up to the Eighth Circuit on remand to determine whether any independent "contacts" of Dassault might satisfy the "minimum contacts" test.

amici correctly point out, the Eighth Circuit's holding "deliberately disregards * * * 'general principle[s] of corporate law deeply ingrained in our economic and legal systems.'" *Amicus* Br. 8 (quoting *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotations omitted)). The result of the Eighth Circuit's approach is to "strip[]" away "crucial protections and rights that are part and parcel of establishment under the corporate form" – an outcome that "will necessarily discourage investment in the U.S. market." *Ibid.* Notably, respondent does not even attempt to explain how the Eighth Circuit's attribution based on a "synergistic relationship" can be reconciled with *Bestfoods* – or with this Court's teaching (Pet. 24-25) that the requirements of due process hinge on traditional practices and principles, including the legal protections long embodied in the law of corporations.

Moreover, as *amici* point out (at 4), the decision below is squarely at odds with *Central States, S.E. & S.W. Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000), cert. denied, 532 U.S. 943 (2001), which held that "constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary." Thus, "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent *violates * * * due process*." *Id*. at 944 (emphasis added). That rule, the Seventh Circuit explained, finds support in this Court's decisions and serves to protect the reasonable expectations of shareholders. *Id*. at 943-45; accord Pet. 25-26. Under *Central States*, the Eighth Circuit's "synergistic relationship" approach to attribution clearly "violates due process." Had this case been brought in the Seventh Circuit, it doubtless would have come out the other way.[2]

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[2] The Eighth Circuit's "synergistic relationship" test is especially troubling because it permits attribution based solely on "factors that are commonplace

2. *The Conflict Over The* International Shoe *Test*. Attempting to make a virtue of necessity, respondent applauds the "malleability" and "permissiveness" of the Eighth Circuit's approach to determining "minimum contacts" and "fair play and substantial justice." Opp. 12, 16. But that is precisely our point. The Eighth Circuit's vague, multi-factor balancing test makes it impossible for defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Beyond that, as we showed in the petition (at 18-19, 22), the Eighth Circuit's approach to the *International Shoe* test ignores this Court's teachings and conflicts with the decisions of other courts.

Respondent insists that "the Eighth Circuit did *not* rely upon a 'multi-factor' balancing test" (Opp. 17 (emphasis in original)). By that she means that the panel "looked to other considerations" only "*after* it had found 'minimum contacts.'" Opp. i (emphasis added); accord *id.* at 17, 20. That argument ignores what the Eighth Circuit actually said – that it would "consider" the fair-play considerations "[i]n assessing the nature of the contacts between Dassault Aviation and Arkansas" (Pet. App. 3a). It also ignores what the Eighth Circuit did, which was to list various factors it considered relevant and apply them in co-equal fashion (including "the quantity of contacts that Dassault Aviation has with Arkansas" (*ibid.*)), and discuss "traditional notions of fair play and substantial justice" as if it were the overarching due process inquiry (rather than the second stage in a two-step inquiry). Pet. App. 8a, 9a. Respondent's suggestion that the Eighth Circuit conducted the two-step inquiry mandated by this Court's decisions and required in other circuits (see Pet. 17-18, 19-20) is wishful thinking.

As explained above, respondent in any event does not deny that the decision below ignores this Court's recent teachings and conflicts with the decisions of other courts by (a) failing to analyze specific and general jurisdiction separately, and (b) failing

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to a normal, run-of-the-mill parent-subsidiary relationship." *Amicus* Br. 9-10.

to give "substantial weight" to Dassault's status as a non-U.S. corporation. See Pet. 18-19, 21. Nor does respondent deny that the distinction between upholding general and upholding specific jurisdiction has profound ramifications for a defendant. See Pet. 26-27 & n.9. These undisputed conflicts alone justify the Court's review of the second question presented.

Respondent faults us for criticizing the test set forth in *Aftanase* v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), because "the panel did not rely on, or even cite," that case. Opp. 20. But we were careful in the petition to say that the panel balanced *six factors* (see Pet. 6); that the *Aftanese* test used by the district court, by the Eighth Circuit in other cases, and by the courts in four States, includes *five similar but not identical factors* (Pet. 20); and that the panel's analysis in this case merely "owes an obvious intellectual debt" to *Aftanese* (Pet. 22 n.5), which is indisputable. See Pet. 20-22 nn.4-5.

