No. 18-457

In The
Supreme Court of the United States

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Petitioner,

v.

THE KIMBERLEY RICE KAESTNER
1992 FAMILY TRUST,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF OF AMICA CURIAE PROFESSOR ROBERTA LEA BRILMAYER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, may a state impose its tax on a trust whose only connection with the taxing state is the relocation to that state, subsequent to the formation of the trust, of one of the trust beneficiaries?

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INTEREST OF AMICA CURIAE[1]

Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School, where she teaches and writes on Conflict of Laws.

In addition to her more than thirty years on the Yale Law School faculty, she has taught at the Columbia Law School, the University of Texas Law School, the University of Chicago Law School, Harvard Law School, and New York University Law School. She has written a number of books and literally dozens of articles on Conflict of Laws, both interstate and international, with a particular focus on personal jurisdiction and choice of law. Among the briefs that she has authored or coauthored are several briefs amica curiae to this Court. *See*, *e.g.*, Brief for Lea Brilmayer as Amica Curiae Supporting Petitioner, *Daimler AG v. Bauman*, 571 U.S. 117 (2013) (No. 11-965), 2013 WL 3377320; Brief for American Association of University Professors, *Connolly v. Burt*, 475 U.S. 1063 (1986) (No. 85-298) (brief submitted prior to case being mooted); Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania as Amici Curiae, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 78-811), 1977 WL 188007, *40. She currently serves as a Member of the Advisory Board to the Draft

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amica curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents.

Restatement (Third) of Conflict of Laws and previously served as a member of the Advisory Board to the 1986 Revisions to the Restatement (Second) of Conflict of Laws. She submits this brief in the hope it will help the Court in resolving the question presented.

Professor Brilmayer's professional affiliation is listed for purposes of personal identification, and is not intended as suggesting any approval or adoption of the views expressed below by Yale University or Yale Law School.

SUMMARY OF ARGUMENT

This case involves the State of North Carolina's efforts to tax the Kimberly Rice Kaestner 1992 Family Trust (the "Kaestner Family Trust" or the "Trust," as applicable), a non-resident trust which never distributed trust income or principal within North Carolina, never invested or held assets in North Carolina, was never administered by any trustee residing in North Carolina, and never conducted any other sort of business in North Carolina during the relevant time period. *Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Dep't of Revenue*, 814 S.E.2d 43, 44-45 (N.C. 2018). At the time that it was established, the Trust had no connections at all with North Carolina and the only connection that the Trust *ever* developed with North Carolina *at any time* was the relocation to North Carolina, well after the Trust was established, of one Trust beneficiary.

North Carolina's treatment of the Kaestner Family Trust fails to satisfy the Due Process Clause of the Fourteenth Amendment for three reasons: (1) insufficient contacts for adjudicative jurisdiction; (2) insufficient contacts for jurisdiction to impose its tax law; and (3) insufficient contacts to satisfy due process limitations of choice of law. What few connections North Carolina has to the Trust are all with one of the Trust's beneficiaries, rather than with the trustees. In order to cure this defect, North Carolina argues that the connections that it has with one beneficiary can substitute for the traditional elements of jurisdiction over the trustee.

The North Carolina Department of Revenue's efforts to tax the Kaestner Family Trust on the basis of the after-acquired domicile of a single beneficiary sets North Carolina's taxation laws on a collision course with the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Standard due process jurisprudence leads to the following conclusions:

(1) States may assert adjudicative jurisdiction over non-resident parties whose conduct has effects in the state, who assert a right to property located in the state, or who are so closely tied to the state as to be effectively "at home" there. As a matter of undisputed fact, however, none of these paradigmatic jurisdictional bases exists in the present case with regard to the trustees;

(2) In the absence of meaningful connection between the property in question, the

party taxed, and the taxing state, jurisdiction to tax does not exist; and,

(3) Even if North Carolina law clearly and consistently supported the position that jurisdiction should be measured by the extent of the beneficiary's contacts—which it does not—there is no basis for North Carolina to have taken the position it urges the Court to adopt, namely that it is the beneficiary's contact that counts. As a matter of settled federal constitutional due process limitations, New York law applies to the question of whether the beneficiary's role in the Trust is so important that despite her formal irrelevance to the minimum contacts analysis, her contacts nonetheless be treated as dispositive for jurisdictional purposes. The instruments creating the Trust specified application of New York law and the mere coincidence of her after-acquired domicile in North Carolina is insufficient as a matter of constitutional law to override the fact that at the time that the Trust instrument was drafted, all connections pointed towards New York. It would violate the Fourteenth Amendment for North Carolina's courts to disregard this obvious truth.

