No. S124286

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

———

Frank Snowney, et al.,

Plaintiffs/Appellants,

v.

Harrah's Entertainment, Inc., et al.,

Defendants/Respondents.

———

After Decision By the Court of Appeal,
Second Appellate District, Division Three
Case No. B 164118

From the Superior Court for Los Angeles County
Hon. Peter D. Lichtman
Case No. BC 267575

———

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/RESPONDENTS

———

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/RESPONDENTS

———

Pursuant to Rule 29.1(f) of Title One of the California Rules of Court, the Chamber of Commerce of the United States (the Chamber) respectfully moves for permission to file the attached brief as *amicus curiae*. The brief is in support of Defendants/Respondents Harrah's Entertainment, Inc., Harrah's Las Vegas, Inc., Harrah's Laughlin, Inc., Harrah's Operating Company, Inc., Harrah's Tahoe Management Company, Inc., and Rio Properties, Inc. (collectively, Harrah's), and urges this Court to reverse the judgment of the

Court of Appeal for the Second Appellate District.

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of all sizes, in every sector of industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts and federal and state legislative and executive branches of government. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. This is such a case.

The court of appeal's holding that California may, consistent with the Due Process Clause of the Fourteenth Amendment, exercise specific jurisdiction over Harrah's in the circumstances of this case is of great concern to *amicus* and its members. The court of appeal applied an exceptionally broad test for specific personal jurisdiction that undermines rational notions of due process and territorial limits on personal jurisdiction. If permitted to stand, the lower court's decision could expose the Chamber's members to suit in far-flung jurisdictions simply because of their use of media of telecommunication—whether telephone, telefax, or the Internet—to advertise or to conduct their business operations.

The court of appeal's approach would largely extinguish due process protections for nonresident corporations with national or international operations. The importance of this case is magnified because the majority of States in the U.S. have long-arm statutes that, like Cal. Code Civ. Proc. § 410.10, authorize the assertion of personal jurisdiction to the maximum extent permitted by the Due Process Clause. See McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended the Limits of Due Process*, 84 B.U. L. REV. 491, 525-530 (2004) (32 of the 50 States do so). If the interpretation below stands, the result will be to inundate California courts with lawsuits like this one, which is based primarily on *one* allegation that *one* California resident was charged $3 *one* time when visiting Harrah's outside of California.[1] If other States impose reciprocal jurisdictional tests, the nationwide effect will be magnified—but this time the brunt of the liberal jurisdictional rules will be felt by the California economy. Furthermore, because the "World Wide Web" is as

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[1] The opportunities to bring these kinds of cases are apparently common. See, *e.g.*, Chris Woodyard, *Hotels face lawsuits on surcharges for phones, energy*, USA TODAY, Sep. 27, 2004; Amanda Bronstad, *Peeved at Valet Parking Policy, Past Guest Sues Beverly Hilton*, LOS ANGELES BUSINESS JOURNAL, August 5, 2002 (describing a purported class action based on valet parking fees brought by counsel in this case, about which counsel boasted, "we must have several hundred thousand people"), available at http://www.findarticles.com/p/articles/mi_m5072/is_31_24/ai_91093387. Cf. C.A. App. 4 (Compl. ¶ 13) ("There are potentially hundreds of thousands of Hotel patrons who were charged an energy surcharge.").

global in scope as its name suggests, it is no more or less fair for a California court to assert jurisdiction on the basis of a website over a corporation operating only in Nevada or New Zealand than for the courts of any jurisdiction in any corner of the globe to assert jurisdiction on the basis of a similar website over a corporation operating only in California.

The scope and importance of the court of appeal's specific-jurisdiction holding is thus difficult to overstate. It threatens significant ramifications for the businesses of thousands of companies based in California and throughout the United States and around the world. Because of the Chamber's substantial and diverse membership, which includes most of the nation's largest companies and many foreign-based multinational corporations—including thousands of companies that do business nationwide and worldwide by means of telephones, the mail, and the Internet—the Chamber is well situated to brief this Court on the impact of the important jurisdictional issues presented in this

case. For all of these reasons, the Chamber respectfully asks this Court for leave to file the attached *amicus curiae* brief in this case.

October 14, 2004

Respectfully submitted,

_____

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/RESPONDENTS

———

INTEREST OF THE *AMICUS CURIAE*

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

STATEMENT

A. Modern-Day Commerce Is National or International in Scope

1. The trend toward nationalization and internationalization of commerce over the past century has been much remarked. As early as 1960, commentators noted that "corporate transactions" were "increasingly assum[ing] a nation-wide character." *Developments in the Law – State-Court Jurisdiction*, 73 HARV. L. REV. 911, 919 (1960) (*Developments*). Over the past 20 years, globalization has produced extraordinary benefits to the U.S. economy. During the prosperous 1990s exports accounted for one-quarter of overall economic growth, and trade liberalization is credited with having caused sustained economic growth during that decade. See Secretary of Commerce Donald L. Evans, Remarks at the Meeting of the National Corngrowers Association (July 16, 2001), available at http://www.commerce.gov/opa/speeches/Evans/2001/July_16_Evans_Corn_Assoc.html.

