

No. 25-349

In the
Supreme Court of the United States

AUDI AG,
Petitioner,

v.

L.W., a minor, by and through his guardian
ad litem, Jared Furze, et al.,
Respondents.

**On Petition for a Writ of Certiorari
to the California Court of Appeal,
Third Appellate District**

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the Fourteenth Amendment prevents a state court from asserting personal jurisdiction over a foreign corporation for a product-liability claim when the corporation did not knowingly cause the product's distribution to the forum State.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF advances that mission by appearing as amicus curiae to urge the Court to apply predictable rules for personal jurisdiction that comply with the strictures of the Fourteenth Amendment. *Ford Motor v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. 351 (2021); *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915 (2011).

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

Forty-five years of circuit percolation is enough.

Ever since the Court offhandedly used the stream-of-commerce analogy in 1980, that metaphor has distorted the Fourteenth Amendment and failed to find uniform purchase in the lower courts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980); Pet. 11–21. This Court has twice come within one vote of excising this dictum from the Nation’s jurisprudence. *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987)

* No party’s counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief’s preparation or submission. Every party’s counsel received timely notice of WLF’s intent to file this brief.

(O'Connor, J., plurality); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011) (Kennedy, J., plurality). But because a fifth vote has never been mustered, this concept, which “is inconsistent with the premises of lawful judicial power,” lives on in California and other jurisdictions. *Nicastro*, 564 U.S. at 883 (Kennedy, J., plurality).

Audi AG is a German company with no relevant contacts in California. Pet. 7. The Fourteenth Amendment guarantees that “[d]ue process protects the defendant’s right not to be coerced except by lawful judicial power,” *Nicastro*, 564 U.S. at 877 (Kennedy, J., plurality). These due process protections extend to foreign corporations, whether domestic out-of-state firms or those based in other countries. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014). Yet Audi finds itself a defendant in a California court not for “the business that the company regularly conducts,” but the actions of a separate corporate entity that it does not command. *Ford Motor*, 592 U.S. at 364; Pet. 8. There was no “fair notice” that Audi’s conduct could lead to its status as a defendant before a California tribunal. *FCC v. Fox Television Studios, Inc.*, 567 U.S. 239, 253 (2012). There was only the “[f]reeform” stream-of-commerce dictum, *Nicastro*, 564 U.S. at 880, judge-made to flow straight from the Danube to the Los Angeles River.

Under that so-called rule, it is genuinely impossible for “out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” *Daimler*, 571 U.S. at 139 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The California proceeding below, then, if

allowed to continue, would proceed in violation of the “fundamental principle in our legal system” that vagueness as to law is a denial of due process. *Fox Television Studios*, 567 U.S. at 253.

Granting review and stripping the stream-of-commerce analogy from the binding pages of the U.S. Reporter would solve that problem, but the Court shouldn’t stop there. Rather, mindful that regularity and predictability in the law is the best form of “fair play and substantial justice,” *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)), the Court should also announce a predictable and policeable rule for specific personal jurisdiction. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010).

Case-linked jurisdiction should lie only where a defendant knowingly causes the distribution of a product into the forum State. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (a person “injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, *knowingly cause* the injury in California”) (emphasis supplied). That’s a concrete standard that sounds in well-established legal principles. It also staves off those hypothetical horrors that have allowed the stream-of-commerce analogy to masquerade as the pursuit of fair play and substantial justice.

In short, a knowing-causation requirement will provide the certainty that businesses need and the Constitution demands. U.S. Const., amend. XIV; Alan Greenspan & Adrian Woolridge, *Capitalism in America: A History* 258 (2018) (“Businesspeople crave certainty as much as almost anything: certainty

allows them to make long-term plans and long-term investments.”).