For these reasons, the judgment below of the North Carolina Supreme Court should be affirmed.

ARGUMENT

I. Examination of the underpinnings of the Due Process Clause's theories of adjudicative jurisdiction and jurisdiction to tax reveals that the Due Process Clause does not support North Carolina's effort to tax the Kaestner Family Trust.

No state may exercise its adjudicative authority or apply its law unless it has a basis for doing so consistent with the Fourteenth Amendment Due Process Clause. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 306-07 (1992) (jurisdiction to tax); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (jurisdiction to adjudicate). The due process standards in these two contexts are thoroughly intertwined. *See Quill*, 504 U.S. at 306-09 (applying updated personal jurisdiction jurisprudence to jurisdiction to tax analysis); *see also id.* at 319 (Scalia, J., concurring) ("[A]bandonment of *Bellas Hess*' due process holding is compelled by reasoning 'comparable' to that contained in our post-1967 cases dealing with state jurisdiction to adjudicate."). Fourteenth Amendment Due Process Clause precedents involving challenges to assertions of state court jurisdiction and Fourteenth Amendment Due Process Clause precedents involving challenges to tax are cited almost interchangeably; the two bodies of authority are mingled in the case law. *See*, *e.g.*, *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080, 2093 (2018) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)); *Quill*, 504 U.S. at 308 (citing *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)).

Table 1 below depicts the different possible bases for adjudicative jurisdiction and jurisdiction to tax that bear on the validity of North Carolina's tax assessment. Adjudicative jurisdiction and jurisdiction to tax (Column 1 on the left and Column 2 on the right, respectively) each support three theories: jurisdiction based on effects within the state of conduct taking place elsewhere (the top row, Row A); jurisdiction based on the existence of property within the state (the middle row, Row B); and jurisdiction based on the insider status of the defendant (the bottom row, Row C).[2]

Table 1	
Due Process Bases for Adjudicative Jurisdiction	**Due Process Bases for Jurisdiction to Tax**
Adjudicative Jurisdiction Based on Effects	**Jurisdiction to Tax Based on Effects**
Principle: The Due Process Clause generally allows the forum's courts to assert jurisdiction over defendants whose conduct	***Principle:*** The Due Process Clause generally allows the taxing state to impose financial disincentives on out of state

[2] There are other bases as well, but these have little relevance to the present problem. For example, express consent is an adequate basis for adjudicative jurisdiction. In addition, entrance into the forum to engage in actionable conduct could possibly be treated as separate from effects-based jurisdiction in which the defendant never entered the forum. This would alter the number of different types of jurisdiction (because "effects" jurisdiction would be split into two) but would not cause any substantive analytical changes.

has effects within the forum state for matters related to that conduct. The Due Process Clause requires "purposeful availment" of the benefits of forum law on the part of the defendant and the conduct having effects in the forum must be the defendant's own conduct. ***Justification:*** the state's interest in protecting persons and property within its borders by shifting to the defendant the cost of the inconvenient litigation. ***Examples:*** "stream of commerce" cases; "nonresident motorist" statutes	taxpayers in order to deter behavior having negative effects in the taxing state. ***Justification:*** the state's interest in protecting persons and property within its borders through the imposition of taxes/financial penalties. ***Examples:*** excise taxes on cigarettes sold in the state.
Property Ownership ***Principle:*** The Due Process Clause allows a state to assert jurisdiction over a defendant who owns property in the state on matters related to that property. ***Justification:*** the state's interest in determining or regulating ownership of assets located within it.	**Property Ownership** ***Principle:*** The Due Process Clause allows a state to tax property held within the state even when it is owned by an out of state taxpayer. ***Justification:*** the state's interest in recouping some or all of the costs created by property held within it.