Nowhere is this more true than in the hospitality industry:

> Travel and tourism is a driving force behind the United States' economy. It is the third-largest retail sales industry and generated $545 billion in direct spending in 2001. The industry supported 7 million American jobs in 2001 and created $94 billion in tax revenue for federal, state, and local governments in 2000. In addition, travel and tourism represents the top services export for the United States and produced a travel trade surplus of nearly $9 billion in 2001.

Doug Baker, *Helping the Tourism Industry Recover*, published by the U.S. Gov't Office of Service Industries, Tourism, and Finance, available at http://www.export.gov/exportamerica/NewOpportunities/no_TourismRecovery1.html. In California the statistics are even more dramatic. According to the California Lodging Industry Association, tourism in California—the primary travel destination in the United States—accounts for $75 billion in direct spending annually, one million people employed, and $5 billion in direct tax revenue. See *California Tourism's Contributions to the California Economy 1998-2002* (*California Tourism*), available at http://www.clia.org/tourism.cfm.

Of course, these economic benefits depend greatly on the industry's ability to reach and to communicate with potential customers. Cf. *California Tourism*, *supra* ("Case studies and research ha[ve] shown that investing in tourism marketing for a destination has an immediate positive effect of generating new spending and jobs for an economy."). It is thus no surprise that modern means of telecommunication—including the Internet—are credited with contributing vitally to economic growth over the past two decades. See Jessica Schneider 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 Oct. 10, 2004). It is estimated that by 2004 there will be between 700

and 945 million users of the Internet worldwide. Cindy 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.*

2. The extension of commerce on a national and global scale has its ill effects as well. Where human and financial interaction goes, litigation does not take long to follow, and litigation with cross-border implications raises important issues of interstate and international comity and fairness to the litigants.[2] Altering one's business plan to minimize the risk of litigation is one possibility. "The most drastic strategy to employ is to simply go offline altogether * * *. For business owners who refuse to 'bet the company' on this possibility, avoiding a presence on the internet is the easiest way to avoid any potential liability from foreign jurisdictions." Chen, *supra*, 25 U. PA. J. INT'L ECON. L. at 453.

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[2] The Chamber has been at the forefront of the discussions of fairness and comity concerns arising from transnational litigation. In *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359 (2004), the Chamber, as well as the United States and several other sovereign nations, filed briefs as *amici curiae* urging the Court to place limits on the antitrust jurisdiction of U.S. courts. The U.S. Supreme Court unanimously reversed a lower-court decision that would have increased opportunities for global forum-shopping and applied U.S. antitrust laws to issues more appropriately dealt with through the laws, policies, and judicial systems of other jurisdictions.

And the hospitality industry is not immune from this trend either. The issue of jurisdiction over a foreign hotel, resort, or cruise line in the home State of a traveler "is repeatedly litigated in our courts." Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, in *Symposium: Fifty Years of International Shoe: the Past and Future of Personal Jurisdiction,* 28 U.C. DAVIS L. REV. 531, 542 (1995). The appropriate test for specific personal jurisdiction in a plaintiff's home State over a foreign vacation company appeared ready for decision by the U.S. Supreme Court in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), but the Court decided the case instead by holding that a contractual forum-selection clause controlled. *Id.* at 595; see Weintraub, *supra*, 28 U.C. DAVIS L. REV. at 543.

B. The Proceedings Below

Plaintiff contacted Harrah's by dialing a 1-800 number to arrange lodging for a trip to Nevada. C.A. App. 5 (Compl. ¶ 18). He took the trip and stayed at Harrah's, and he now alleges that, on checking out of the hotel, he was charged a $3 "energy surcharge" of which he had not previously been apprised. C.A. App. 5 (Compl. ¶ 15). On returning to California, plaintiff initiated this purported class action to recover his $3.

1. Harrah's moved to quash service of process, arguing that California courts lacked personal jurisdiction over it. The trial court held that Harrah's

lacked the kind of "'extensive, wide-ranging, substantial, continuous and systematic'" contacts required to justify the exercise of *general* jurisdiction. C.A. App. 277, 280 (emphasis omitted) (quoting *Henderson* v. *Sup. Ct.*, 77 Cal. App. 3d 583, 590 (1978)). "As for specific jurisdiction" (C.A. App. 280 (emphasis omitted)), the court held that the contacts with California alleged—advertising in California, inducing California residents to patronize its business and realizing profit from their patronage, contracting with Internet service providers that may maintain databases in California, and engaging in direct mailing to individuals enrolled in Harrah's rewards program—were insufficient to satisfy the requirement that Harrah's "purposefully avail" itself of the privilege of conducting activities in California. *Id.* at 280-281. Plaintiff appealed.

