No. 02-15035

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GATOR.COM CORP.,

Plaintiff-Appellant,

v.

L.L. BEAN, INC.,

Defendant-Appellee.

On Rehearing En Banc

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE L.L. BEAN, INC., AND URGING AFFIRMANCE

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN E. UNTEREINER
KATHRYN SCHAEFER ZECCA
MAX HUFFMAN
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

Attorneys for *Amicus Curiae*

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RULE 26.1 DISCLOSURE

Pursuant to FRAP 26.1, the Chamber of Commerce of the United States discloses that, in addition to the parties and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement of the Defendants/Appellees (which is hereby incorporated by reference into this Certificate), the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae

The Chamber of Commerce of the United States

Counsel for *Amicus Curiae*

Robin S. Conrad, National Chamber Litigation Center, Inc.

Stephanie A. Martz, National Chamber Litigation Center, Inc.

Alan E. Untereiner, Robbins, Russell, Englert, Orseck & Untereiner LLP, Washington, D.C.

Kathryn Schaefer Zecca, Robbins, Russell, Englert, Orseck & Untereiner LLP, Washington, D.C.

Max Huffman, Robbins, Russell, Englert, Orseck & Untereiner LLP, Washington, D.C.

/S/
Alan E. Untereiner

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE L.L. BEAN, INC., AND URGING AFFIRMANCE

INTEREST OF THE *AMICUS CURIAE*

The interest of *amicus curiae* the Chamber of Commerce of the United States (Chamber) is described in the accompanying motion for leave to file this brief.

STATEMENT OF FACTS

This case raises important questions concerning the limits imposed by the Due Process Clause of the Fourteenth Amendment on the power of individual states to compel nonresident, foreign corporations – lacking all of the traditional indicia of "presence" within the state – to appear and defend against claims that do not directly arise out of the corporation's contacts with the forum or its residents. More specifically, this Court, in reviewing the three-judge panel's opinion, is presented with the question whether the advent of the Internet – and the participation by nonresident companies in electronic commerce – has fundamentally altered (or rendered largely irrelevant) the basic ground rules governing the law of personal jurisdiction. To answer those questions, it is necessary first to understand what the Internet is – and what it is not.

A. The Internet and Electronic Commerce

1. "The Internet is not, as many suggest, a separate place removed from our world. Like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction." Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, in *Symposium: The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 475, 476 (1998). As a matter of technological fact, the Internet – while "unique and wholly new" – is nothing more than a "medium of worldwide human communication." *Reno* v. *ACLU*, 521 U.S. 844, 850 (1997); accord *Avery Dennison Corp.* v. *Sumpton*, 189 F.3d 868, 871 (9th Cir. 1999) (describing the Internet as "the newest medium of communication").

An Internet website "is simply an interactive presentation of data which a user accesses by dialing into the host computer." *Avery Dennison*, 189 F.3d at 872. "Each [page] has its own address – rather like a telephone number." *Reno*, 521 U.S. at 852 (internal quotation omitted). "Access to a website reflects nothing more than a telephone call by a [forum state] resident to the defendant['s] computer servers." *GTE New Media Servs., Inc.* v. *BellSouth Corp.*, 199 F.3d 1343, 1349-1350 (D.C. Cir. 2000).

Internet communication is thus functionally indistinguishable from a 1-800 telephone number that is used to order goods displayed in a paper catalog. See, *e.g.*, *Avery Dennison*, 189 F.3d at 872 ("Some merchants maintain a form of 'electronic catalog' on the Internet, permitting Internet users to review products and services for sale."). Reflecting this reality, the United States Department of Commerce, in its estimates for retail and food sales, groups together "[e]lectronic shopping and mail order houses" as a single category called "Nonstore retailers" – a category distinct from "stores." See *Advance Monthly Sales for Retail and Food Services, by Kind of Business – April 2004*, U.S. DEP'T OF COMMERCE NEWS (May 13, 2004), available at http://www. census.gov/svsd/www/fullpub.html (visited May 21, 2004) ("*Advance Monthly Sales*").

2. The Internet is credited with contributing vitally to economic growth over the past two decades. See Davis, *Internet Drives U.S. Economy*, IQ MAGAZINE (May/June 2002), available at http://business.cisco.com/prod/tree.taf%3Fasset_id=85758&MagID=85785&public_view=true&kbns=1.html (visited June 7, 2004). Needless to say, the Internet's impact on the economy is hardly limited to the creation of "dot.com" companies. Established companies like Defendant-Appellee L.L. Bean, Inc. ("L.L. Bean") have grown by communicating more efficiently with customers. See Miller, *Bean CEO's Agenda: Stores, Japan,*

the Web, CATALOG AGE, April 1, 2001, available at http://catalogagemag.com/mag/marketing_bean_ceos_agenda/ index.html (visited June 10, 2004) ("Although Bean's total sales increased just 4% in 2000, its Web sales jumped 75%, and the company expects the pace to continue this year.").