Examples: quiet title actions; "slip and fall" cases (suit against owner for failure to maintain property which caused the plaintiff's injury).	***Examples:*** real estate taxes, personal property taxes or use taxes; inheritance taxes.
At Home ***Principle:*** The Due Process Clause allows a state to assert jurisdiction over defendants who are effectively "at home" in that state over any and all matters. ***Justification:*** citizens of a state submit to their state's sovereignty by participating in its democracy and should provide one guaranteed forum where an individual is indisputably subject to suit on any cause of action. ***Examples:*** jurisdiction over residents, domiciliaries, locally incorporated legal entities; defendants whose contacts with the forum state are sufficiently systemic and continuous.	**Raising Revenue** ***Principle:*** The Due Process Clause allows states to impose taxes to raise "general" revenue by taxing the citizens of that state or to raise financial support for provision of services, including to non-locals. ***Justification:*** absent collection of taxes, the people of a state will be unable to support social and economic programs, provide police protections, etc., or to charge for the provision of particular services. ***Examples:*** tax on local person's income, special purpose taxes (e.g., sewage districts).

A. The theory of "effects jurisdiction" justifies neither North Carolina's assertion of adjudicative jurisdiction nor North Carolina's assertion of jurisdiction to tax.

Row A in Column 1 and Column 2 depicts adjudicative jurisdiction based on effects and tax jurisdiction based on effects, respectively. "Effects jurisdiction" in the adjudicative jurisdiction context (Column 1) refers to situations in which the forum asserts its judicial authority over litigation arising when a dispute with some sort of multistate aspect (e.g., conduct that took place elsewhere or that was caused by outsiders) causes harm in the forum. *See Calder v. Jones*, 465 U.S. 783, 787 (1984). This category includes, for example, what has become known as "stream of commerce" jurisdiction. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011); *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987). The theoretical foundation of this type of jurisdiction is obvious: it is the state's ability to protect persons and property within its borders. Adjudicative effects jurisdiction supports the state's policy interest in deterring and/or compensating legally actionable conduct taking place across state lines, by making it possible to bring those causing the harm to justice.

In keeping with this rationale, the Due Process Clause requires intentionality of some sort, such as foreseeability or purposeful availment. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (requiring foreseeability); *Hanson v. Denckla*,

357 U.S. 235, 253 (1958) (requiring purposeful availment). Since the object is to discourage further occurrences in the future, there is little point in penalizing the causation of harms that could not be foreseen or prevented.

Column 2 depicts effects jurisdiction in the specific context of taxation. There is considerable overlap between this category and effects-based adjudicative jurisdiction. Like the theory of effects-based adjudicative jurisdiction, effects based tax jurisdiction is frequently used to change behavior or to direct it into what is seen as socially more desirable directions. For example, states frequently place excise taxes on cigarettes in order to minimize what were perceived to be undesirable health consequences. *See*, *e.g.*, N.C. Gen. Stat. § 105-113.2 et seq. (2019) (taxing cigarettes and other tobacco products).

The due process requirements on jurisdiction to impose taxes of this sort are very similar to the limitations on adjudicative jurisdiction. The Due Process Clause requires taxing states to establish both that the taxpayer has minimum contacts with the taxing state, *see* ***Quill***, 504 U.S. at 306 (citing *Miller Bros. Co. v. Maryland*, 374 U.S. 340, 344-45 (1954)), and that the particular tax is rationally related to advancing the states' legitimate interest in deterring the in-state effect, *see id.* (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

It might seem at first that North Carolina's claim to impose its taxing authority on the Trust would be

based on a theory of effects jurisdiction. In the present case, one might argue that North Carolina's tax was imposed to deter actions that had effects in North Carolina. Someone or something from outside the state was directed into the state and the result was an event in North Carolina that North Carolina had a right to regulate.