2. The court of appeal reversed the holding that California lacked specific personal jurisdiction over Harrah's. *Snowney* v. *Harrah's Entertainment, Inc.*, 11 Cal. Rptr. 3d 35, 39, 44 (Cal. App.), review granted, 92 P.3d 841 (Cal. 2004). The court of appeal recognized the appropriate test for specific personal jurisdiction—accepted by this Court and the U.S. Supreme Court—which requires that the defendant have purposefully availed itself of the privilege of conducting activities in the forum; that the cause of action "arise out of or relate to" the defendant's contacts; and that the exercise

of jurisdiction be "fair and reasonable." *Snowney*, 11 Cal. Rptr. 3d at 40 (internal quotations omitted) (citing *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-478 (1985), and *Vons Companies, Inc.* v. *Seabest Foods, Inc.*, 14 Cal. 4th 434, 442-448, 926 P.2d 1085, 1092-1096 (1997)).

The court of appeal then discussed the definition of "aris[ing] out of or relate[d] to," holding, based on this Court's decisions in *Vons Companies* and *Cornelison* v. *Chaney*, 16 Cal. 3d 143, 149, 545 P.2d 264, 267 (1976), that the defendant's forum contacts need only have a "substantial connection" with the plaintiff's cause of action. *Snowney*, 11 Cal. Rptr. 3d at 40. The court expressly rejected tests followed by federal courts of appeals nationwide, which require allegations of causation—either but-for or proximate—or of "substantive relevance," whereby the forum contact establishes or supports an element of the plaintiff's cause of action. *Id.* at 40. Instead, the court held, "in light of the nature and intensity of the contacts, that the contacts are sufficiently related to the alleged causes of action to justify the exercise of personal jurisdiction." *Id.* at 43.

Under its broad interpretation of "relatedness," the court of appeal was able to consider all of Harrah's contacts with California, whether or not the particular contact induced plaintiff to stay at Harrah's on his trip to Nevada, and whether or not the contact had anything to do with the $3 surcharge of

which plaintiff complains. The court of appeal considered advertising (including billboards, print advertisements in newspapers, and radio and television commercials); offices located in California through which Harrah's markets to "high-end patrons"; a "central Internet site" through which people can gain information and make reservations; and a toll-free telephone reservation system. *Id.* at 41-42. Finally, drawing a conclusion that could apply to any hotel, anywhere, seeking to conduct a tourist business, the court held that (*id.* at 42)

> by soliciting and receiving the patronage of California residents through these activities and to this extent, the Hotel Defendants have purposefully directed their activities at California residents, have purposefully derived benefit from their contacts with California, and have established a substantial connection with this state.

SUMMARY OF ARGUMENT

Specific personal jurisdiction is not available in California over Harrah's for the claims plaintiff asserts in this case. The contacts that Harrah's has with the California forum—which are identical to the contacts that any business, anywhere, competing for tourist dollars in the modern business climate would have, and to the contacts that myriad California businesses have with countless forums worldwide—do not satisfy the tests announced by the U.S. Supreme Court for asserting specific personal jurisdiction for claims of harm suffered in Nevada.

Plaintiff's claims do not arise out of, and are not related to, Harrah's contacts with California. The court of appeal's holding to the contrary was based on a test for relatedness—asking only whether the contact has a "substantial connection" to the cause of action—that this Court has applied in the past, but that contravenes the tests for relatedness that are applied by courts across the country. The U.S. Supreme Court has never endorsed the substantial connection test. Instead, that Court's case law is better interpreted as consonant with the much more narrow "substantive relevance" test proffered in a scholarly article. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77. One recent decision of this Court also signals a possible shift toward the substantive-relevance test. This Court should take this opportunity to adopt the substantive-relevance test.

Under the substantive-relevance test for relatedness, Harrah's contacts with the California forum do not relate to plaintiff's alleged harm suffered in Nevada, and do not provide any basis for specific jurisdiction. But, even under a broader interpretation of relatedness, the contacts that might be substantially connected to plaintiff's alleged injury—the maintenance of a 1-800 telephone number and Internet website and advertising in California—fall far short of constituting "purposeful availment" of the privilege of conducting activities

in the California forum. By instead considering contacts with California—including offices maintained in California that cater to high spenders—that bear no legal relation whatever to plaintiff's causes of action, the court of appeal erred in concluding that Harrah's properly could be subjected to specific personal jurisdiction in this State.

The "harm" allegedly suffered in this case is *de minimis*, but the importance of the jurisdictional inquiry in this case is far greater than plaintiff's alleged $3 overpayment. The contacts that Harrah's has with California are the types of contacts that any modern national or international business would have. Under the rule announced by the court of appeal below, nothing prevents California courts from exercising jurisdiction over companies located in Florida, Maine, or even overseas, if they advertise their existence and their products or services, and provide means for California residents to contact them to purchase products or make vacation reservations. This result is reached no matter where any harm occurs, or no matter how minimal its impact on California. Given this State's massive population, California risks becoming the courtroom to the world.

The converse also is true. If the court of appeal's rule gains broader acceptance, California's vital tourist industry will be faced with the Hobson's choice of curtailing efforts to market tourist travel outside of the State or

defending itself in far-flung forums against claims for injuries that took place in California. Neither is an acceptable result.