It is estimated that, by 2004, there will be between 700 and 945 million users of the Internet worldwide. Chen, *United States and European Approaches to Internet Jurisdiction and Their Impact on E-Commerce*, 25 U. PA. J. INT'L ECON. L. 423, 428 (2004). "Not only have more people been accessing the internet, but more people have been utilizing it to set up their own web sites." *Ibid.* The "explo[sion]" of "e-commerce involving sale of goods and services on the internet" is not limited to large companies but also includes millions of small businesses (such as florists, realtors, motels, and restaurants).

The benefits of these developments extend far beyond the companies that are actively engaged in e-commerce. Consumer spending largely drives the U.S. economy. In 2003, consumer spending made up $7.75 trillion of a total gross domestic product of $10.9 trillion. *News Release: Gross Domestic Product* (Mar. 25, 2004), available at http://www.bea.gov/bea/newsrel/gdpnewsrelease.htm (visited May 25, 2004). Spending directed at non-store retailers such as L.L. Bean has totaled more than $10 billion per month in 2004, up approximately 10 percent from the

previous year – and amounting to more than 3 percent of the total consumer spending on retail and food services. See *Advance Monthly Sales*, *supra*. The availability and use of electronic commerce inures to everybody's benefit.

B. The Proceedings In This Case

In addition to facilitating commerce and communication, the Internet has spawned litigation. In this case, L.L. Bean, a Maine corporation with its principal place of business in Maine, learned that Plaintiff-Appellant Gator.com Corp. ("Gator.com") had programmed "pop-up" ads – offering coupons for an L.L. Bean competitor, Eddie Bauer, and a hyperlink to the Eddie Bauer website – to appear on the computer screens of Internet users who had loaded the Gator.com software when they accessed the L.L. Bean website. *Gator.com Corp.* v. *L.L. Bean, Inc.*, 2001 WL 1528393, at *1 (N.D. Cal. Nov. 21, 2001). In response, L.L. Bean mailed a "cease-and-desist" letter to Gator.com at its California headquarters, seeking assurances that the pop-up ads would be discontinued. *Id.* at *2.

1. After receiving the letter, Gator.com sued L.L. Bean in the United States District Court for the Northern District of California, seeking a declaratory judgment of non-infringement. The district court granted L.L. Bean's motion to dismiss for lack of personal jurisdiction. It held that there was no valid basis for the assertion of either "specific" jurisdiction (where the cause of action specifically arises out of the

defendant's forum contacts), or "general" jurisdiction (where the defendant's activities within the forum are so continuous and systematic that the law deems the defendant to be "present" generally and thus amenable to any kind of suit, even on causes of action that are wholly unrelated to the defendant's forum contacts). *Gator.com*, 2001 WL 1528393, at *2-*9.

2. On appeal, a three-judge panel reversed. 341 F.3d 1072 (2003). Without reaching the question of specific jurisdiction, the panel ruled that L.L. Bean was subject to general jurisdiction in California. At the outset, the panel acknowledged that, under Ninth Circuit precedent, the standard for establishing general jurisdiction was "'fairly high,'" requiring "'contacts with the forum state * * * of a sort that 'approximate physical presence.'" 341 F.3d at 1076 (quoting *Bancroft & Masters, Inc.* v. *Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2002)); see also *ibid.* (contacts must be "substantial" or "continuous and systematic"). "Admittedly," the panel observed, "L.L. Bean has few of the factors traditionally associated with physical presence, such as an official agent or incorporation." *Id*. at 1078. L.L. Bean, the panel observed,

> is a Maine corporation with its principal place of business in that state. Its corporate offices, distribution facilities, and manufacturing facilities are all located in Maine. L.L. Bean sells clothing and outdoor equipment and maintains stores in Maine, Delaware, New Hampshire, Oregon, and Virginia.

> In total, L.L. Bean sells over one billion dollars worth of merchandise annually to consumers in 150 different countries.
>
> * * *
>
> L.L. Bean is not authorized to do business in California, has no agent for service of process in California, and is not required to pay taxes in California.

Id. at 1074. Moreover, as Gator.com conceded in its brief before the panel, "L.L. Bean has no retail stores or offices within California, or local telephone listings, property ownership, and bank accounts" and "L.L. Bean collects no sales tax on California sales." Br. of Appellant 7.