Although any decision by this Court to address the *International Shoe* test promises significant benefits to lower courts and litigants throughout the country, this case is an ideal vehicle because it originates in the Eighth Circuit, a court especially in need of correction because it "has meandered among variations of a multi-factor balancing test that merely pays lip service to this Court's earlier decisions while ignoring this Court's more recent doctrinal developments." Pet. 11; accord Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 840-42 (2004) (Eighth Circuit's "whole-hog" approach "collapses the general jurisdiction, specific jurisdiction, and fair play and substantial justice analysis into one sweeping inquiry," "intermingle[s] specific and general jurisdiction principles," and creates serious uncertainty); *Amicus* Br. 7.[3]

3. *Respondent's Arguments On The Merits*. Unable to deny plausibly the conflicts in the lower courts or the impor-

[3] Inexplicably, respondent devotes many pages (Opp. 11-13, 16) to arguing that, under *International Shoe*, a foreign corporation need not be physically present in the forum to be subject to jurisdiction there. Dassault has never suggested otherwise.

tance of the issues presented, respondent devotes the bulk of her brief to arguing that the outcome below is correct. Although that effort is unavailing, what is striking is how much respondent relies on arguments the court below never invoked.

a. *The Newly Minted "Agency" Theory*. No fewer than 15 times in her brief, respondent states that Falcon Jet is Dassault's "agent." Opp. 13, 15 & n.5 (four times), 17, 18, 19 (twice), 24, 25, 27 (four times). There is nothing in the record, however, to support this mantra (which is raised for the first time in this Court). The district court *found otherwise*. See Pet. App. 19a ("[T]he evidence of record reveals nothing more than a typical corporate relationship between a parent and its wholly owned subsidiary."); *id*. at 18a ("none of the evidence" submitted by Anderson, including the "distributorship agreements" entered into by the two companies, demonstrates that Falcon Jet "was controlled" by Dassault or was Dassault's "instrumentality").

Nor is it true that the Eighth Circuit somehow relied on an agency relationship between Falcon Jet and Dassault, as respondent at one point suggests. See Opp. 17. The court of appeals made no mention of an agency relationship, and it left intact the district court's finding that the two entities had a normal parent-subsidiary relationship. Moreover, the Eighth Circuit's discussion of the supposedly "synergistic" or "symbiotic" relationship between Dassault and its subsidiary would have been wholly unnecessary (along with much else in the opinion below) if the court had believed there was an agency relationship.

Even if respondent were free to raise this argument (and she is not), the argument would have to be rejected. As the Eighth Circuit no doubt understood, a contractual relationship between a manufacturer and a distributor is simply not the same thing as the relationship between a principal and agent. Nor do any of the garden-variety provisions of the Dassault-Falcon Jet distributorship agreement quoted by respondent (see Opp. 14) demonstrate the existence of an agency relationship.

b. *The "Stream Of Commerce" Theory*. Respondent suggests that the Eighth Circuit could have properly exercised

jurisdiction over Dassault based on a "stream of commerce" theory (which is a form of specific jurisdiction). See Opp. 7-10, 22-23. She also invokes a number of "stream of commerce" cases involving distributors where the manufacturer's product was marketed in the forum and caused an injury there to a forum resident. *Id.* at 25-28. Notably, respondent observes that this jurisdictional theory "featured prominently in the arguments below" (Opp. 7) but cannot bring herself to say that the Eighth Circuit *actually relied* on a "stream of commerce" theory, because of course it did not.

There is a good reason the Eighth Circuit declined to credit this argument. As explained in the petition (at 29-30), this Court's cases make clear that the "stream of commerce" theory requires *an injury in the forum*. Respondent disagrees (Opp. 22), but she does not explain how this Court's cases could be read otherwise or cite a single case that supports her novel view.[4] Because the injury to respondent did not occur in Arkansas, the "stream of commerce" theory does not work.

