No. 16-11051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEPUY ORTHOPAEDICS, INC., PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

JAY CHRISTOPHER,

Plaintiff-Appellee-Cross-Appellant;

JACQUELINE CHRISTOPHER,

Plaintiff-Appellee,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,

Defendants-Appellants-Cross-Appellees.

(Continued Caption on Inside Cover)

On appeal from the United States District Court
for the Northern District of Texas
Nos. 14-cv-1994, 11-cv-2800, 12-cv-1672, 11-cv-1941, 13-cv-01071

OPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PHRMA) AS *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLANT JOHNSON & JOHNSON

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Consolidated with

No. 16-11052

RICHARD KLUSMANN,
Plaintiff-Appellee-Cross-Appellant;
SUSAN KLUSMANN,
Plaintiff-Appellee,
– v. –
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DONALD GREER,
Plaintiff-Appellee-Cross-Appellant,
– v. –
DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
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ROBERT PETERSON,
Plaintiff-Appellee-Cross-Appellant;
KAREN PETERSON,
Plaintiff-Appellee,
– v. –
DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,
Defendants-Appellants-Cross-Appellees.

Consolidated with

No. 16-11056

MARGARET AOKI,

Plaintiff-Appellee-Cross-Appellant,

– v. –

DEPUY ORTHOPAEDICS, INC. and JOHNSON & JOHNSON,

Defendants-Appellants-Cross-Appellees.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America (PhRMA) respectfully request leave to file the accompanying amicus brief in support of Defendant-Appellant Johnson & Johnson. In support of this motion, *amici* state as follows:

1. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases addressing the constitutional limits on courts' exercise of personal jurisdiction.[1]

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[1] The Supreme Court cases presenting issues regarding the limits on the scope of personal jurisdiction in which the Chamber has filed *amicus* briefs include *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). The Chamber has also filed numerous *amicus* briefs in this Court, including recently in *Aetna Life Ins. Co. v. Methodist Hosps. of Dallas* (No. 15-10210), *Adhikari v. Kellogg Brown & Root, Inc.* (No. 15-20225), and *Bd. of Comm'rs of S.E. La. Flood Prot. Auth. v. Tenn. Gas Pipeline Co., LLC* (No. 15-30162). The Chamber's most recent briefs in personal jurisdiction cases, including in

2. PhRMA is a voluntary, nonprofit association comprised of leading pharmaceutical research and technology companies. PhRMA members are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. In 2015 alone, PhRMA members invested $58.8 billion in discovering and developing new medicines. (PhRMA, *2016 Profile: Biopharmaceutical Research Industry* (2016) p. ii, at http://phrma.org/sites/default/files/pdf/biopharmaceutical-industry-profile.pdf.) PhRMA frequently files amicus briefs on issues that affect its members, and the issues presented in this case are especially crucial to them.

3. Many Chamber and PhRMA members do business through subsidiaries in States other than their State of incorporation and of principal place of business (the forums in which they are subject to general personal jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014)). They therefore have a substantial interest in the rules governing the extent to which a State can subject nonresident corporations to specific personal jurisdiction.

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appellate courts around the country, are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.
PhRMA has also filed briefs in several personal-jurisdiction cases, including *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016).

4. Allowing courts to subject corporations to specific jurisdiction based on sales by their independent subsidiaries—when the parent itself lacks minimum contacts with the forum State—would contravene decades of this Court's precedents regarding specific jurisdiction. *Amici* seek leave to file the attached brief to explain why that result is irreconcilable with well-settled law and would impose unfair burdens on businesses, courts, and the national economy.

5. *Amici* respectfully submit that their proposed brief will aid in the Court's resolution of the questions at issue.

6. This Court routinely grants motions for leave to file *amicus* briefs, including where one party objects to the motion. *See, e.g.*, *In re: Deepwater Horizon* (No. 14-31299), Doc. No. 00512888799 (granting Chamber's opposed motion); *Centurytel of Chatham, LLC v. Sprint Commc'ns Co., LP* (No. 16-30634), Doc. No. 00513687149 (granting opposed motion).