Nevertheless, the panel concluded that "L.L. Bean's contacts with California, in particular its substantial mail-order and internet-based commerce in the state, are sufficient to support the assertion of general personal jurisdiction." 341 F.3d at 1074. In reaching that conclusion, the panel emphasized that: "[a] very large percentage of L.L. Bean's sales come from mail-order and internet business"; "[t]he company ships approximately 200 million catalogs each year"; in 2000, L.L. Bean's "website sales accounted for over two hundred million, or about 16 percent, of its total sales"; and, also in 2000, "L.L. Bean sold millions of dollars worth of products in California (about six percent of its total sales) through 'its catalog, its toll-free telephone number, *and* its Internet website.'" *Ibid*. (emphasis added; citation omitted). Moreover, "L.L. Bean also mailed a substantial number of catalogs and packages to

California residents, targeted substantial numbers of California residents for direct email solicitation, * * * maintained substantial numbers of 'on-line' accounts for California consumers," and "maintain[ed] relationships with numerous California vendors from whom [it] purchase[d] products." *Ibid.*

Finally, the panel thought it was significant that L.L. Bean's website was "highly interactive." 341 F.3d. at 1078 (citing *Zippo Mfg. Co.* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)). The panel relied substantially on Gator.com's analogy of L.L. Bean's Internet website to a "virtual store" in concluding that L.L. Bean's non-physical contacts with California "'approximate physical presence.'" *Id.* at 1079-1080 (quoting *Bancroft*, 223 F.3d at 1086); see also *id.* at 1079 (stating that "an online store can operate as the functional equivalent of a physical store"). Indeed, the panel went out of its way to say that "even if the *only* contacts L.L. Bean had with California were through its virtual store, a finding of general jurisdiction in the instant case would be" permissible. *Ibid.* This Court subsequently granted rehearing en banc. See 366 F.3d 789 (2004).

ARGUMENT

If adopted by the full court, the panel's holding and analysis would work a vast expansion of the jurisdiction of the federal district courts in this Circuit and would have enormous, negative consequences for L.L. Bean and every other company –

whether large or small – that sells products over the Internet. By concluding that *general* jurisdiction may be asserted over a company that transacts substantial business with a state's residents over the Internet, the panel effectively opened up the courts of California to every claim that may be asserted against any such company, even if the claim has nothing whatsoever to do with the defendant's contacts with the forum. Significantly, every state in the Ninth Circuit has a long-arm statute or rule that (like California's) authorizes the assertion of personal jurisdiction to the maximum extent permitted by the Due Process Clause.[1] Although the state courts remain free to disagree with this Court's view of the limits imposed by the federal Constitution on the assertion of personal jurisdiction, the federal district courts are bound to adhere to this Court's holding. If the state courts do elect to take a more restrictive approach concerning state authority, the inevitable consequence will be a tsunami of new diversity cases against "Internet" defendants in the federal district courts in this Circuit.

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[1] See *Cramer* v. *Wade*, 985 P.2d 467, 471 (Alaska 1999) (interpreting ALASKA STAT. § 09.05.015(c)); Ariz. R. Civ. P. 4.2(a); *Doggett* v. *Elec. Corp. of Am.*, 454 P.2d 63, 67 (Idaho 1969) (interpreting IDAHO CODE §§ 5-514 to 5-517); *Cowan* v. *First Ins. Co. of Haw., Ltd.*, 608 P.2d 394, 399 (Haw. 1980) (interpreting HAW. REV. STAT. § 634-35); *Davis* v. *Am. Family Mut. Ins. Co.*, 861 F.2d 1159, 1161 (9th Cir. 1988) (citing Mont. R. Civ. P. 4B); NEV. REV. STAT. § 14.065; Ore. R. Civ. P. 4L; *Ali* v. *Ashcroft*, 346 F.3d 873, 889 (9th Cir. 2003) (Washington law).

Although Gator.com defends the panel's holding by arguing that this suit is at least related to L.L. Bean's Internet contacts with California (see Opp. to Pet. for Rhg. 9), the nature of *general* jurisdiction is such that it allows suit over *any* cause of action. See *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408, 415 n.9 (1984). Thus, if the panel's decision is adopted by the full court, federal district courts in California would be entitled to entertain contract disputes between L.L. Bean and suppliers based overseas; employment disputes between L.L. Bean and employees at its Freeport, Maine headquarters; tort claims against L.L. Bean by people injured in slip-and-fall accidents in Maine – all based on a plaintiff's subjective determination that California is the preferable forum for the litigation. That outcome is simply incompatible, we suggest, with assuring 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).

Contrary to the three-judge panel's suggestion, nothing about the Internet – which is simply a new, but not a fundamentally different, medium of communication (see pp. 2-5, *supra*) – has altered the basic ground rules of personal jurisdiction law or erased the protections offered by the Due Process Clause to nonresident corporate

defendants. "[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not created problems that are qualitatively more difficult." Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 411 (2004). The *en banc* court should reject the panel's flawed reasoning and conclude that general jurisdiction may not be asserted in this case.