Respondent's obvious intention to press a "stream of commerce" argument as an alternative basis for affirmance if review is granted makes this case more, not less, worthy of this Court's review – for the reasons set forth in the petition. See Pet. 28-30.

c. *The Specific Jurisdiction Theory*. Respondent also suggests that the Eighth Circuit could have exercised "specific jurisdiction" over Dassault on the ground that respondent's claim "arises out of" or "relates to" the French manufacturer's contacts with Arkansas. Opp. 21-22; see also Pet. 4 n.1, 18 (explaining the showing required for specific jurisdiction). In essence, she contends that her claims for defective manufacture

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[4] Understandably, respondent also makes no effort to defend the vast expansion of personal jurisdiction that would result if her novel variant of the "stream of commerce" theory were accepted. Under respondent's view, "stream of commerce" jurisdiction could be exercised in any State through which a manufacturer's product (or other products like it) passed, however transitorily, even if the product ultimately caused an injury half way around the world to a non-U.S. citizen. That cannot be right.

and design of the subject jet *by Dassault in France* (due to Dassault's installation there of a defective autopilot) "arose out of" the actions of *Falcon Jet in Arkansas*, undertaken after purchasing the plane from Dassault, in outfitting and decorating the plane to the specifications of Amway, Falcon Jet's customer, and in delivering the jet to Amway. Opp. 21-23.

Respondent's theory depends not only on the correctness of the Eighth Circuit's attribution ruling but also on a sweeping definition of the "arising out of" nexus required by the Due Process Clause. In *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16 n.9 (1984), this Court reserved the question of the proper definition of "arising out of" or "relates to" in specific jurisdiction cases. Following *Helicopteros*, substantial confusion developed in the lower courts over the meaning of this nexus requirement. A decade ago this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), to resolve that confusion but disposed of that case on another ground. See Pet. 9. As the Second Circuit has 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" or have "substantive relevance" to the plaintiff's underlying legal claim, 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).

Respondent's argument for specific jurisdiction clearly flunks the "proximate cause" or "substantive relevance" test. Even if *Falcon Jet*'s Arkansas actions in outfitting and delivering the jet to Amway could properly be attributed to Dassault (and they cannot), those activities did not proximately cause respondent's alleged injuries and they have no substantive relevance to her defective design and manufacturing claims. See also Pet. 28. Moreover, in the absence of such attribution respondent also cannot satisfy the "but for" test, since *Dassault* had no contacts with Arkansas that could have qualified as the "but for" cause of her injuries in Michigan. Only if Falcon Jet's activities can be attributed to Dassault would respondent have

a colorable argument under the "but for" test. In any event, this theory would fail because the "but for" test is wrong. See No. 89-1647 Br. for Petitioner, *Carnival Cruise Lines* v. *Shute*, at 15-20; Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444-45, 1458-62 (1988).

d. *The General Jurisdiction Theory*. Lastly, respondent contends that if the Eighth Circuit had applied the exacting test for general jurisdiction, and examined whether Dassault had "continuous" and "systematic" activities within Arkansas, it could have upheld jurisdiction. Opp. 23. But, as the district court noted, Dassault has *none* of the traditional indicia of corporate "presence" in Arkansas. Pet. 5. As both the district court and the Eighth Circuit acknowledged, Dassault itself had *no* direct contacts with Arkansas. See Pet. 27; Pet. App. 3a, 15a. Although respondent makes much of offhand statements in websites and corporate reports about Dassault's supposed "presence" in Arkansas "through" its Falcon Jet subsidiary (Opp. 5), there is simply no way for respondent to satisfy the demanding general jurisdiction test without attributing Falcon Jet's Arkansas contacts to Dassault. But, as explained above and in the petition, such attribution implicates an area of substantial confusion in the lower courts and violates due process.

4. *The Compelling Need For This Court's Guidance*. This Court has given very limited attention to personal jurisdiction issues in the past two decades, relative to the historically high level of attention and the frequency with which personal jurisdiction is litigated in the federal and state courts. Pet. 8-9, 23-24. The Court's staying its hand while lower courts and commentators refine important issues is a time-tested approach, but only "as long as the benefits of avoidance outweigh the problems." PERRY, DECIDING TO DECIDE 231 (1991). In the area of personal jurisdiction, including both of the issues presented in the petition, this tipping point has been reached.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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