7. Defendants-Appellants have consented to the filing of the *amicus* brief. Plaintiffs-Appellees have stated that they are opposed to the filing of the brief.

WHEREFORE, *amici* respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae*.

Dated: February 6, 2017

Respectfully submitted,

/s/ *Archis A. Parasharami*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for the Chamber of Commerce of the United States of America and PhRMA certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 627 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

February 6, 2017

/s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that that on February 6, 2017, I electronically filed the foregoing brief using the CM/ECF system, which will send notification of the filing to the attorneys on that system.

Dated: February 6, 2017 /s/ *Archis A. Parasharami*

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Aoki et al. v. DePuy Orthopaedics, Inc. et al., Nos. 16-11051, 16-11052, 16-11053, 16-11054, 16-11056.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Margaret Aoki, Jay Christopher, Jacqueline Christopher, Donald Greer, Richard Klusmann, Susan Klusmann, Robert Peterson, Karen Peterson, Plaintiffs-Appellees;
2. DePuy Orthopaedics, Inc.; Synthes, Inc.; DePuy Synthes, Inc.; Johnson & Johnson International; Johnson & Johnson, Defendants-Appellants;
3. The Lanier Law Firm, PC (W. Mark Lanier, Richard P. Meadow); Fisher, Boyd, Johnson & Huguenard, LLP (Larry Boyd, Wayne Fisher, Justin Presnal); Neblett, Beard & Arsenault (Richard J. Arsenault, Jennifer M. Hoekstra); Simmons Hanly Conroy (Jayne Conroy); Franklin D. Azar & Associates, P.C. (Franklin D. Azar, Robert O. Fischel, Tonya L. Melnichenko, Nathan J. Axvig); Kiesel & Larson LLP (Paul R.

Kiesel, Helen Zukin, Matthew A. Young); Parker Waichman LLP (Jerrold S. Parker); Kenneth W. Starr; Counsel for Plaintiffs-Appellees;

4. Kirkland & Ellis LLP (Paul D. Clement, Jeffrey M. Harris, Michael D. Lieberman, Kevin M. Neylan, Jr.); Skadden, Arps, Slate, Meagher & Flom LLP (John H. Beisner, Stephen J. Harburg, Jessica D. Miller, Geoffrey M. Wyatt); Locke Lord LLP (Michael V. Powell, Seth M. Roberts); Barrasso Usdin Kupperman Freeman & Sarver, L.L.C. (Richard E. Sarver, Andrea Mahady Price); Andrew C. White, Johnson & Johnson Services, Inc.; Counsel for Defendants-Appellants;
5. The Chamber of Commerce of the United States of America; Pharmaceutical Research and Manufacturers of America (PhRMA), *amici curiae*;
6. Mayer Brown LLP (Andrew J. Pincus, Archis A. Parasharami, Matthew A. Waring, Andrew A. Lyons-Berg), counsel for *amici curiae*.
7. U.S. Chamber Litigation Center (Kate Comerford Todd, Sheldon Gilbert), counsel for *amicus curiae* the Chamber of Commerce of the United States of America.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases addressing the constitutional limits on courts' exercise of personal jurisdiction.[2]

Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association comprised of leading pharmaceutical research and technology companies. PhRMA members are devoted to inventing medicines that allow patients to live longer, healthier, and more

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[1] In accordance with Fed. R. App. P. 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] The Supreme Court cases presenting issues regarding the limits on the scope of personal jurisdiction in which the Chamber has filed *amicus* briefs include *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). The Chamber's most recent briefs in personal jurisdiction cases, including in appellate courts around the country, are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction. PhRMA has also filed briefs in several personal-jurisdiction cases, including *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016).

productive lives. In 2015 alone, PhRMA members invested $58.8 billion in discovering and developing new medicines. (PhRMA, *2016 Profile: Biopharmaceutical Research Industry* (2016) p. ii http://phrma.org/sites/default/files/pdf/biopharmaceutical-industry-profile.pdf.) PhRMA frequently files amicus briefs on issues that affect its members, and the issues presented in this case are especially crucial to them.