I. The Panel's Ruling On General Jurisdiction Represents A Major Departure From Settled Law, Is Inconsistent With The Supreme Court's Decisions, And Undercuts The Important Rationales Underlying The Due Process Clause's Limits On Personal Jurisdiction

The three-judge panel based its holding that L.L. Bean is subject to general jurisdiction in California primarily on L.L. Bean's "substantial mail-order and internet-based commerce in the state" of California. 341 F.3d at 1074. It reached that conclusion even while acknowledging that the Maine company lacked all of the traditional indica of corporate "presence" in California. See pp. 6-7, *supra*. Although Gator.com suggests that the panel relied on more than L.L. Bean's Internet and catalog commerce (Opp. to Pet. for Rhg. 6-7), it overlooks the panel's sweeping statement that "even if the *only* contacts L.L. Bean had with California were through

its virtual store, a finding of general jurisdiction in the instant case would be" permissible. 341 F.3d at 1079.

The panel's decision to uphold general jurisdiction in this circumstance is flawed at every turn. As we explain below, it ignores (and renders largely irrelevant) the established framework of personal jurisdiction law; it is inconsistent with the careful – and cautious – adherence of the Supreme Court to the traditional principles of analysis in the area of general jurisdiction (in contrast to the more fluid and flexible area of specific jurisdiction); and it undercuts the important rationales that the Supreme Court has recognized for the Due Process Clause's limitations on state adjudicative authority.

A. The Standards Governing "Specific" And "General" Jurisdiction

1. As both the district court and the three-judge panel recognized, there are two distinct categories of personal jurisdiction: "specific" and "general." Each is governed by different standards. Specific jurisdiction may be exercised whenever a cause of action *arises out of or relates to* a nonresident defendant's contacts with the forum state. 341 F.3d at 1076. General jurisdiction, in contrast, exists without such a connection when the defendant's contacts with the forum state are both "continuous and systematic." *Ibid*. General jurisdiction is far more demanding, requiring a showing of "substantial" activities on the defendant's part within the forum state.

Although firmly rooted in earlier case law and academic commentary, this distinction was first made explicit by the Supreme Court in *Helicopteros*, 466 U.S. at 414-415 nn.8-9. "This general-specific jurisdiction distinction is an extremely significant one" not only because of the greater difficulty of establishing a basis for the assertion of general jurisdiction but also because of the significant consequences for the defendant that attend the exercise of general jurisdiction. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5, at 507 (3d ed. 2002).

2. Notably, the doctrine of *specific* jurisdiction has changed over time in response to the growing nationalization and internationalization of commerce. See, *e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292-293; *Developments in the Law – State-Court Jurisdiction*, 73 HARV. L. REV. 911, 919 (1960) ("*Developments*") (noting that "[a]s corporate transactions increasingly assumed a nation-wide character, it became necessary for the states to find some ground upon which jurisdiction could be asserted over foreign corporations"). For this reason, as early as 1960, "[t]here [was] little doubt that a corporation [was] amenable to state jurisdiction in a tort action even though it has carried on only isolated or sporadic activity within the forum state, *so long as the alleged tort grew out of that activity.*" *Id.* at 926 (emphasis added).

Thus, in specific jurisdiction cases, the Supreme Court and the lower courts have developed a "stream-of-commerce" theory that permits a state to assert jurisdiction in tort actions over nonresident or foreign manufacturers whose products are sold into the forum and cause injuries there. See, *e.g.*, *Asahi Metal Indus. Co.* v. *Superior Court of Cal.*, 480 U.S. 102 (1987). The Supreme Court has also endorsed an "effects test" that permits the assertion of specific jurisdiction over claims arising out of other types of intentional acts by nonresident defendants, where those acts are specifically aimed at the forum and cause harm there. See *Calder* v. *Jones*, 465 U.S. 783, 788-789 (1984) (libel action). And several courts of appeals – including this Circuit – have authorized further expansions of the doctrine of specific jurisdiction. This Court, for example, has adopted a broad "but for" test for determining whether a plaintiff's claim "arises out of" a defendant's forum contacts. See *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 380-81 (9th Cir.1990), rev'd on other grounds, 499 U.S. 585 (1991). Although the Supreme Court has permitted an expansion of specific jurisdiction over the years, it has also cautioned that it would be wrong "'to assume that this trend heralds the eventual demise of all restrictions on the personal

jurisdiction of state courts.'" *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 250-251 (1958)).[2]