In the present context, however, neither jurisdiction to adjudicate nor jurisdiction to tax can be predicated upon an analysis of effects.[3] The reason is that the party who caused the in-state effects—the relocation of one beneficiary to North Carolina—is not the party over whom jurisdiction is sought. It is jurisdiction over the trustee that is sought, while the decision to move to North Carolina was made by the beneficiary. This basis for jurisdiction cannot justify the assertion of either adjudicative or tax jurisdiction because if it influences anything, it influences the wrong party's behavior. Moreover, assertion of jurisdiction cannot be justified in terms of effects when imposing a duty to defend simply penalizes innocent conduct, such as the trustee's performance of official trust duties as to which no allegations of wrongfulness have been made (e.g., the trustee's performing his required duty of providing the beneficiary with an accounting of the Trust assets, *Kimberly Rice Kaestner 1992 Family*

[3] In addition to the factual problems described here in the text, it is highly implausible that North Carolina imposed the tax to deter Trust beneficiaries from moving to North Carolina. There is no clear reason that the state would want to do that, and it has not claimed such a motive.

Trust v. North Carolina Dep't of Revenue, 814 S.E.2d 43, 45, 50-51 (N.C. 2018). *See*, *e.g.*, *Kulko v. Superior Court*, 436 U.S. 84, 96-97 (1978) (Jurisdiction can be based on effects in the forum only where it is alleged that defendant engaged in wrongful conduct causing injury in the forum, not where the defendant merely acquiesced in his daughter's request to be allowed to live with her mother.).

B. Jurisdiction based on property cannot justify the tax because the Trust holds no property in North Carolina.

In theory, the location of the property can form an adequate basis for jurisdiction to adjudicate or jurisdiction to tax. But as with jurisdiction based on effects, the theory of jurisdiction based on property fails to provide jurisdiction on the facts of the case at hand.

The Due Process Clause permits both adjudicative and tax jurisdiction over nonresident's property held in the forum state. *See*, *e.g.*, *Shaffer v. Heitner*, 433 U.S. 186 (1977) (discussing the history of property as a basis for jurisdiction). Frequently the asset in question is real property, but the reasoning extends to other sorts of property as well. Jurisdiction based on property is depicted in Row B of Table 1. Since the landmark holding in *Shaffer* the property must be related to the dispute. *Id.* at 213.

The theoretical basis for this type of jurisdiction is obvious. Every state has a legitimate right to determine the ownership of assets that are located within

it. *Id*. at 207-08. Furthermore, it is perfectly compatible with "traditional notions of fair play and substantial justice" to require the claimants to cooperate with this state interest, from which they derive substantial benefits. *International Shoe Co.*, 326 U.S. at 316. Property located in the forum may impose costs, bring about harms, or generate controversy there. *See Shaffer*, 433 U.S. at 199-200 (discussing the traditional category of in rem jurisdiction). States are entitled to expect that nonresident claimants will help in defraying those costs.

It would, moreover, be inconsistent for an individual both to claim ownership of property within the state but also deny the existence of minimum contacts. Accordingly, there is a due process basis for the state imposing its taxes on outsiders who own property, or claim to own property, within the state. *See Miller Bros. Co.*, 347 U.S. at 345.

If the Kaestner Family Trust owned property in North Carolina, North Carolina could tax that property or income sourced from it. In fact North Carolina does so for trusts so situated. *See* N.C. Gen. Stat. § 105-160.2 (2017). But North Carolina does not now claim that there is property in North Carolina that could justify jurisdiction over the trustee. The facts of the case at hand therefore do not support using property to base jurisdiction to tax.

C. "At-home" jurisdiction does not exist in the present case with regard to either jurisdiction to adjudicate or jurisdiction to tax.