ARGUMENT

The U.S. Supreme Court and this Court have recognized two discrete categories of personal jurisdiction—"specific" and "general"—that are governed by different standards. See *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-415 nn.8-9 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966)); *Pavlovich* v. *Sup. Ct.*, 29 Cal. 4th 262, 268-269, 58 P.3d 2, 6 (2002) ("'Personal jurisdiction may be either general or specific.'") (quoting *Vons Companies, Inc.* v. *Seabest Foods, Inc.*, 14 Cal. 4th 434, 445, 926 P.2d 1085, 1092 (1997)). 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. *Helicopteros*, 466 U.S. at 414 n.8. General jurisdiction, in contrast, exists without such a connection when the defendant's contacts with the forum State are both "continuous and systematic." The court of appeal forswore reliance on the *doctrine* of general jurisdiction, but Harrah's "contacts" with California on which the court relied have so remote a nexus, if any, to the cause of action plaintiff is pursuing that no plaintiff who could take advantage of such a loose test would ever bother

to try to make the exacting showing required for general jurisdiction—thus effectively obliterating an important distinction that this Court and the U.S. Supreme Court have recognized.

Only specific jurisdiction is before the Court; the court of appeal below actually decided only "Snowney's principal contention" that "defendants have sufficient contacts with California to justify the exercise of specific personal jurisdiction" (*Snowney*, 11 Cal. Rptr. 3d at 39), and plaintiff does not ask this Court to affirm on the alternate ground of general jurisdiction (see, *e.g.*, Pls. Br. 31 ("the general jurisdiction portion of the *Circus Circus* analysis is irrelevant to this case")).[3]

As Members of this Court have remarked (*Pavlovich*, 29 Cal. 4th at 285, 58 P.3d at 17 (Baxter, J., dissenting)), the doctrine of specific jurisdiction is flexible, and has evolved in response to the growing nationalization and

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[3] In any event, there would be no basis to hold that Harrah's has the kind of "continuous and substantial" contacts with California that "make it reasonable for the state to exercise [general] jurisdiction" (RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 47(2) (1971)) over it. See *Vons Companies*, 14 Cal. 4th at 446, 926 P.2d at 1092 ("such a defendant's contracts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction"). General jurisdiction properly is understood to be limited to the State of a corporation's "home," or principal place of business. See von Mehren & Trautman, *supra*, 79 HARV. L. REV. at 1141-1142; cf. *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 447-448 (1952) (general jurisdiction over corporation in its surrogate home).

internationalization of commerce. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980) ("The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years."). This is a natural result of the broader geographic scope of commercial activity over the past century. See *Developments*, *supra*, 73 HARV. L. REV. at 919 (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"). But the U.S. Supreme Court has specifically 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)).

Although new theories of specific personal jurisdiction have been announced that demonstrate the prescience of Professors von Mehren and Trautman in predicting that "specific jurisdiction [would] come into sharper relief and form a considerably more significant part of the scene" (von Mehren & Trautman, *supra*, 79 HARV. L. REV. at 1164), the U.S. Supreme Court has simultaneously adopted and continued to apply important limitations that

ensure that defendants' due process rights and rational notions of territorial limits on personal jurisdiction are not discarded.

Thus, before a court may exercise specific personal jurisdiction over a defendant, the plaintiff must demonstrate that the defendant has "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.'" *Burger King*, 471 U.S. at 475 (quoting *Hanson*, 357 U.S. at 253). The plaintiff also must demonstrate that the defendant has certain "'minimum contacts' in the forum State" (*Burger King*, 471 U.S. at 474 (quoting *International Shoe Co.* v. *Wash.*, 326 U.S. 310, 316 (1945)), and that its cause of action "arise[s] out of or relate[s] to the defendant's contacts with the forum" (*Helicopteros*, 466 U.S. at 414 n.8). Finally, the plaintiff must demonstrate that the exercise of jurisdiction would "comport with 'fair play and substantial justice'" by weighing several fairness factors. *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 320). This Court has followed those same requirements. See *Pavlovich*, 29 Cal. 4th at 269, 58 P.3d at 6-7.

I. There Is No Basis for Asserting Personal Jurisdiction over Harrah's in This Case

A. Plaintiff's Claims Do Not "Arise from" or "Relate to" Harrah's Contacts with California

Applying the relatedness requirement—that a plaintiff's cause of action "arise from" or "relate to" the defendant's contacts with the forum State—is a process of determining which contacts may be counted as part of the jurisdictional analysis. See Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 82. Courts and commentators have followed and proposed different tests for relatedness.[4] Some courts have required a contact to be the "proximate cause" of the injury complained of in order to be counted. See, *e.g.*, *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1260 (1st Cir. 1990). Some courts—including the Ninth Circuit—have required the contact to be the "but-for" cause of the injury. See *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991). And some courts have followed a more rigorous analysis that asks about the "substantive relevance" (Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 82) of the contact to the cause of action. Cf. *United Elec., Radio & Mach. Workers* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) ("[T]he

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[4] See generally Flavio Rose, *Related Contacts and Personal Jurisdiction: the "But For" Test*, 82 CAL. L. REV. 1545, 1568-1581 (1994) (surveying case law and stating the various tests for relatedness).

defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case.") (quoting *Marino* v. *Hyatt Corp.*, 793 F.2d 426, 430 (1st Cir. 1986)). Under the substantive-relevance test, "[a] contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits." Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 82.