3. General jurisdiction is, and always has been, a very different matter. The test for general jurisdiction, first announced by the Supreme Court in *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), has remained relatively static. According to the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 47(2) (1971):

> A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

The Restatement also notes – citing *Perkins* – that "such jurisdiction is particularly likely to exist in situations where the corporation's principal place of business is in

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[2] The district court correctly held that the cease-and-desist letter sent by L.L. Bean to Gator.com's California office could not support the exercise of *specific* jurisdiction in this case. See *Gator.com*, 2001 WL 1528393, at *6-*9. Although space limitations will not permit a full discussion of this issue, the Chamber suggests that if the *en banc* Court reaches the issue of specific jurisdiction, it should take this opportunity to revisit – and repudiate – this Circuit's expansive "but for" test, the continuing validity of which has been debated by different panels. Compare *Doe* v. *American Nat'l Red Cross*, 112 F.3d 1048, 1051& n.7 (9th Cir. 1997) with *Omeluk* v. *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995). The "but for" test represents a minority view in the Circuits and has been harshly criticized by knowledgeable commentators. See, *e.g.*, Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CALIF. L. REV. 1545, 1569-1581 (1994); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1451-1464 (1988). For reasons identified by these commentators (and by many other courts), the "substantive relevance" test is far preferable.

the State." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 47 cmt. e. As Professors von Mehren and Trautman explained in an influential article, general jurisdiction in the state of a corporation's "principal place of business" is the historic rule:

> From the beginning in American practice, *general adjudicatory jurisdiction* over corporations and other legal persons could be exercised by the community with which the legal person had *its closest and most continuing legal and factual connections*. The community that chartered the corporation and in which it has its head office occupies a position somewhat analogous to that of the community of a natural person's domicile and habitual residence. If a corporation's managerial and administrative center is in a state other than its state of incorporation, presumably general jurisdiction should exist in either community.

von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1141-1142 (1966) (emphasis added) (cited by the Supreme Court in *Helicopteros* for the definitions of general and specific jurisdiction).

As a result of increased nationalization and internationalization of commerce, it was inevitable that "specific jurisdiction [would] come into sharper relief and form a considerably more significant part of the scene." *Id.* at 1164. But because of the dramatic consequences that attach to *general* jurisdiction (permitting any claim to be asserted against the defendant, even if wholly unconnected the defendant's forum contacts), courts understandably have been far more reluctant to expand this basis for jurisdiction.

B. The Supreme Court's "General" Jurisdiction Cases

In this regard, the Supreme Court is no exception. To be sure, since *International Shoe Co.* v. *Wash.*, 326 U.S. 310 (1945), most of the Supreme Court's "minimum contacts" decisions have been resolved on the basis of "specific" jurisdiction. In only two cases – *Perkins* and *Helicopteros* – has the Court resolved questions concerning the assertion of general jurisdiction over corporate defendants. And only *Perkins upheld* the assertion of general jurisdiction – in circumstances where the traditional indicia of corporate "presence" were satisfied. In its general jurisdiction cases, the Supreme Court has given no indication that an expansion of (or departure from) traditional principles is appropriate or warranted. On the contrary, the Court has faithfully adhered to the traditional, time-tested approach.

Perkins involved a suit in the Ohio courts by a shareholder of a mining concern organized under the laws of the Philippines. 342 U.S. at 447. In *Perkins*, the company's mining operations were originally in the Philippines but had been "completely halted during the occupation of the Islands by the Japanese." *Ibid.* During that suspension, the company's president had moved to Ohio, where he "maintained an office"; "kept there 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; conducted 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 447-448) – effectively establishing a new corporate primary place of business. Because these many activities within Ohio amounted to the "continuous and systematic supervision of the necessarily limited wartime activities of the company," the Court held that they provided a sufficient basis for the exercise of general jurisdiction. *Id*. at 448.

In *Helicopteros*, the Court reversed a decision of the Texas Supreme Court that had upheld 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), the Court rejected the argument that Texas could nevertheless assert general jurisdiction because the defendant purchased most of its helicopters, spare parts and equipment worth more than $4 million, and its training services, from a company located in Texas; sent its CEO to

Texas for a contract-negotiation session; sent personnel to Texas for training; and accepted into its New York bank account checks drawn on a Texas bank. 466 U.S. at 410-411, 416-419. Even such substantial contacts with Texas, the Court explained, did not warrant the conclusion that Texas was the corporation's second home.

Notably, the Court in *Helicopteros* also reaffirmed 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 when the corporation lacked an established place of business in the forum and never regularly carried on business there. 466 U.S. at 417-418 & n.12. This unequivocal rule casts a shadow over the panel's suggestion that L.L. Bean's relationship with California suppliers might provide a basis for asserting general jurisdiction in this case. 341 F.3d at 1078 (describing "extensive contacts with California vendors").