ARGUMENT

I. THE COURT’S STREAM-OF-COMMERCE DICTUM WORKS AGAINST FAIR PLAY AND SUBSTANTIAL JUSTICE.

Twice in four decades, stream-of-commerce has failed to persuade a majority of the Court. *Asahi*, 480 U.S. at 112 (O’Connor, J., plurality); *Nicastro*, 564 U.S. at 880–81 (Kennedy, J., plurality). Yet because five justices have “declined the invitation to repudiate it,” “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad,” the stream-of-commerce analogy “stalks our” Nation’s “jurisprudence” still. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). This tale can only end by this Court’s hand, and it should grant review to finally slay the theory.

The reason why the stream-of-commerce “doctrine” doesn’t work—it provides no concrete rule and sketches no outer bounds—is because it is stippled in ambiguities. It asks courts to review a complaint and measure it against “[f]reeform notions of fundamental fairness,” *Nicastro*, 564 U.S. at 880 (Kennedy, J., plurality), such as a defendant’s “expectation[s]” or the inchoate aspiration to “indirectly” meet a market. *World-Wide Volkswagen*, 444 U.S. at 297–98.

This elasticity leads to absurd results, like this one: a German corporation with no tangible

connection to California sits before a California state court as a defendant in a products-liability case. Pet. 7. Not because it “regularly conducts” business in that State, but because a different corporation did so. *Ford Motor*, 592 U.S. at 364; Pet. 23. That’s at odds with this Court’s prior rule that jurisdiction “is proper” only if based upon “actions by the defendant *[it/self]* that create a ‘substantial connection’ with the forum State.” *Burger King Corp.*, 471 U.S. at 475 (emphasis in original) (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 233 (1957)).

This vagueness is of constitutional moment. The Due Process Clause instantiates the “fundamental principle . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *Fox Television Stations*, 567 U.S. at 253. It’s not enough to know that a line exists. You must know where the line is. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (“Predictability, or as Llewellyn put it, ‘reckonability,’ is a needful characteristic of any law worthy of the name.”).

Without that knowledge, a forum State’s jurisdiction functions as a trap for even the wary, denying “fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.” *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring). This proteanism belies the Court’s repeated assurances, grounded in the Due Process Clause, that while a corporation may not engage in jurisdictional *evasion*, it may absolutely structure itself for purposes of jurisdictional *avoidance*. *Ford Motor*, 592 U.S. at 360; *Daimler*, 571 U.S. at 139.

But that promise drowns in the stream-of-commerce, which teems with “the shoals of vagueness.” *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (*per curiam*). So long as that metaphor bears law, it is virtually impossible for a foreign corporation manufacturing a product with any demand in the United States to credibly structure its business model to avoid jurisdiction in any of the several States—let alone California, the Union’s largest and wealthiest concentration of consumer demand. As a result, the stream-of-commerce theory plays havoc not just domestically, but with the United States’s multi-trillion-dollar import market. U.S. Dep’t of Commerce, Bureau of Economic Analysis, *U.S. International Trade in Goods and Services, Annual and December 2024*, (Feb. 5, 2025); <https://perma.cc/UQ2E-LDB4>.

Unless this Court grants review, courts in all fifty States will be “free to decide, without any legally fixed standards” which defendants are haled to court, and which are not. *Beckles v. United States*, 580 U.S. 256, 266 (2017) (internal quotation marks and citation omitted). Such vagueness is “inconsistent with the basic values of our constitutional heritage,” *Shaffer*, 433 U.S. at 212, offending “traditional notions of fair play and substantial justice.” *Int’l Shoe*, 326 U.S. at 316 (internal quotation marks and citation omitted).

Unless the Court grants review and ends this, however, no business with even an ancillary brush against a forum State like California, even through intermediaries, can know whether it was on the right side of the line. Only when a corporation has “*clear*

notice that it is subject to suit. . . can [it] act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.” *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis supplied). But if the standard for specific jurisdiction is left broken, trillions of dollars of economic activity will continue to be conducted in the Court’s judicially-created zone of uncertainty—with the price of “doing business” incalculable for setting prices or insuring risks. This is economically destructive, and will only reduce the scale, scope, and affordability of products available for purchase the United States.