A final category of potential justifications for the application of state power, depicted in Row C of Table 1, involves an individual's direct relationship with a particular state with which he or she has very significant connections. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). Historically, this was the type of jurisdiction that a state had over a person who was domiciled or resident in, incorporated in, or otherwise substantially associated with the forum. *See id.* at 924; Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988). Through clarification by this Court, this type of jurisdiction has become known as "at-home" jurisdiction, because in order for jurisdiction to exist the defendant must have his or her "home" in the forum. *See Daimler AG*, 571 U.S. at 122, 127; *Goodyear*, 564 U.S. at 924.[4]

[4] With the "general jurisdiction" that typically accompanies such bases for the exercise of state authority, all substantive claims are equally supported by the contacts that the plaintiff alleges to exist between the defendant and the forum. Since it is the defendant's direct relationship with the forum that justifies jurisdiction, and not the defendant's relationship as mediated through a particular controversy, the existence of jurisdiction is independent of the content of the cause of action. A finding of at-home jurisdiction therefore supports power to entertain all claims against the defendant. *See Goodyear*, 564 U.S. at 919; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984).

The theory of at-home jurisdiction rests on principles of democratic sovereignty; it is all a matter of self-governance. It is fair to require the defendant to appear and defend in local courts when those local courts are the courts of the defendant's own political community.[5] At-home jurisdiction is a general concept, which justifies all manner of exercise of state power over the forum political community. In the context of jurisdiction to tax, however, special considerations apply. The most common justification for taxes, of course, is the legitimate interest in raising revenue; states are expected to be able to support social, economic, educational, and political projects financially. Ilya Somin, *Revitalizing Consent*, 23 Harv. J.L. & Pub. Pol'y 753, 759 (2000). However, while it is surely a legitimate interest on the part of the state to use the tax system to raise money, this interest is not, by itself, adequate to satisfy due process. It goes at most halfway to point out that the state has a legitimate interest in raising money; the state must in addition justify imposing the tax on the particular taxpayers who are commanded to pay. *See Walden v. Fiore*, 571 U.S. 277, 283-86 (2014) (summarizing the Court's case law on this issue); *see also Quill*, 504 U.S. at 306 (The state must justify its imposition of a tax on a particular taxpayer.). From a due

[5] Thirteen years after the Trust was formed, a successor trustee, domiciled in Connecticut, was appointed. *Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Dep't of Revenue*, No. 12-CVS-8740, 2015 WL 1880607, at *1 (N.C. Super. Ct. Apr. 23, 2015). This might make the Trust at home in Connecticut instead of New York, but because it makes no difference to North Carolina's ability to assert general jurisdiction over the Trust, this is not examined further.

process perspective, it is as important that the state raise money from the right people as that it raise money at all. Surely Kansas could not justify taxing the people of Ohio to support Kansas' social programs simply by saying that Kansas really needed money.

The question whether it is a suitable group that is being asked to provide financial support rarely presents a problem when the taxpayer is at home in the state.[6] If a citizen asks, "why me?" a legitimate answer is, "because you are a member of a political group that has decided to pursue particular objectives and to undertake particular programs—along with your fellow citizens, you have undertaken to impose these burdens on yourselves." This is why a state has extremely broad tax powers over those who are at home in it. *See Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1798 (2015) ("The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' ")

[6] There has always been dispute over precisely how much connection was required to establish this relationship of citizenship or near-citizenship. Being domiciled or a citizen of a state would be sufficient under traditional standards, as would being incorporated in the state for corporations. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 924; Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988). However, other characteristics could also potentially suffice to render a person at home in a state. For example, the fact that a trust has its principle place of administration in the state, or was originally set up in the state and is governed by its trust laws, would contribute to its being "at home" in the state. Under such logic, the Kaestner Family Trust would seem to be at home in New York or Connecticut, but not North Carolina.

(quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995)). And so it might seem that at-home jurisdiction is available whenever the individuals whose interests are at stake are local people.

This argument appears to lend support to the claim that at-home jurisdiction is available in the case at hand. In the present case there was, after all, at least one potential stakeholder who was at home in North Carolina: the Trust beneficiary. Can minimum contacts with the forum be shown by the North Carolina domicile of the beneficiary? Can the after-acquired domicile of the beneficiary substitute for contacts between the forum and the trustee? North Carolina's claim to at-home jurisdiction over the Trust seems at first to have more potential than either an effects-based or a property-based theory. It can be argued that the at-home theory justifies jurisdiction because the beneficiary was "at home" in North Carolina.