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Allowing courts to subject corporations to specific jurisdiction based on sales by their independent subsidiaries—when the parent itself lacks minimum contacts with the forum State—would contravene decades of this Court's precedents regarding specific jurisdiction. *Amici* file this brief to explain why that result is irreconcilable with well-settled law and would impose unfair burdens on businesses, courts, and the national economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This litigation is remarkable for a host of reasons. For one, the jury trial was marred by inflammatory claims against the Appellants. Not only did the district court permit Plaintiffs' counsel to read to the jury large swaths of an anti-business publication, "Doubt is their Product," which had no bearing on the case, the court also permitted Plaintiffs' counsel to repeatedly make salacious and irrelevant allegations about the Appellants—alleging dramatically that DePuy "paid a massive fine" for "bribing doctors," and that Johnson & Johnson (J&J) was in business with the "henchmen of Saddam Hussein." *See* Appellant Br. 52, 55, 58.

Just as remarkable as this inflammatory rhetoric (which is by itself a sufficient basis for reversal) was the district court's decision to allow the case to go to trial in the first place. The district court exercised personal jurisdiction over J&J despite the fact that J&J itself did no business in Texas. The court's decision to do so was apparently premised on the in-State activities of DePuy Orthopaedics, Inc., one of J&J's wholly owned subsidiaries.[3]

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[3] The district court did not explain why it believed that it had personal jurisdiction over J&J. The court's denial of J&J's motion to dismiss for lack of personal jurisdiction addressed the collective contacts of "the Johnson & Johnson Defendants"—a group that included J&J along with three other subsidiaries that are not parties to this appeal. It did not identify

That approach flies in the face of both longstanding precedent on specific personal jurisdiction and the principle of separate corporate personhood—a principle that is at the heart of the law of corporations. And since J&J *itself* did not establish minimum contacts with Texas sufficient to support specific jurisdiction, the district court's judgment violated due process.

Both settled law and important policy considerations cry out for reversal of the judgment below. The district court's expansive view of specific personal jurisdiction over parent corporations would do serious harm to businesses by disrupting their expectations about where they can be sued. If the decision below were upheld, it would be impossible for product manufacturers to predict where they might face large product-liability suits such as this one. It would also unnecessarily burden the court system, because it would give plaintiffs' lawyers incentives to name as many related corporate defendants as possible in every case, hoping to score large verdicts against parent entities that should not even be subject to personal jurisdiction in the forum because they engaged in no suit-related conduct there. And it would harm the national economy, by discouraging foreign

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any contacts specific to J&J. And the court's orders denying J&J's motion for judgment as a matter of law and renewed motion for judgment as a matter of law gave no reasoning for the decisions.

direct investment and interstate commerce. These deleterious consequences provide a further reason to reverse the judgment below.

ARGUMENT

The district court's exercise of personal jurisdiction over J&J conflicts with Supreme Court precedent, disobeys the teachings of this Court, and ignores the principle—fundamental to corporate law—that parent and subsidiary corporations are separate entities.

I. THE DISTRICT COURT LACKED PERSONAL JURISDICTION OVER J&J.

"The Due Process Clause of the Fourteenth Amendment sets . . . outer boundaries [on] a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). These limitations on a court's authority "protect[] [the defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

Applying this due process principle, the Supreme Court has recognized "two categories of personal jurisdiction." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). General jurisdiction permits courts to adjudicate claims against a defendant arising out of actions occurring anywhere in the world, but only when the defendant's "affiliations with the [forum]

State are so 'continuous and systematic' as to render them essentially at home" there. *Id.* (quoting *Goodyear*, 564 U.S. at 919). Specific jurisdiction, on the other hand, empowers courts to adjudicate claims relating to the defendant's in-forum conduct and exists when "the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). Because plaintiffs conceded that J&J was not subject to general jurisdiction in Texas (*see* Appellant Br. 40), specific jurisdiction is the only possible basis for the judgment against J&J.