It needn’t be this way. And, indeed, the Due Process Clause forbids it. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids.”) (internal parentheticals, quotation marks, and citation omitted).

II. THE COURT SHOULD GRANT REVIEW TO ANNOUNCE A UNIFORM, PREDICTABLE, AND POLICEABLE RULE.

So grant the writ and end the stream-of-commerce dictum, yes. But the Court should do “more” than just that. *Asahi*, 480 U.S. at 112 (O’Connor, J., plurality). As the Court has recognized, “[s]imple jurisdictional rules . . . promote greater predictability.” *Hertz*, 559 U.S. at 94. Yet the sprawling and inconclusive caselaw on specific personal jurisdiction has been the natural

consequence of this Court's indulgence of ambiguities in its quest "to give specific content to the 'fair play and substantial justice' concept" and to clarify what counts as "certain minimum contacts." *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 316). But the Due Process Clause abhors ambiguity. The Court should offer it no safe harbor. Rather, the Court ought to set a straightforward nationwide rule for case-linked personal jurisdiction.

Specifically, the Court should determine that personal jurisdiction may lie only when a corporation produces a product and *knowingly causes* its distribution directly to the forum State. *Cf. Calder*, 465 U.S. at 790 (a person "injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California"). Such a standard explains the bounds of both the "purpose" and "availing" that together compose "purposeful availment." *See Asahi*, 480 U.S. at 112 (O'Connor, plurality) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*") (quoting *Burger King*, 471 U.S. at 475) (emphasis in original).

This is a straightforward rule of law. No longer would courts get tripped up on questions of sales volume or whether it was foreseeable that a product might be sold somewhere in the United States by a distributor. Personal jurisdiction only would attach where the company had direct and concrete knowledge of sales "purposefully directed toward the forum State," *Asahi*, 480 U.S. at 112 (emphasis

omitted), and that the corporation—not an intermediary—caused them.

Knowledge and causation requirements have long littered the American legal landscape. A general counsel of even a modest firm that sells products in forum States—let alone a large multinational contracting with an American distributor—can comprehend and apply those venerable principles. The current state of the law, by contrast, makes legal advice no more than an educated guess.

And, while sourced from longstanding law, that rule will work in the modern world. By measuring specific intention and not happenstance, a knowing-causation rule provides meaningful guidance to transactions made with cash at the counter as well as those consummated by the tap of a touchscreen. *Nicastro*, 564 U.S. at 890 (Breyer, J., controlling) (expressing uncertainty about announcing a rule without giving guidance for online distribution).

A knowing-causation test not only offers more certainty for producers, it also provides greater protection for consumers. “Given the long history of willful blindness and its wide acceptance in the Federal Judiciary,” there is “no reason why the doctrine should not apply in civil lawsuits for” products liability. *Global-Tech Appliances v. SEB S.A.*, 563 U.S. 754, 768 (2011). And so while the knowing-causation rule would yank Audi out from the case below, that standard would also protect against any corrupt wink-and-nod arrangement with a distributor for the intentional delivery of defective products. In this way, a knowing-causation rule keeps the Constitution’s promise that jurisdiction avoidance

is permissible, but ensures that jurisdiction evasion can be captured. *Ford Motor*, 592 U.S. at 360; *Daimler*, 571 U.S. at 139.

For while knowing-causation ensures that “those who live or operate outside a State” keep their “due process right not to be subjected to judgment in its courts as a general matter,” *Nicastro*, 564 U.S. at 881 (Kennedy, J., plurality), it preserves incentives for those “who manufacture and market consumer products” to “make those products safe.” Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 Rev. Litig. 239, 274 (1988).

CONCLUSION

Moving the Court's personal jurisdiction standard from an incoherent aphorism to a coherent rubric will comply with the Constitution's demand for definitiveness in the law. And that, in turn, will provide the "reckonability" that going concerns at home and abroad need most.

The Court should grant the writ.

Respectfully submitted,

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