This Court has in the past followed an exceptionally broad test for relatedness that permits jurisdiction even without any allegations of causation or of substantive relevance, asking only whether the cause of action "ha[d] a substantial connection" to the defendant's activity in the forum. *Cornelison*, 16 Cal. 3d at 148, 545 P.2d at 267. This Court in *Cornelison* held that specific personal jurisdiction could be asserted over an out-of-state truck driver, based on an accident that occurred out of state, because the truck driver regularly drove in California. *Id.* at 149-150, 545 P.2d at 267-268. See also *Vons Companies*, 14 Cal. 4th at 448, 926 P.2d at 1094 ("crucial inquiry" is "whether the cause of action arises out of *or has a substantial connection* with" the contacts) (emphasis in original). This test has been the subject of substantial criticism by other courts and scholars.[5]

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[5] See, *e.g.*, *Obermeyer* v. *Gilliland*, 873 F. Supp. 153, 157 (C.D. Ill. 1995) (following the majority rule and declining to follow *Cornelison*); *Roskelley & Co.* v. *Lerco, Inc.*, 610 P.2d 1307, 1311 1312 (Utah 1980)

The court of appeal in this case understood this Court's cases to permit it to apply a "test" that asked only if "the contacts are sufficiently related to the alleged causes of action to justify the exercise of personal jurisdiction." 11 Cal. Rptr. 3d at 43. But that is no test at all. As the U.S. Supreme Court observed in another legal context, when giving up on its prior enterprise of trying to determine what is "related to" what else: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes [the doctrine being construed] would never run its course, for '[r]eally, universally, relations stop nowhere.'" *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting HENRY JAMES, RODERICK HUDSON xli (New York ed., World's Classics 1980); see also *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., joined by Ginsburg, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."). In

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("Justice Clark, in his dissent, with which the other two Justices concurred, pointed out that defendant's activities in the State of California would be relevant in determining limited jurisdiction in a cause of action alleging defendant's fraud in dealing with the local manufacturers, whom he served, but simply is not relevant to an action alleging negligent driving in Nevada. We would agree with the dissent in that case.").

fairness to the court of appeal, it did not deem any contact "related to" the cause of action sufficient for personal jurisdiction, but instead demanded that the contacts be "sufficiently related." The adverb, however, merely begs the question of what degree of relationship is sufficient—exactly the question the various tests stated by courts and scholars are designed to address, and to make more predictable of resolution.

Notably, the U.S. Supreme Court has given little guidance as to the appropriate interpretation of relatedness in a specific-jurisdiction analysis. See Rose, *supra*, 82 CAL. L. REV. at 1545 ("The [U.S.] Supreme Court has not defined 'related' for purposes of specific jurisdiction * * *."). In *Shute*, the writ of certiorari was granted to review the Ninth Circuit's "but-for" causation test, but the Court decided the case instead on the interpretation of a contractual forum selection clause. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 595 (1991).

But the U.S. Supreme Court has never endorsed any of the more permissive relatedness tests. And there is good reason to believe that the Court would not endorse such a test. In *Rush* v. *Savchuk*, 444 U.S. 320 (1980), the Court held that a defendant in a suit over an auto accident was not subject to personal jurisdiction based on the presence in the forum of his insurance company. The insurance policy was not an "operative fact[] of the negligence

action * * *. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance of the litigation * * *." *Id.* at 329.[6] As Professor Brilmayer has noted, "[a]n amorphous test for relatedness probably would have found the policy related. Indeed, prior to *Rush* several commentators had argued that an insurance policy should be deemed related property." Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 739 n.90 (1988) (citing commentary).

B. This Court Should Adopt the Substantive-Relevance Test

The narrower substantive-relevance test prevents a State from impermissibly regulating activity that neither takes place nor has an effect within the State. "Imposition of burdens on outsiders," such as defending against litiga-

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[6] *Helicopteros* itself—although specifically reserving the definition of relatedness for a later case because the parties conceded that the case did not "arise out of" and did not "relate to" forum contacts (466 U.S. at 415 n.10)—lends support to the substantive-relevance analysis. In that case, the defendant's contacts with Texas, which consisted of a trip to the forum by the defendant's CEO to negotiate a contract, purchases of helicopters and equipment in Texas, and training trips to Texas made by the defendant's employees (*id*. at 416), apparently were not sufficiently related to a wrongful death cause of action based on a helicopter crash to warrant the exercise of specific personal jurisdiction. See *id.* at 419-420 (Brennan, J., dissenting) ("in [the Court's] view, the underlying cause of action does not arise out of or relate to the corporation's activities within the State") (internal quotations omitted). Under a more liberal relatedness test, there would have been specific jurisdiction. See *id.* at 425 (Brennan, J., dissenting) ("the wrongful death claim * * * is significantly related to the undisputed contacts between Helicol and the forum").