There are, however, serious problems with this claim. As the discussion above indicates, jurisdiction does not exist where imposition of the burden to defend would influence the conduct, at most, of the wrong people. It is true that if the nonresident trustee had the same quantity and quality of contact with North Carolina as the beneficiary does, then jurisdiction over the trustee would exist. This does not mean, however, that the contacts between the beneficiary and the forum can be transferred to the trustee, and used to obtain jurisdiction over him; nor does it mean that contacts with the trustee are unnecessary. North Carolina's chief problem in the case at hand is precisely

that the wrong individual has connections to the forum. North Carolina has established contacts with an individual who is not a party to the dispute, who is not the individual named in its caption, and who is not the one that will be expected to pay the judgment. This does nothing to protect the due process rights of the individual who actually would be required to pay. Under the at-home theory, no less than other theories discussed here, the focus must still be on contacts between the forum and the trustee. This problem turns out to be insurmountable for North Carolina's establishment of jurisdiction.

II. North Carolina cannot base jurisdiction over the trustee on the North Carolina domicile of the beneficiary.

In the case at hand, North Carolina's problem lies in the fact that it wants to substitute the contacts of the beneficiary for the contacts of the trustee. This Court explained the reasons for not allowing such a substitution in the landmark case of *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, the strategy of simply shifting focus to individuals more amenable to jurisdiction was rejected.

A. The forum may not manipulate the party structure of the dispute solely in order to refocus the jurisdictional inquiry upon individuals more likely to be amenable to jurisdiction.

Like the present case, *Hanson*, 357 U.S. 235, involved litigation over a trust, and the ties between the forum and the involved individuals all took the form of connections between the forum and the beneficiaries. There were no ties between the forum and the trustee. *Id.* at 238-43. The plaintiff sought to proceed without the participation of the trustee; but this Court recognized that under Florida law, it was the trustee who was the necessary party. *Id.* at 245. Since it would have violated due process to assert jurisdiction over the trustees, the case had to be dismissed. *Id.* at 244. In *Hanson*, this Court refused to allow the forum to simply substitute another defendant who was more amenable to jurisdiction.

As with the present case, in *Hanson* there were adequate ties for jurisdiction over the beneficiary—had jurisdiction over the beneficiary been the relevant question—but not for jurisdiction over the trustee. The beneficiary in the present case has connections to North Carolina, but, under *Hanson*, it is inappropriate to impute these connections to another party. This unwillingness reflects this Court's consistent policy that jurisdiction must be established against each defendant, individually; the contacts of one party cannot be imputed, willy-nilly, to another. *See Walden*, 571 U.S. at 284; *Burger King Corp.*, 471 U.S. at 475-76;

Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 417; *World-Wide Volkswagen Corp.*, 444 U.S. at 298. In *Hanson*, this Court rested its unwillingness to allow Florida to refocus on the connections with the beneficiaries upon its interpretation of Florida law. 357 U.S. at 254. It held that Florida law required jurisdiction over the trustee, and that Florida law could not simply be departed from or altered ad hoc in order to make establishment of jurisdiction easier. *Hanson*, 357 U.S. at 254; *see* Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1 (1986) (arguing that the forum may not depart from general domestic law principles of agency, piercing the corporate veil, attribution of responsibility, etc., simply because doing so would make possible the assertion of jurisdiction).

In the present case, as in *Hanson*, shifting the focus of the case would require manipulation of forum law regarding the identity of the real parties in interest. Forum law does not in either case authorize manipulation of the party structure simply because the forum (whether Florida or North Carolina) would like to be able to assert jurisdiction. As with Florida law in *Hanson*, under North Carolina law the beneficiary and the trustee are not interchangeable, nor can the contacts of the beneficiary be attributed to the trustee. *See*, *e.g.*, N.C. Gen. Stat. Ann. § 36C-1-103 (2019) (defining beneficiary and trustee separately); N.C. Gen. Stat. Ann. § 36C-2-202 (2019) (creating different rules for adjudicative jurisdiction over trustees and

beneficiaries of trusts with their principle place of administration in North Carolina); N.C. Gen. Stat. Ann. § 36C-4-402(a)(5) (2019) (requiring that the same person not be the sole trustee and sole beneficiary of a newly created trust). Application of bona fide North Carolina procedural policy would require jurisdiction over the trustee, not minimum contacts with the beneficiary.