As the Supreme Court recently reaffirmed in *Walden v. Fiore*, the specific jurisdiction inquiry "'focuses on the relationship among the defendant, the forum, and the litigation.'" 134 S. Ct. 1115, 1121 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). The central question is whether "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum State." *Id.* If this "substantial connection" is lacking, a court's exercise of specific jurisdiction violates due process. *Id.*

Walden also reaffirmed the principle that the minimum-contacts requirement "must be met ***as to each defendant*** over whom a state court exercises jurisdiction." *Id.* at 1123 (quoting *Rush v. Savchuk*, 444 U.S. 320,

332 (1980) (emphasis added)). Put differently, "[d]ue process requires that a defendant be haled into court in a forum State based on ***his own*** affiliation with the State"—not based on the actions of other parties. *Id.* (emphasis added). As the Supreme Court has explained, the relevant contacts must "proximately result from actions by the defendant *himself*." *Burger King*, 471 U.S. at 475 (emphasis in original).

These principles are fatal to the judgment against J&J here, because the district court lacked power to issue it. For the reasons we discuss below, any contacts between DePuy (the subsidiary) and Texas could not be attributed to J&J. And J&J explains convincingly why J&J *itself* did not have *any* suit-related contact with Texas. Appellant Br. 39-42. The judgment must therefore be reversed for lack of personal jurisdiction. *See, e.g.*, *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 344 (2d Cir. 2016) (reversing trial-court judgment for lack of personal jurisdiction).

A. Attributing The Forum Contacts Of An Independent Corporate Subsidiary To Its Parent Violates Due Process.

No principle is more fundamental to American corporate law than the principle that each corporation is a distinct legal entity, separate and apart from both its shareholders and its corporate subsidiaries, parents, or affiliates. In the shareholder context, that rule has been recognized by the Supreme Court and this Court for many decades. *See, e.g.*, *Burnet v. Clark*,

287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entit[i]es."); *In re Sims*, 994 F.2d 210, 217 (5th Cir. 1993) ("It is fundamental . . . that 'one of the principal purposes for which the law has created the corporation' is to give it an existence separate and distinct from its stockholders . . . ."') (quoting *Berger v. Columbia Broad. Sys., Inc.*, 453 F.2d 991, 994 (5th Cir. 1972)); *Berger*, 453 F.2d at 994 ("It is elemental jurisprudence that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners."*)*.

Courts have accordingly held time and again that a parent corporation is separate from its subsidiaries and that the activities of subsidiaries generally cannot be attributed to their corporate parents. As the Supreme Court explained nearly two decades ago, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929)); *see generally* 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 26 (Sept. 2016) ("A subsidi-

ary corporation is presumed to be a separate and distinct entity from its parent corporation."). This "dual personality of parent and subsidiary is not lightly disregarded," since to do so "operates to defeat one of the principal purposes for which the law has created the corporation." *Berger*, 453 F.2d at 994.

The rule that subsidiaries' activities are not attributable to their parents has long been recognized in the law of personal jurisdiction. Over 90 years ago, the Supreme Court rejected the notion that "corporate separation carefully maintained must be ignored in determining the existence of jurisdiction." *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925). In *Cannon*, the Court held that a corporate parent was not subject to jurisdiction based on the activities of its wholly owned subsidiary where "the corporate separation" between the two, "though perhaps merely formal, was real." *Id.* at 337.