Perkins, *Helicopteros*, and *Rosenberg Bros.* confirm the requirement of traditional indicia of corporate presence – offices, employees, and operations – within a state as a prerequisite for the exercise of general jurisdiction. While many of those indicia were present in *Perkins*, in both cases where the assertion of jurisdiction was invalidated – *Helicopteros* and *Rosenberg Bros.* – they were missing. Thus, general jurisdiction may be exercised only where a defendant has effectively

made the forum its "home" – either through incorporation under the state's laws or through continuous and systematic contacts related to the operation of the defendant's business within the forum.

C. The Limits On States' Exercise Of Personal Jurisdiction Are Based On Important Constitutional Concerns

The threshold requirement that a plaintiff show "minimum contacts" to justify an assertion of personal jurisdiction is supported by two overarching rationales: fairness to the defendant; and principles of horizontal federalism. See *Developments*, *supra*, 73 HARV. L. REV. at 911. The first rationale is based on the due process implications, first recognized by the Supreme Court in 1877 in *Pennoyer* v. *Neff*, of forcing a foreign defendant to appear against its will in a state's courts to defend against litigation. See 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment * * *, the validity of such judgments may be directly questioned * * *, on the ground that the proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."). See also *World-Wide Volkswagen*, 444 U.S. at 291-292 ("The concept of minimum contacts * * * protects the defendant against the burdens of litigating in a distant or inconvenient forum.").

The second rationale "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id*. at 292; see *id*. at 293 (discussing the importance of the states' "sovereign power to try causes in their courts," which "implie[s] a limitation on the sovereignty of all [of the] sister States"). Restrictions on personal jurisdiction are thus properly viewed as

> more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson, 357 U.S. at 251. This rationale has a long pedigree. See Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1825-1826 (2003) ("[S]overeignty concerns served as the primary rationale for the pre-*International Shoe* conception of personal jurisdiction.").

D. The Panel's Holding Departs From The Traditional Approach To Evaluating General Jurisdiction, Is Inconsistent With The Supreme Court's Decisions, And Undercuts The Constitutional Concerns Underlying The Limits On Personal Jurisdiction

In upholding general jurisdiction notwithstanding L.L. Bean's lack of all of the traditional indicia of corporate "presence" in California, the panel deviated from

the well-established legal framework governing general jurisdiction. It also strayed from the clear meaning of the Supreme Court's general jurisdiction holdings in *Perkins* and in *Helicopteros*: that general jurisdiction will be permitted *only* in a forum that properly might be considered the defendant's home. See also von Mehren & Trautman, *supra*, 79 HARV. L. REV at 1144 ("[A]bsent the kind of total, close, and continuing relations to a community implied in incorporation or in the location of a head office within a state, jurisdiction over legal persons * * * should take the form of specific jurisdiction.").

Moreover, the panel evidently failed to appreciate the compelling reasons why courts have chosen *not* to relax due process limits in the area of general jurisdiction (although they occasionally have relaxed the limits on specific jurisdiction). By upholding general jurisdiction on a basis that is so insubstantial and so broadly applicable, the panel has adopted a regime that will render the inquiry into personal jurisdiction largely unnecessary for a large class of defendants. That, in turn, will permit the settled doctrinal categories and rules to be circumvented. Nor did the panel adequately appreciate that the current rules governing specific jurisdiction permit the assertion of jurisdiction in many if not all of the scenarios that would be of real concern to courts (even if not in this particular case, see *supra* note 2).

As if that were not enough, the panel's analysis also undercuts the rationales that underlie the Due Process Clause's limits on the adjudicatory authority of individual states in our federal system. In treating L.L. Bean's website as a "virtual store" (341 F.3d at 1079), the panel indulged the fiction

> that the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received.

ALS Scan, Inc. v. *Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712-713 (4th Cir. 2002). But that fiction eviscerates core notions of due process and state sovereignty, which serve as essential restrictions on the assertion of general jurisdiction.

II. The Panel's Ruling On General Jurisdiction Will Have Negative Consequences And Is At Odds With The Decisions Of Other Circuits

As previously explained, the Supreme Court has rejected jurisdictional analyses that have the effect of undermining 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 that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. But the panel's holding does just that. For that reason, and because it is inconsistent with the

well-reasoned decisions of other circuits, the panel's approach and holding should be rejected by the *en banc* Court.