tion, "must be justified," because—unlike a State's citizens—outsiders do not have adequate political recourse if they object. Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 85-86. Unduly liberal relatedness tests, like the test applied by this Court in *Cornelison*, may rely on wholly innocent conduct—what Professor Brilmayer terms "nonnegligent stopovers" (Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 86)—to provide the justification for imposing the burden of defending against litigation in the State. Brilmayer, *A General Look*, *supra*, 66 TEX. L. REV. at 739. But that is precisely the harm that specific-personal-jurisdiction tests should be careful to avoid. Such a rule imposes a higher cost on outsiders than on citizens of the State, and is tantamount to a rule of *general* jurisdiction.

Loose relatedness tests also lose sight of the federalism foundations of this area of the law. Any time one State asserts jurisdiction over a controversy more naturally resolved in a different State, there is a question whether the States are showing one another the respect they deserve. The constitutional restrictions on personal jurisdiction are "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." *Hanson*, 357 U.S. at 251. In this respect, due process "act[s] as an instrument of interstate federalism" (*World-Wide Volkswagen*, 444 U.S. at 294), permitting each State to retain one

of the "essential attributes of sovereignty, including, in particular, the sovereign power to try causes in [its] courts" (*id*. at 293). The minimum-contacts inquiry—and the "relatedness" aspect of that inquiry at issue here—"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 291-292. This case squarely presents the comity concern. Little question can exist that Nevada—itself a State dependent on tourist dollars—has a powerful interest in regulating the business conduct of its hotels and casinos, just as California would have if the positions were reversed.

The substantive-relevance test also has the virtues of clarity and consistency. See Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265, 1290 (1993). Professor Brilmayer has described an easy-to-apply bright line rule: "A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits." Brilmayer, *Contacts*, *supra*, 1980 SUP. CT. REV. at 82. In other words, related contacts "are precisely those already defined as a proper subject for regulation under the applicable substantive law." *Id.* at 86. As a corollary, the test makes it less likely that past contacts that did not result in any injury or controversy will

provide the basis for specific jurisdiction. These virtues, which are not shared by the more liberal relatedness tests,[7] honor the U.S. Supreme Court's admonition that defendants must be able 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.

It is for good reason, then, that many courts reject the more permissive tests for relatedness.[8] Based on language employed in a recent decision, this Court might be thought to be trending in that direction. Echoing the arguments made by Justice Clark in his *Cornelison* dissent—that merely fortuitous contacts with the forum, unconnected to the plaintiff's cause of action, do not provide a basis for specific personal jurisdiction (16 Cal. 3d at 152-153, 545

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[7] See, *e.g.*, Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1843 (2003) ("So long as a significant number of states hold on to a loose conception of Prong 2 [arising out of or relatedness], website operators—knowing that their sites are universally available, but not knowing where the next lawsuit will be filed—must choose between exposing themselves to potential jurisdiction in distant forums, and going offline. Since the theory behind personal jurisdiction demands that citizens be able to take reasonable steps to structure their affairs to avoid jurisdiction, that choice is unacceptable.").

[8] See, *e.g.*, *United Elec., Radio & Mach. Workers*, 960 F.2d at 1089 ("[W]e steadfastly reject the exercise of personal jurisdiction whenever the connection between the cause of action and the defendant's forum-state contacts seems attenuated and indirect."); *Simpson* v. *Quality Oil Co.*, 723 F. Supp. 382, 388 (S.D. Ind. 1989) ("Both federal and state cases decided in Indiana suggest that the defendant's contacts with the forum must be substantively related to the cause of action in order to confer specific jurisdiction over the defendant.").

P.2d at 270)—this Court's recent decision in *Pavlovich* questioned whether effects felt in California that were not part of the causes of action were relevant to the specific-personal-jurisdiction analysis. 29 Cal. 4th at 276, 58 P.3d at 11. Those alleged contacts—possible effects on the California motion-picture industry from illegally copying DVDs using defendant's software—were not related to plaintiff's claims "because [plaintiff] does not assert a cause of action premised on the illegal pirating of copyrighted motion pictures." *Ibid.*

When this understanding of relatedness is applied to plaintiff's allegations in this case, it becomes clear that plaintiff's alleged $3 injury, which he suffered in Nevada, is not related to Harrah's contacts—advertisements, a toll-free number, offices, and an Internet "presence"—with California. Plaintiff's claims do not arise from Harrah's contacts with the State of California.[9]

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[9] Courts regularly hold that contacts such as advertising a vacation destination and maintaining an Internet website that allows the making of on-line reservations are not related to tortious injuries suffered at the vacation destination. See *Bell* v. *Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087-1088 (E.D. Mo. 2001) (noting that hotel reservations are unique from sales of goods over the Internet); *Smith* v. *Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225, 1230-1231 & n.5 (N.D. Okla. 2001) (holding that the plaintiff failed to establish a nexus between forum contacts and the injury, and citing cases).

