

No. 18-545

IN THE
Supreme Court of the United States

FIRST ADVANTAGE BACKGROUND SERVICES CORP.,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO, et al.,

Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of California**

**MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF AND *AMICI CURIAE* BRIEF OF
WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF PETITIONER**

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November 26, 2018

**MOTION FOR LEAVE TO FILE
AMICI CURIAE BRIEF
IN SUPPORT OF PETITIONER**

Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari. WLF and AEF timely notified each party's counsel of record of their intent to file this brief. Petitioner's counsel consented to the filing. Respondents' counsel asked for a summary of the *amicus* brief, was unsatisfied with the summary WLF provided, and withheld consent to the filing.

WLF often files *amicus* briefs in this Court in support of free enterprise and the rule of law. It has participated as *amicus curiae* in personal-jurisdiction cases such as *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). AEF, too, often participates as *amicus curiae* in cases before this Court.

A court may exercise specific personal jurisdiction over a defendant only if "the defendant's conduct connects him to the forum in a meaningful way." *Walden v. Fiore*, 571 U.S. 277, 290 (2014). The trial court here failed to heed this limit on its power to hale Petitioner, a Florida corporation headquartered in Georgia, into a California court. The trial court cited no "meaningful" connection between Petitioner and California in its order denying Petitioner's motion to quash service for lack of personal jurisdiction.

The trial court's error was not genuinely reviewed on appeal. Unless it is willing to default, a defendant wrongly haled into a California court may obtain review of an erroneous personal-jurisdiction

ruling only by petitioning the Court of Appeal for an interlocutory writ of mandate. But because the Court of Appeal almost always summarily denies such requests—just as it did here—seeking writ review is a hollow option. *This* Court, therefore, is the only place where Petitioner can get a second opinion on the trial court’s decision to make it litigate thousands of miles from its home state and its headquarters. *Amici’s* brief urges the Court to serve as a vital backstop of Petitioner’s due-process rights, and to provide clarity for similarly situated litigants in California.

Amici’s brief brings into sharper focus the harshness of the bind Petitioner finds itself in. By granting review and bringing attention to the inadequacy of California’s system for evaluating personal jurisdiction, the Court can ensure other parties do not face Petitioner’s predicament.

WLF and AEF respectfully request leave to file the attached *amici curiae* brief.

Respectfully submitted,

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QUESTIONS PRESENTED

The questions presented are:

1. May a state court exercise specific jurisdiction over a non-resident defendant facing a federal statutory claim brought as a putative nationwide class action when the claim arises from alleged conduct outside the forum state that did not harm the plaintiff in the forum (or anywhere else)?

2. If not, may the state court presume that the defendant's alleged non-forum activities harmed the plaintiff in the forum state—even if the plaintiff makes no such allegations and offers no proof of such harm—and then place the burden on the defendant to show otherwise?

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INTEREST OF *AMICI CURIAE**

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, a limited and accountable government, and the rule of law. WLF has submitted several *amicus curiae* briefs to this Court stressing the limits the Due Process Clause places on personal jurisdiction. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy. It has appeared as *amicus curiae* before this Court on many occasions.

The Due Process Clause protects a corporate defendant from being forced to defend a lawsuit in a forum where (1) the defendant neither is incorporated nor maintains its principal place of business, and (2) the defendant has not acted to connect itself to the lawsuit at hand. A court may not, in short, exercise personal jurisdiction over a nonresident corporate defendant.

* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's and AEF's intent to file the brief.

The trial court here extended its personal jurisdiction beyond the bounds set by the Due Process Clause. The Court of Appeal then rubber-stamped this violation of due process in an illusory review mechanism. *Amici* urge the Court to grant review to ensure that corporate defendants receive the due process—both in jurisdictional rulings and in appellate procedure—to which they are entitled.