A. The Panel's Approach Would Sow Confusion And Uncertainty And Have Other Negative Effects

Under the panel's holding, any sizable catalog or Internet company likely will be subject to general jurisdiction in *every U.S. state and territory*. Nearly any company transacting business with California residents from afar, by telephone, telefax, mail order, or the Internet, will be subject to general jurisdiction in California; that state's large population (by recent count, consisting of 12 percent of the U.S. population) necessarily means that a successful national company will make regular sales to California residents. Moreover, nothing about the panel's analysis limits it to large companies like L.L. Bean. Indeed, the panel's explicit reliance on the percentage of L.L. Bean's total sales to California residents (6%) would, if generalized, have the perverse effect of subjecting many small businesses to general jurisdiction in that state. Thus, under the panel's analysis, California effectively becomes the *de facto* "courtroom to the world," at plaintiffs' sole discretion (subject, of course, to doctrines such as *forum non conveniens*).

This cannot be right. "In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority,

it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet." *ALS Scan*, 293 F.3d at 713. Unlike contacts traditionally relied on for findings of general jurisdiction – indicia of physical presence in the forum – companies and individuals cannot control from what forum their Internet sites are accessed. See Chen, *supra*, 25 U. PA. J. INT'L ECON. L. at 432. ("[t]he internet cannot feasibly be closed to users from another state"). The panel singlehandedly erased decades of development of the Supreme Court's personal jurisdiction doctrine, which takes as granted that companies *may* decide in which fora to establish the kind of contacts that will open them up to *in personam* jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297. In this case, far from permitting L.L. Bean to "structure [its] primary conduct" to control where it will be subject to suit, the panel's holding would force the company to choose between ceasing its Internet operations (at the risk of falling into paper-catalog obscurity) and preparing to defend against lawsuits in each and every forum across the country. The law should not require this Hobson's choice.

Moreover, the ramifications of the jurisdictional uncertainty created by the panel's approach extend far beyond even the cross-continental transaction involved in this case. Nothing about the panel's holding limits it to suits by U.S. plaintiffs or against U.S. defendants. Instead, under the panel's approach, California presumably

could exercise general jurisdiction over a New Zealand or Sri Lankan corporation with any significant volume of sales in the state, whether made by catalog, telephone, or interactive Internet website. Such broad-ranging general jurisdiction raises substantial global forum-shopping concerns, and will permit litigation to be brought that has nothing to do with the particular forum state's concerns. In cases involving *non*-U.S. corporations forced to submit to the general jurisdiction of a U.S. state, the harm may include impairment of "the Federal interest in Government's foreign relations policies." *Asahi*, 480 U.S. at 115. Compare *Helicopteros*, 466 U.S. at 425 n.3 (Brennan, J., dissenting) (noting Solicitor General's concern that broad interpretation of general jurisdiction would cause foreign companies to refrain from making purchases in the United States). And, of course, there can be no guarantee that other countries will not impose a similarly expansive jurisdictional regime upon U.S. companies that use the Internet to sell goods and services to their citizens.[3]

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[3] The foreign relations concern of arguable overreaching by U.S. courts is present in at least two cases argued this Term at the Supreme Court (and, in both cases, the Chamber filed briefs as *amicus curiae* at both the petition and merits stages). See *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 966 (2003) (order granting certiorari) (argued April 26, 2004); *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 531 (2003) (order granting certiorari) (argued April 20, 2004). In *Empagran*, the United States and several of its trading partners filed briefs that (like the briefs submitted by the Chamber) raised the international comity concerns of allowing plaintiffs to "forum-shop" by suing in United States courts over issues of primarily extraterritorial concern. See http://supreme.lp.findlaw. com/supreme_court/docket/

(continued...)

B. The Panel's Holding Conflicts With Well-Reasoned Decisions Of Other Circuits

Other circuits have rejected general jurisdiction arguments supported by contacts similar to, or more substantial than, those alleged in this case. Thus, in *Beacon Enters., Inc.* v. *Menzies*, 715 F.2d 757 (1983), the Second Circuit held that "an unspecified number of mail order sales of [the defendant's] products in New York * * * are insufficient to satisfy [the] 'doing business' test" under New York's long-arm statute. *Id.* at 762-763. "The shipment of goods into New York," the Second Circuit explained, "does not *ipso facto* constitute 'doing business.'" *Id.* at 763.[4]

Similarly, in *ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617 (1997), the Fourth Circuit held in a case involving mail-order transactions that proof of regular sales to customers in South Carolina did not give rise to general jurisdiction in that state over a New Hampshire corporation. As in *Beacon* and in this case, the

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[3](...continued)
2003/april.html (visited May 21, 2004).

[4] Although the jurisdictional determination in *Beacon* was made under New York law, rather than the Due Process clause, state-court interpretations of the long-arm statute allowed general jurisdiction if the defendant was "engaged in such a continuous and systematic course of "doing business" here as to warrant a finding of [] "presence" in this jurisdiction.'" 715 F.2d at 762 (quoting *Simonson* v. *International Bank*, 200 N.E.2d 427, 429 (1964)).

defendant in *ESAB Group* had no sales representatives or other agents in the forum. See 126 F.3d at 624-625.