C. Harrah's Contacts Do Not Constitute Purposeful Availment of the California Forum

By considering all of Harrah's contacts with California, whether or not related—a step that would have been appropriate were the court conducting a general-jurisdiction inquiry, but should be considered impermissible in this specific-jurisdiction analysis—the court of appeal was misled to hold that Harrah's contacts with California rose to the level of purposeful availment.

The purposeful-availment requirement protects defendants' due process rights by ensuring that defendants are not forced to defend themselves in a distant forum based solely on the "unilateral activities" of the plaintiff. *Burger King*, 471 U.S. at 475. The test "'focuses on the defendant's intentionality.'" *Pavlovich*, 29 Cal. 4th at 269, 58 P.3d at 7 (quoting *United States* v. *Swiss Am. Bank, Ltd.*, 274 F.3d 610, 623-624 (1st Cir. 2001)). The requirement ensures that defendants will be able 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*, 444 U.S. at 297.

The court below relied on indicia of Harrah's presence in California that are irrelevant to the purposeful-availment inquiry. As discussed above, only contacts that "aris[e] from or relate[] to" plaintiff's causes of action permissibly are considered. See *Pavlovich*, 29 Cal. 4th at 276, 58 P.3d at 11 ("[W]e question whether these effects are even relevant to our analysis,

because [the plaintiff] does not assert a cause of action premised on the illegal pirating of copyrighted motion pictures.").[10] The discussion of "radio and television advertisements on California stations"; "offices located in this state"; a "central Internet site [that] provides information on the six hotels here at issue"; and a "central toll-free telephone reservation system" (*Snowney*, 11 Cal. Rptr. 3d at 41-42) is relevant only to the extent that plaintiff could allege that his "cause of action [was] premised on" those contacts. *Pavlovich*, 29 Cal. 4th at 276, 58 P.3d at 11.

Considering only the contacts that relate to plaintiff's claims, it becomes clear that this case is utterly unlike *Burger King* or *Vons Companies*, in both of which cases the defendants purposefully availed themselves of the forum by engaging in a continuing course of conduct in the forum State. See *Vons Companies*, 14 Cal. 4th at 449, 926 P.2d at 1094 ("[T]his case closely resembles *Burger King* * * *. [T]he cross-defendants here, like the defendants in *Burger King*, purposefully availed themselves of benefits in the forum by reaching out to forum residents to create an *ongoing* franchise relationship.").

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[10] Accord *Cornelison* v. *Chaney*, 16 Cal. 3d 143, 153, 545 P.2d 264, 270 (1976) (Clark, J., dissenting) ("the appropriate test for 'limited jurisdiction' focuses on the nexus between the cause of action at issue and defendant's activities within the forum"); *Revell* v. *Lidov*, 317 F.3d 467, 472 (5th Cir. 2002) ("For specific jurisdiction we look only to the contact out of which the cause of action arises * * *.").

Because of the extensive continuing relationship that the defendant in *Vons Companies* had with the California forum, this Court's decision in that case to apply the *Cornelison* rule does not imply that a similar result should follow in this case from plaintiff's single contact with Harrah's in making a 1-800 call from California.

Instead, even under the substantial-connection test for relatedness, the only contacts that plaintiff can allege that relate to his causes of action are a telephone call, initiated by plaintiff, advertisements, and an Internet presence accessible from California. Courts specifically have held that such contacts are insufficient to qualify as purposeful availment. See *Circus Circus Hotels, Inc.* v. *Sup. Ct.*, 120 Cal. App. 3d 546, 569-571 (1981), disapproved of on other grounds, *Vons Companies*, 14 Cal. 4th at 461-462, 926 P.2d at 1102-1103; see also Defs. Br. 10-19.

The most expansive interpretation of the purposeful-availment requirement recognized by the U.S. Supreme Court permits the assertion of specific personal jurisdiction in limited circumstances "'based on the "effects" of [the out-of-state] conduct in California.'" *Pavlovich*, 29 Cal. 4th at 270, 58 P.3d at 7 (quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984)). This Court has rejected the application of the effects test beyond the narrow circumstance in which the defendant "expressly aimed" intentionally tortious conduct at

California. *Pavlovich*, 29 Cal. 4th at 270, 272, 58 P.3d at 7-8, 9. It is clear that the effects test does not avail plaintiff anything here. The only allegation of harm to plaintiff is a $3 charge paid on a one-night stay at Harrah's. C.A. App. 3 (Compl. ¶ 5). Harrah's imposes that charge in Nevada on visitors to Nevada (and Nevadans who choose to stay at Harrah's) while they are in Nevada, with no purpose to cause any effects elsewhere. There may be some incidental California "effect" because the Californian whose wallet has been lightened by $3 (like many whose wallets are lightened by considerably larger sums during visits to Las Vegas) will return to California, but such *de minimis* effect is a far cry from the "potentially devastating impact" on the plaintiff in *Calder*. 465 U.S. at 789.