The Court restated that principle in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The plaintiff in *Keeton* sued a magazine publishing company for libel, and the Court held that the publisher had sufficient minimum contacts with the forum State to warrant jurisdiction. *Id.* at 773-74. But the Court made clear that "[i]t does not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc.,

that jurisdiction may also be asserted" over "Hustler's holding company." *Id.* at 781 n.13. Since "[e]ach defendant's contacts with the forum State must be assessed individually," the Court observed, jurisdiction over a parent does not "automatically establish jurisdiction over a wholly owned subsidiary," and vice versa. *Id.*

This Court's own personal-jurisdiction precedents have also consistently held that the contacts of a subsidiary may not be imputed to the parent corporation. *See, e.g.*, *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) ("[T]he mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent."). Indeed, this Court has "long presumed the institutional independence of related corporations, such as parent and subsidiary, when determining if one corporation's contacts with a forum can be the basis of a related corporation's contacts." *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999); *see also Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990) ("[T]he mere existence of a parent-subsidiary relationship will not support the assertion of jurisdiction over a foreign parent."); *Southmark Corp. v. Life Inv'rs, Inc.*, 851 F.2d 763, 774 n.18 (5th Cir. 1988) ("In this Circuit, it is established that so long as a par-

ent and a subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other.").

For personal jurisdiction purposes, the presumption of corporate independence may only be overcome with "clear evidence" that "one corporation assert[s] sufficient control to make the other its agent or alter ego." *Dickson Marine*, 179 F.3d at 338. That showing "requires . . . 'something beyond the subsidiary's mere presence within the bosom of the corporate family.'" *Id.* (quoting *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465-66 (1st Cir. 1990)). Indeed, "the parent [must] so dominate[] the subsidiary that 'they do not in reality constitute separate and distinct corporate entities'" before the subsidiary's activities will be attributed to the parent. *Dalton*, 897 F.2d at 1363 (quoting *Hargrave*, 710 F.2d at 1159); *see also Southmark*, 851 F.2d at 774 n.18 ("[O]ur cases 'demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.'") (quoting *Hargrave*, 710 F.2d at 1160).

Thus, for example, in *Hargrave*, this Court declined to impute the forum contacts of a wholly-owned subsidiary to its parent for jurisdictional purposes, even though the parent "had complete authority over general policy decisions," because the "[d]ay-to-day business and operational deci-

sions . . . were made by [the subsidiary's] officers." *Hargrave*, 710 F.2d at 1160. Because the subsidiary controlled its own day-to-day affairs, the subsidiary and its parent were to be considered no more than "two separate corporations joined by the common bond of stock ownership," which was an insufficient basis for attributing the subsidiary's forum contacts to the parent. *Id*. at 1161; *see also Dickson Marine*, 179 F.3d at 338–39 (applying the "*Hargrave* factors" to hold that a "parent company [could not] be held amenable to personal jurisdiction because of the acts of [its] subsidiary."). Other circuits similarly refuse to attribute subsidiaries' forum contacts to their parents in assessing personal jurisdiction.[4]

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[4] *See, e.g.*, *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011) ("Our cases consistently have insisted that personal jurisdiction can be based on the activities of [a] nonresident corporation's in-state subsidiary . . . only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego.") (internal quotation marks omitted); *Good v. Fuji Fire & Marine, Ins. Co.*, 271 F. App'x 756, 759 (10th Cir. 2008) ("For purposes of personal jurisdiction, a holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity.") (internal quotation marks omitted); *Negron-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007) (rejecting jurisdiction as to a holding company and noting that "[t]here is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary"); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World*

Under these precedents, it is crystal clear that due process forbids attributing DePuy's contacts with Texas to J&J. DePuy is a wholly owned, *fourth-level* subsidiary of J&J, which is a holding company that also owns numerous other subsidiaries. *See* Appellant Br. 8 n.1. And the two are plainly separate: as Appellants note (*id.* at 41), Plaintiffs did not even at-