This Court continues to adhere to the general principle that it is the contacts between the forum and the real party in interest that matter rather than the contacts between the forum and a non-party over whom jurisdiction would be more readily available. In *Rush v. Savchuk*, a passenger injured in a motor vehicle accident sued the driver in a state where jurisdiction over the driver would not have been available. 444 U.S. 320, 322-23 (1980). His strategy was to sue the driver's insurance carrier, instead. *Id.* This Court rejected the Minnesota Supreme Court's view that the contacts between the insurance company and the forum were sufficient basis for jurisdiction under the Due Process Clause; citing *Hanson*, it wrote:

> In short, it cannot be said that the defendant engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, see *Kulko v. California Superior Court*, 436 U.S. 84, 93-94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), merely because his insurer does business there. Nor are there significant contacts between the litigation and the forum. The Minnesota Supreme Court was of the view

> that the insurance policy was so important to the litigation that it provided contacts sufficient to satisfy due process. The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

Id. at 329 (footnote omitted). The Court continued:

> The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the assertion of jurisdiction over Rush based solely on the activities of State Farm. Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom the state court exercises jurisdiction.

Id. at 331-32.

The very strategy rejected in *Hanson v. Denckla*, and attempted in the case presently before us was in this way rebuffed in *Rush v. Savchuk*, as well.

But there is still another reason that North Carolina cannot simply decide, in effect, to substitute jurisdiction over the beneficiary for jurisdiction over the trustee. It relates to a third respect in which due process limits North Carolina's attempt to assert adjudicative jurisdiction or jurisdiction to tax against persons with which it has no contact. Due process limits all efforts by the forum to assert its authority over a dispute with which it has only the most negligible contact. Allowing North Carolina to refocus attention on the contacts with the beneficiary, rather than the trustee, would violate recognized constitutional principles regarding due process of law.

B. Due process principles limit state overreaching in the multistate context and prohibit attempts such as North Carolina's to acquire jurisdiction that would not otherwise exist.

Due process limits state authority in a wide range of multistate contexts, including not only the standard choice of law context in which the forum decides whether to apply its law or the law of another state (*see*., *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820-23 (1985) (invalidating blanket attempt to apply forum law to nationwide class action)) but also where the state seeks to refocus the jurisdictional inquiry to avoid its evident lack of connection with a party over whom jurisdiction is lacking (*see Hanson*, 357 U.S. at 247-52, and *Rush*, 444 U.S. at 327-33); in interstate criminal law (*see*, *e.g.*, *Skiriotes v. Florida*, 313 U.S. 69,

78-79 (1941) (upholding application of Florida regulation prohibiting the taking of sponges with scuba equipment outside state territorial waters against due process challenge)) and in the permissibility of state tolling statutes alleged to discriminate against foreign corporations that are amenable to suit in the forum. (*see*, *e.g.*, *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 411-12 (1962) (upholding state statute against due process challenge)).

The limits that the Due Process Clause imposes are exemplified by the 1930 case of *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). A paradigm illustration of the ways that state overreaching can violate the Fourteenth Amendment, *Home Insurance* stands squarely for the proposition that a state may not assert its authority over a transaction that, when entered into, bore no connection to the state. The case deals, more specifically, with the special irrelevance of post-transaction change in domicile by one of the parties. *Home Insurance* gives meaning to the concept of due process limits on state overreaching in the multistate context, by providing an illustration of what it means for a state, put simply, to push things too far.