STATEMENT OF THE CASE

First Advantage Background Services Corp. (First Advantage) provides employment background-check reports. It is a Florida corporation headquartered in Georgia. Pet. App. 46a. It has no offices in California. *Id.*

In 2015 a California resident named Marcus Chism applied for employment with Frito-Lay, Inc. *Id.* As part of the hiring process, Chism consented to Frito-Lay's obtaining a background check. *Id.* Frito-Lay retained First Advantage, which prepared a background-check report outside California and then posted it, for Frito-Lay to review, on servers in Indiana. *Id.* Frito-Lay hired Chism. Pet. Br. 3.

Chism sued First Advantage in federal court under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. Although Chism concedes that he consented to a background check, he alleges that First Advantage illegally failed to ensure that Frito-Lay *certified* that Chism had granted consent. Because Chism cannot point to any tangible harm caused by the alleged certification error, the federal court dismissed the action for want of standing. Pet. App. 19a-21a; see *Spokeo, Inc., v. Robins*, 136 S. Ct.

1540 (2016). Chism then re-filed his lawsuit in California state court. Pet. Br. 5.

First Advantage moved to quash service for lack of personal jurisdiction, arguing that it “is not at home in California” and that Chism’s “claim does not arise out of First Advantage’s forum-related activity.” Pet. App. 46a. The trial court denied the motion. *Id.* at 3a-18a. Chism, it concluded, had met his burden to establish jurisdiction by citing his California residency and some disclosures in the background-check report that mention California. *Id.* at 8a.

A court may exercise specific personal jurisdiction over a defendant only if there is a “connection between the forum and the specific claims at issue.” *Bristol-Myers Squibb*, 137 S. Ct. at 1781. That the plaintiff feels an effect of the defendant’s conduct is not by itself a sufficient “connection” to establish personal jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 290 (2014). Rather, “the defendant’s conduct” must connect “him to the forum in a meaningful way.” *Id.* The trial court failed to explain how boilerplate disclosures in a background-check report create a “meaningful” connection between a defendant and a foreign state. Nor did the trial court explain how the boilerplate disclosures connect to “the specific claims at issue” here.

The Court of Appeal summarily denied a petition for writ of mandate, and the California Supreme Court summarily denied a petition for review. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

Before exercising specific personal jurisdiction over a defendant, a court must first conclude that a meaningful connection exists between the forum and the conduct by the defendant that allegedly gives rise to the claim. A plaintiff cannot establish specific personal jurisdiction in a state foreign to the defendant merely by feeling an effect of the defendant's conduct there. Nor can a plaintiff establish such jurisdiction by pointing to connections between the defendant and the forum that do not relate to the plaintiff's claim.

These are bedrock principles. All the same, some courts continue to struggle with them. This is particularly problematic in a state like California, which offers negligible appellate review of erroneous personal-jurisdiction rulings.

California does not allow a defendant to preserve for appeal a challenge to the trial court's personal jurisdiction. If the trial court denies a motion challenging personal jurisdiction, and the defendant goes on to litigate the case on the merits, the defendant waives the jurisdictional issue. The defendant can avoid this outcome in only two ways. It can either (1) default and then appeal or (2) petition for a writ of mandate. No rational defendant would accept the risks—e.g., waived defenses, an empty-chair trial, a class-wide judgment, massive liability—of a default. That leaves only the petition for a writ of mandate. But such petitions are rarely granted. That avenue of appeal is therefore illusory.

Because California's system of evaluating personal jurisdiction is deficient, this Court is the only tribunal that can ensure First Advantage receives *any* appellate review of the trial court's erroneous personal-jurisdiction ruling. If the petition for a writ of certiorari is denied, First Advantage must either (1) default or (2) waive the personal-jurisdiction issue without having received any meaningful review of it.

For personal-jurisdiction issues, at least, California's writ-of-mandate procedure likely violates due process. That procedure should not, therefore, be the last step in First Advantage's effort to get *someone* to seriously consider the trial court's jurisdictional ruling. Leaving First Advantage to its fate would be unjust. It would, moreover, ensure that corporate defendants continue to find themselves in the same oppressive position First Advantage finds itself in today.