And plaintiff's class-action allegations do nothing to raise the importance of the effects in California that are alleged. Although plaintiff alleged that "[t]here are potentially hundreds of thousands of Hotel patrons who were charged an energy surcharge, without any notice of such surcharge" (App. 4 (Compl. ¶ 13)), plaintiff nowhere alleges that any of those class members—apart from himself—is from California. No basis exists to infer that Harrah's expressly aimed its allegedly tortious conduct at California, when plaintiff alleges effects that would be felt in whatever far-flung forum a class member calls home.

II. The Ramifications of Asserting Specific Jurisdiction On the Facts of this Case Counsel in Favor of More Rational Interpretations of Specific-Personal-Jurisdiction Standards

It is clear that companies seeking to compete in the tourism industry cannot fail to market themselves through advertisements or to make themselves accessible through media of telecommunication, such as a toll-free telephone number or the Internet. See *California Tourism*, *supra* (describing a national print and television advertising campaign with an estimated boost to the state tourism industry of $2.6 billion). It is especially the case that the industry cannot ignore the California market. According to estimates by the U.S. Census Bureau, California represents approximately 12% of the total population of the United States. See U.S. Census Bureau, *California QuickFacts*, available at http://quickfacts.census.gov/qfd/states/06000.html (estimating California's year 2003 population to be approximately 35.5 million, and that of the United States to be approximately 290.8 million).

The Internet—a "'unique and wholly new medium of worldwide human communication'" (*Pavlovich*, 29 Cal. 4th at 265, 58 P.3d at 5 (quoting *Reno* v. *ACLU*, 521 U.S. 844, 849-850 (1997)))—presents special dangers of subordinating defendants' due process rights. It is particularly important that this Court be cognizant of the ubiquity of Internet communications when it considers whether Internet contacts may be used to satisfy the "purposeful

availment" and "arising out of or related to" tests for specific jurisdiction in this case. Unlike contacts traditionally relied on for findings of jurisdiction, 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 ("The internet cannot feasibly be closed to users from another state * * *."); see also note 7, *supra*.

For these reasons, finding purposeful availment based on Internet contacts, advertisements, and maintenance of a 1-800 number for reservations and information would erase decades of the U.S. Supreme Court's personal jurisdiction doctrine, which presumes that companies must be permitted to decide in which forums to establish the kind of contacts that will open them up to personal jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 297.

Such a broad assertion of jurisdiction also threatens untold harm to an industry that is vital to California's, and the Nation's, economies. Although this case involves a company based in Nevada being asked to defend against a lawsuit brought in California, nothing about the analysis followed by the court of appeal and urged by plaintiff limits it to jurisdiction in a neighboring State. Even a cursory Internet search for vacation lodging in the State of Maine uncovers hundreds of companies, both large and very small, that have toll-free contact numbers and Internet websites covering the range of

interactivity. The same applies for Florida and for overseas destinations. Under the court of appeal's rule, all of these companies potentially are subject to specific personal jurisdiction in California if a California resident decides to initiate a lawsuit over a dispute with his host that took place on vacation, so long as it can be tied in some remote way to information about the company that is accessible from California.

Of course, if other jurisdictions follow the court of appeal's lead, the opposite also could be true. California's Disneyland Resort advertises itself with a fully interactive Internet website found at http://disneyland.disney.go.com/dlr/index?bhcp=1 (which can be viewed in English, Spanish, or Japanese), has at least one toll-free number, and conducts massive advertising campaigns "targeting" every state in the Nation (and likely many foreign countries). Small California innkeepers also market themselves worldwide on the Internet and maintain toll-free numbers. Permitting jurisdiction over these defendants in Maine, Florida, or overseas, based on disputes centered in California over the price of a room, both threatens untoward effects on California's tourism industry and removes any rationality from the scheme of territorial jurisdiction.

If—as can be expected—California plaintiffs seize on the court of appeal's rule to ask courts to exercise personal jurisdiction over overseas

corporations, whether a casino in Monte Carlo or a lodge in New Zealand, the harmful result may include the impairment of "the Federal interest in Government's foreign relations policies." *Asahi Metal Indus. Co.* v. *Sup. Ct. of Cal.*, 480 U.S. 102, 115 (1987); cf. *Helicopteros*, 466 U.S. at 425 (Brennan, J., dissenting) (noting the Solicitor General's concern that broad interpretation of general jurisdiction would deter foreign companies from doing business with the United States). And it is reasonable to believe that other countries might reciprocate by imposing similarly expansive jurisdictional regimes on U.S. companies that market their services by Internet and advertisements to foreign travelers.

CONCLUSION

The judgment of the court of appeal below should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using WordPerfect Version 10 in Times New Roman 13-point font. The text of this brief contains 7079 words as counted by WordPerfect Version 10, not including the portions of the brief permitted to be excluded by California Rule of Court 29.1(c)(3). I further certify that, pursuant to Rule 14(b)(1), this brief was printed on recycled paper.

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I certify that on October 14, 2004, I caused one copy of this brief to be served on each counsel and court listed below by overnight delivery.

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