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Corp., 230 F.3d 934, 943 (7th Cir. 2000) ("[W]e hold that constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary."); *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("Where the subsidiary's presence in the state is primarily for the purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of the local activities of the subsidiary.") (internal quotation marks omitted); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184-86 (2d Cir. 1998) (holding that plaintiffs failed to make prima facie showing that domestic subsidiary of foreign automaker was an "agent" or "mere department" of the foreign parent, as required for jurisdictional discovery, and noting that foreign parent "properly may" "structure[] its business so as to separate itself from the operation of its wholly-owned subsidiaries in the United States"); *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998) ("[A] company does not purposefully avail itself merely by owning all or some of a corporation subject to jurisdiction. . . . [Plaintiff] must provide sufficient evidence for us to conclude that [parent] is being brought into court for something that it has done, not for something that [subsidiary] has done."); *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 63 (4th Cir. 1993) (holding that contacts of subsidiary could not be imputed to parent where the two corporations "studiously observed all corporate formalities").

tempt to show that the two companies failed to observe proper corporate formalities or that J&J controlled DePuy's day-to-day operations.

Under such circumstances, there is no "symbiotic corporate relatedness" between DePuy and J&J that would allow the "parent company [to] be held amenable to personal jurisdiction because of the acts of [its] subsidiary." *Dickson Marine*, 179 F.3d at 338; *see also Hargrave*, 710 F.2d at 1159. To the contrary, DePuy is the paradigmatic example of a subsidiary that is merely "presen[t] within the bosom of [its parent's] corporate family." *Dickson Marine*, 179 F.3d at 338. This bare parent-subsidiary relationship "is not sufficient to warrant the assertion of jurisdiction over the foreign parent." *Hargrave*, 710 F.3d at 1159.

B. J&J Itself Did Not Have Sufficient Suit-Related Contacts With Texas To Support Specific Jurisdiction.

Since DePuy's contacts cannot be attributed to J&J, J&J "lacks the 'minimal contacts' with [Texas] that are a prerequisite to the exercise of jurisdiction over [it]." *Walden*, 134 S. Ct. at 1124. The uncontroverted evidence at trial showed that J&J did not sell the Ultamet device; DePuy did. *See* Appellant Br. 40. Plaintiffs pointed to certain *general*, high-level activities by J&J—such as assisting in DePuy's nationwide and international advertising campaigns or giving DePuy general authorization to sell the Ultamet "worldwide" (Appellant Br. 41)—but even assuming *arguendo*

that these activities are suit-related,[5] they are irrelevant to specific jurisdiction. As *Walden* made clear, contacts must be specifically made "with the forum State *itself*" to support specific jurisdiction. *Walden*, 134 S. Ct. at 1122 (emphasis added). General conduct that is not directed at the particular forum does not satisfy that requirement. *See, e.g.*, *Nicastro*, 564 U.S. at 885 (defendant did not purposefully avail itself of the New Jersey market by "direct[ing] marketing and sales efforts at the United States" generally); *see also, e.g.*, *Rush*, 444 U.S. at 330 ("[A] 'contact' can have no jurisdictional significance" if it exists "simultaneously" "in all 50 states and the District of Columbia."). The general activities by J&J that plaintiffs relied on have nothing more to do with Texas than they do with any other State. Accordingly, they could not support specific jurisdiction over J&J in Texas.

Thus, even if the district court's exercise of personal jurisdiction over J&J were based on J&J's own activities rather than on *DePuy's* forum contacts, it violated due process.

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[5] We agree with J&J that the nationwide advertisements are not suit-related because plaintiffs never showed that they saw the advertisements. *See* Appellant Br. 42.

II. EXERCISING SPECIFIC JURISDICTION OVER CORPORATE PARENTS IN THESE CIRCUMSTANCES WOULD HARM BUSINESSES, COURTS, AND THE ECONOMY.

The district court's judgment not only violates settled due process principles: if upheld, it will inflict severe new burdens on the business community, the courts, and the economy as a whole.

A. Subjecting Corporate Parents To Specific Jurisdiction Based On Product Sales By Subsidiaries Would Make Jurisdiction Less Predictable.