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

THIS COURT IS THE ONLY TRIBUNAL THAT CAN PROVIDE MEANINGFUL REVIEW OF FIRST ADVANTAGE'S OBJECTION TO PERSONAL JURISDICTION

In California state court, a defendant may object to personal jurisdiction through a motion to quash service and, if that is denied, through a petition for a writ of mandate. Cal. Code Civ. Proc. § 418.10(a)-(c); *Jardine v. Superior Court*, 213 Cal. 301, 304-05

(1931). This procedure fails to adequately protect an out-of-state defendant from being wrongly haled into California's courts.

The Court of Appeal almost always summarily denies a petition for a writ of mandate, leaving the defendant with little choice but to waive the objection by litigating on the merits. See, e.g., *Am. Express Centurion Bank v. Zara*, 199 Cal.App.4th 383, 387 (2011). The only alternative is to suffer a default judgment to preserve the objection for appeal. But that is not a realistic option, not least because such a judgment can include class liability. See *Kass v. Young*, 67 Cal.App.3d 100 (1977). After the Court of Appeal denies the petition, and the state Supreme Court denies review, a defendant must look, in desperation, to the federal Supreme Court for one last chance at obtaining meaningful review.

A. Under California's Writ-Of-Mandate System, A Legitimate Objection to Personal Jurisdiction Is Overwhelmingly Likely To Receive No Meaningful Review

In federal court, a defendant may preserve a timely personal-jurisdiction defense for appeal. Fed. R. Civ. P. 12(h); see, e.g., *Brownlow v. Aman*, 740 F.2d 1476, 1483 n.1 (10th Cir. 1984). In California, by contrast, a defendant who litigates on the merits waives even a timely objection to the court's personal jurisdiction. *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal.App.4th 429, 437 (2010). In California, therefore, it is crucial not only that the trial court diligently consider each challenge to personal

jurisdiction, but also that a defendant be afforded a real opportunity for interlocutory appeal of the trial court's ruling.

Mandamus is “the *exclusive* remedy for a party who wishe[s] to assert his jurisdictional objection while nevertheless preserving his right to defend on the merits if his challenge [is] unsuccessful.” *Geudalia v. Superior Court*, 211 Cal.App.3d 1156, 1160 n.2 (1989); see also *Powers v. City of Richmond*, 10 Cal.4th 85, 122-23 (1995) (George, J., concurring). A defendant may bring other pleading-stage objections with the jurisdictional objection, but any other filing is a general appearance that constitutes consent to the court's jurisdiction. *State Farm*, 181 Cal.App.4th at 444.

If the Court of Appeal denies the defendant's petition for a writ of mandate, the defendant must either (1) suffer a default judgment or (2) proceed with the action and waive further review of the trial court's jurisdictional ruling. *Id.* at 441; see also *Zara*, 199 Cal.App.4th at 387.

A defendant who chooses the default-judgment route must contend with—among other terrible consequences—the possibility that the trial court will enter a *classwide* default judgment. *Kass*, 67 Cal.App.3d at 109; see also *Barboza v. West Coast Digital GSM, Inc.*, 179 Cal.App.4th 540, 542 (2009). No sane corporate general counsel would accept a default judgment and the risk of classwide liability as the price of full appellate review of a jurisdictional challenge.

Because default is not a realistic option, the petition for a writ of mandate is the defendant's only opportunity to challenge a personal-jurisdiction ruling. But that route is perilous. Any action in the trial court while the petition is pending could waive the jurisdictional challenge. This is not a hypothetical concern; at least one defendant has paid the price for failing to understand that litigating in the trial court, while the petition is pending, waives the jurisdictional challenge. See *State Farm*, 181 Cal.App.4th at 433, 441.