In *Bird* v. *Parsons*, 289 F.3d 865 (2002), the Sixth Circuit refused to find general jurisdiction despite evidence of thousands of Internet transactions (conducted through a fully interactive website) between the defendant and the forum state. After reviewing the Supreme Court's *Perkins* and *Helicopteros* decisions, the Sixth Circuit noted that the plaintiff did not allege that the defendant had an office in Ohio; or was registered to do business in Ohio; or maintained Ohio bank accounts; or directed its business from Ohio. 289 F.3d at 873-874. The Sixth Circuit also relied on this Court's decision in *Bancroft*, 223 F.3d 1082, in concluding that transacting business with Ohio residents, by itself, did not permit general jurisdiction. *Id* at 874.[5] See also *Revell* v. *Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (refusing to find general jurisdiction based on forum residents' Internet subscriptions to the defendant's online journal). The three-judge panel's decision in this case is inconsistent with all of these well-reasoned decisions.

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[5] The three-judge panel's decision arguably undermines *Bancroft*'s holding that a foreign corporation's advertising in California, contracts with California-based vendors, and other commerce with parties domiciled in California may "constitute doing business *with* California, but do not constitute doing business *in* California." 223 F.3d at 1086 (emphasis added).

Notably, the panel also created a split of authority with the Fifth Circuit on the question whether the "interactivity" test first articulated in *Zippo*, 952 F. Supp. 1119, is applicable to questions of general (as opposed to specific) jurisdiction. The panel was wrong to rely on *Zippo* for the proposition that, because L.L. Bean's website is interactive,[6] general jurisdiction is appropriate. Instead, the panel should have followed the Fifth Circuit's holding that the *Zippo* test is limited to *specific* jurisdiction.[7] As the Fifth Circuit explained, the *Zippo* test

> is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding

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[6] The panel found that L.L. Bean's website is "interactive" because customers can "view and purchase products on-line as well as interact with L.L. Bean customer service representatives 'live' over the internet." 341 F.3d at 1074. But those same features characterize a large, and increasing, number of Internet websites – and are not materially different from a toll-free phone number for ordering printed on a paper catalog. See Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1379 (2001) ("[I]t is important to note that the standards for what constitutes an active or passive website are constantly shifting."); Siddiqi, *Welcome to the City of Bytes?*, 14 N.Y. INT'L L. REV. 43, 73-74 (2001) ("[A]n increasing number of Web sites will necessarily adopt interactive features."). Given these realities, it is not only established retailers that would be swept up by the panel's expansive holding. As of 1999, 35 percent of small business owners maintained websites, and 22 percent used the Internet to sell goods and services. See Williams, Office of Advocacy, Small Business Administration, *E-Commerce: Small Businesses Venture Online* 5 (July 1999), available at http://www.sba.gov/advo/stats/e_comm.pdf (visited June 10, 2004).

[7] This Circuit applies *Zippo* in specific jurisdiction cases. See *Cybersell, Inc.* v. *Cybersell, Inc.*, 130 F.3d 414, 418-419 (9th Cir. 1997).

> of general jurisdiction – in other words, while it may be doing business *with* Texas, it is not doing business *in* Texas.

Revell, 317 F.3d at 471 (citing *Bancroft*, 223 F.3d at 1086). This case demonstrates the wisdom of the Fifth Circuit's analysis.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment of the district court dismissing the complaint for lack of personal jurisdiction.

June 10, 2004

Respectfully submitted,

/S/

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN E. UNTEREINER
KATHRYN SCHAEFER ZECCA
MAX HUFFMAN
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

Attorneys for *Amicus Curiae*
Chamber of Commerce of the United States

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using WordPerfect Version 10 in 14-point Times New Roman font.

_____/S/_____
Alan E. Untereiner
Counsel for *Amicus Curiae*

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I certify that on June 10, 2004, I caused two copies of the Brief of the Chamber of Commerce of the United States As *Amicus Curiae* In Support of Defendant-Appellee L.L. Bean, Inc., and Urging Affirmance, to be served by United States Mail on each of the counsel listed below:

Michael Traynor, Esq.
Counsel for Gator.com Corp.
Cooley Godward LLP
One Maritime Plaza
20th Floor
San Francisco, CA 94111-3699

Peter J. Brann, Esq.
Counsel for L.L. Bean, Inc.
Brann & Isaacson
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070

_____/S/_____
Alan E. Untereiner
Counsel for *Amicus Curiae*