The Supreme Court has long recognized that the concept of specific jurisdiction aims to "give[] a degree of predictability to the legal system that allows 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 Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Companies know that they generally have a "due process right not to be subjected to judgment in [the] courts" of a State other than their home State, unless they have affirmatively established contacts with the State itself that make them subject to specific jurisdiction there. *Nicastro*, 564 U.S. at 881; *see also Walden*, 134 S. Ct. at 1123. Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

The need for predictability is a particularly important feature of the corporate relationships between parents and subsidiaries. As early as 1929, Justice Douglas wrote that separate corporate personhood "is ingrained in our economic and legal systems. The social and economic order is arranged accordingly." Douglas & Shanks, *supra*, at 193. If that was the case in 1929, it is even more true today. Companies across the country and around the world order their affairs on the assumption that separate legal entities will in fact be treated separately, relying on that assumption to structure their businesses and to anticipate where each entity in a corporate family is potentially subject to litigation.

But the district court's approach to personal jurisdiction would disrupt these expectations and dramatically reduce companies' ability to control or predict where they are subject to specific jurisdiction. If an entity like J&J—which has over 265 direct and indirect corporate subsidiaries (Appellant Br. 8 n.1)—can be haled into court based on product sales by its subsidiary, the large businesses that drive the national economy will have no way of avoiding being trapped in mass actions in any forum in the country where any of their subsidiaries sell products—no matter what the parent corporation's level of involvement in the sales or how "distant or in-

convenient" the forum is for the parent. *See World-Wide Volkswagen*, 444 U.S. at 292.

That result would be deeply troubling. The Supreme Court has recognized, both with respect to personal jurisdiction and in other contexts, that the law should avoid upsetting the settled expectations of regulated parties when possible. *See Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"); *Burger King*, 471 U.S. at 475 n.17 (explaining that due process is violated when a defendant "has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there") (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *see also, e.g.*, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) ("[C]ourts must be cautious before adopting changes that disrupt . . . settled expectations."); *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 316 (1992) (reaffirming Court's prior decision and noting that the decision's rule "encourages settled expectations and, in doing so, fosters investment by businesses and individuals"). And nothing would do more to disrupt the settled expectations of the countless companies that do business through subsidiaries

than holding that a parent corporation can be subjected to personal jurisdiction in circumstances like these.

B. Expanding Personal Jurisdiction Over Parent Corporations Would Encourage Litigation And Place Unnecessary Burdens On The Courts.

Allowing specific jurisdiction over parent corporations based on product sales by subsidiaries would also lead to an increase in speculative litigation. This case itself is a paradigmatic example: despite the lack of any evidence of participation by J&J in the alleged wrongful conduct, plaintiffs were able to obtain jurisdiction over J&J and thus make it subject to the eventual judgment. That result, if allowed to stand, will encourage plaintiffs in other cases to name as many defendants in a corporate family as possible, seeking to win verdicts against the deepest-pocketed entities they can find.

To be sure, a parent corporation that is sued and has not engaged in any wrongdoing should ultimately avoid liability on the merits—but as the verdict here demonstrates, that does not always happen. Moreover, the threat of massive judgments may induce parent corporations to settle suits rather than vindicating themselves at trial. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008) (noting that "extensive discovery and the potential for uncertainty and disruption in a lawsuit

could allow plaintiffs with weak claims to extort settlements from innocent companies"). And meanwhile, the addition of a parent corporation to a suit against a subsidiary increases the complexity of the litigation, burdening the court with additional litigation over both merits issues related to the parent and discovery disputes involving the parent's records.

The rule against imputing subsidiaries' activities to parent corporations avoids these harmful consequences by allowing a parent corporation with no suit-related connection to the forum to be dismissed for lack of personal jurisdiction at the pleading stage. It is therefore critical that this Court reaffirm that rule to ensure that errors like the one committed by the district court are not repeated in this Circuit.

C. Subjecting Corporate Parents To Specific Jurisdiction Based On Product Sales By Subsidiaries Would Deter Corporate Investment.