First Advantage has so far avoided this pitfall and preserved its objection to personal jurisdiction. Yet the Court of Appeal summarily denied First Advantage's petition for a writ of mandate, and the state Supreme Court summarily denied its petition for review. Pet. App. 1a-2a. Without review by this Court, First Advantage will have either (1) to defend the case and waive its jurisdictional objection or (2) to default, suffer entry of a massive default judgment, and then appeal the issue of personal jurisdiction—quite possibly by itself, other defenses having been waived.

This case illustrates just how problematic California's illusory review process is. The Court of Appeal rubber-stamped a trial-court ruling that flouts this Court's personal-jurisdiction jurisprudence. A court may exercise specific personal jurisdiction over a foreign defendant only if there is a "connection between the forum and the specific claims at issue." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. That the plaintiff feels an effect from the foreign defendant's conduct is not by itself a sufficient "connection" to establish personal

jurisdiction. *Walden*, 571 U.S. at 290. The plaintiff must instead cite conduct by the defendant that “meaningfully” connects the defendant to the forum. The trial court cited no “meaningful” connection between First Advantage and California—only some references to California in boilerplate disclosures. What’s more, the trial court never connected the boilerplate disclosures to “the specific claims at issue” in the case. Yet First Advantage is stuck with the trial court’s unreviewed (or barely reviewed) ruling.

Other foreign litigants haled into California courts surely face the same dilemma. A writ of mandate is, of course, an extraordinary remedy. It is so extraordinary, in fact, that in California more than ninety percent of writ petitions are summarily denied, typically without a written opinion. See *Brown, Winfield & Canzoneri, Inc. v. Superior Court*, 47 Cal.4th 1233, 1241 n.3 (2010); *Powers*, 10 Cal.4th at 114 n.19. It is likely that many others have faced, and are facing, the same bleak choice presented to First Advantage: litigate and waive a key defense, or default and face a doomsday judgment.

California’s system for reviewing—or, rather, *not* reviewing—challenges to personal jurisdiction will, if left unchecked, continue to place defendants in an untenable position. This Court should step in, remind the state courts of the standards governing personal jurisdiction, and ensure that California’s appellate courts take more seriously review of personal jurisdiction.

B. First Advantage Has A Due-Process Right To Receive Meaningful Review Of Its Jurisdictional Objection

Overly broad judicial discretion can “invite extreme results that jar one’s constitutional sensibilities.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990). Depriving a party of meaningful appellate review ensures that the trial court’s discretion is total, and that its “extreme results” go uncorrected, even unnoticed. The right of appellate review is, therefore, vital to protecting a party’s liberty and property. See *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 484, 510-11 (1984). Yet California offers mandatory review of an objection to personal jurisdiction only if the defendant refuses to appear and suffers a default judgment. *Zara*, 199 Cal.App.4th at 387.

As Judge Friendly notes in his seminal article on due process, a fundamental element of a fair hearing is a written opinion setting forth the adjudicative body’s reasons for its decision. Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. Pa. L. Rev. 1267, 1291 (1975). “The necessity for justification,” he writes, “is a powerful preventive of wrong decisions. The requirement also tends to effectuate intra-agency uniformity. . . . A statement of reasons may even make a decision somewhat more acceptable to a losing claimant. Moreover, the requirement is not burdensome.” *Id.* at 1292.

By this standard, the Court of Appeal, when it reviews writ petitions, sometimes fails to provide a

fair hearing. True enough, there is nothing wrong with summarily denying interlocutory review of an issue the complaining party can appeal at the end of the case. But a party challenging personal jurisdiction in California state court has no such luxury. The petition for a writ of mandate is her only shot, short of defaulting, at getting a second opinion on the trial court's personal-jurisdiction ruling. Summarily denying her petition for a writ of mandate violates due process. Absent review by this Court, parties will continue to suffer this type of due-process violation.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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