Finally, permitting specific jurisdiction in these circumstances would discourage both foreign direct investment and interstate commerce, which are both vitally important drivers of economic growth.

An October 2013 study by the federal government found that foreign direct investment "supports a host of benefits in the United States, notably good jobs and innovation led by research and development investment." U.S. Dep't of Commerce, Foreign Direct Investment in the United States

at 11 (Oct. 2013), goo.gl/sVzZVL; *see also* Penny Pritzker, U.S. Secretary of Commerce, Remarks at 2016 SelectUSA Investment Summit (June 20, 2016) ("Pritzker Remarks") ("Foreign investment makes the United States more prosperous, more innovative, and more competitive."), https://www.commerce.gov/news/secretary-speeches/2016/06/us-secretary-commerce-penny-pritzker-delivers-remarks-2016-selectusa. Indeed, the U.S. affiliates of foreign firms in 2012 employed 6.4 million people in the United States, spent $57 billion on U.S. research and development, and exported nearly $360 billion worth of goods manufactured in the United States. Bureau of Econ. Affairs, Foreign Direct Investment in the United States: Final Results from the 2012 Benchmark Survey, http://1.usa.gov/1oqcH72. The federal government has therefore made, and continues to make, concerted efforts to further increase foreign investment in the United States. Pritzker Remarks, *supra*; *see* generally *About SelectUSA*, SELECTUSA, https://www.selectusa.gov/about-selectusa.

Endorsement of the district court's approach to personal jurisdiction would threaten to deprive the United States of the benefits of foreign direct investment. If the price of a foreign corporation's investing in the United States were that it became subject to personal jurisdiction wherever its American subsidiaries sold products, "[o]verseas firms . . . could be

deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (addressing risks of expansive liability under securities laws); *see also Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987) (plurality opinion) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Indeed, given the uniquely expansive procedural rules governing civil litigation in the United States—including broad discovery; the prospect of large damages awards dwarfing those available in most other countries; contingent-fee representation of plaintiffs; and the virtual prohibition against shifting of litigation costs to a losing plaintiff (cf. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 269 (2010))—there is little doubt that foreign enterprises would revamp their operations to avoid subjecting themselves to extensive subsidiary-based jurisdiction in U.S. courts, even if that would require significantly reducing their U.S. operations.

The vitality of interstate commerce would also be threatened. The law has long sought to foster a "federal free trade unit" among the several States and to promote the "interstate movement of goods." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949). The benefits to Americans have been substantial: the "material success" resulting from inter-

state trade has been "the most impressive in the history of commerce." *Id.* The rule of corporate separateness contributes to this success by assuring corporations that, if they do business in other States through properly separate subsidiaries, they are not subject to personal jurisdiction in those other States. But the district court's approach to personal jurisdiction would destroy the benefit of this jurisdictional framework, by deterring corporations from selling their products nationwide—and by raising manufacturers' costs, making the products that *are* sold more expensive.

In sum, allowing jurisdiction over a parent corporation based on product sales by its subsidiary would be bad for business, bad for the courts, and bad for the economy as a whole.

CONCLUSION

The district court's judgment should be reversed, and the case should be remanded with instructions to dismiss the claims against J&J for lack of personal jurisdiction.

Respectfully submitted,

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Dated: February 6, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for the Chamber of Commerce of the United States of America and PhRMA certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,058 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 6, 2017 /s/ *Archis A. Parasharami*

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on February 6, 2017, the foregoing brief was transmitted to the Clerk of the U.S. Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, and that (1) the required privacy redactions were made pursuant to Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document pursuant to Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection, and according to the program is free of viruses.

Dated: February 6, 2017 /s/ *Archis A. Parasharami*

CERTIFICATE OF SERVICE

I hereby certify that that on February 6, 2017, I electronically filed the foregoing brief using the CM/ECF system, which will send notification of the filing to the attorneys on that system.

Dated: February 6, 2017 /s/ *Archis A. Parasharami*