Home Insurance is in many respects a near perfect replica of North Carolina's attempt at imposing its tax law on the Kaestner Family Trust. *Home Insurance* involved an insurance policy which was written in Mexico and was to be performed in Mexico. *Id.* at 403-04. The risk that it covered was a tugboat located in Mexico and the contract contained a choice of law clause selecting Mexican law. *Id.* at 403. The loss occurred in

Mexico. *Id.* Both parties at that point resided in Mexico. *Id.* Subsequent to the occurrence of the insured-against risk, however, the contract was duly assigned to the plaintiff who, while then living in Mexico, maintained a permanent residence in Texas. *Id.*

In announcing its opinion, this Court described the facts of *Home Insurance* in the following terms:

> [N]othing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made.

281 U.S. at 408-09. The Court then concluded, "[Texas] may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 410.

Under these circumstances (this Court held) it would have violated the Fourteenth Amendment Due Process Clause for Texas to be permitted to regulate

the case. *Id.* at 408 ("Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law."). The contractual choice of Mexican law was not to be over-ridden by a post-hoc move by one of the parties to Texas.[7] This Court rejected Texas' attempt to justify its application of Texas law as merely "remedial" or procedural, on the grounds that state choice of law principles regarding characterization of the issue would not avoid Texas' federal constitutional obligation.

The similarities between Texas' disregard for the exclusively Mexican location of all relevant events in *Home Insurance* and North Carolina's overreaching in the present case are striking. In effect, North Carolina is now seeking to impose a new duty on the trustee, contrary to the terms of the Trust agreement, and in violation of a clause selecting New York law to govern trust affairs.[8] The new duty—imposed without

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[7] The choice of law clauses in the two cases are important not so much for their literal applicability—because, in other words, they should be enforced as written so that the forum had to apply the other state's law—but because they underscore the parties' expectations. In the present case, neither party had the slightest reason to expect being subjected to North Carolina's taxing authority; in *Home Insurance*, application of Texas law was a complete surprise.

[8] The Trust was created in New York pursuant to a written agreement between the settlor, John Lee Rice, III and the trustee, William B. Matheson. *Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Dep't of Revenue*, 814 S.E.2d 43, 45 (N.C. 2018).

warning by a state wholly unconnected to the Trust agreement and whose identity would have been completely unpredictable at the time that the Trust was created—was a responsibility to defend cases brought in states where the trustee had no connections, simply because the beneficiary later chose to relocate there.

Most important of all, in both cases, was the complete absence of any connection to the state that would later end up seeking to impose its will upon the parties. Contacts between Dick's insurance contract and Texas—like contacts between the North Carolina and the Kaestner Family Trust in the present case—were simply nonexistent. Dick had no more than a nominal affiliation with Texas prior to the occurrence of the loss. In the present case, the beneficiary had never lived in North Carolina at the point that the Trust instruments were drafted, and there was no reason to assume that she ever would. Just as no one would have had reason to expect the application of Texas law in *Home Insurance*, at the time that the creation of the Trust was completed in the present case, no one would have predicted application of the law of North Carolina.

Matheson was later replaced as trustee by David Bernstein, a Connecticut resident. *Id*. Bernstein acted as trustee and remained a Connecticut resident during the relevant time period. *Id*. The assets of the Trust, consisting of various financial investments, were held by custodians located in Boston, Massachusetts. *Id*. No party to the Trust had any contact with the state of North Carolina until one Trust beneficiary relocated to North Carolina in 1997. *Id*.

This Court continues to cite *Home Insurance* as authoritative. In 1981, a plurality of *Allstate Ins. Co. v. Hague* described *Home Insurance* as one of two "instructive examples" of states violating the Due Process Clause by applying local law to contracts utterly lacking in forum contact. 449 U.S. 302, 309 (1981). The first of these was *Home Insurance* and the second was *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). Both cases involved claimants who relocated to the forum after the transaction was completed, having had no connections with the forum at the time of the transaction. The Court summarized *John Hancock*:

> [In *Yates*] the insurer, a Massachusetts corporation, issued a contract of insurance on the life of a New York resident. The contract was applied for, issued, and delivered in New York where the insured and his spouse resided. After the insured died in New York, his spouse moved to Georgia and brought suit on the policy in Georgia. Under Georgia law, the jury was permitted to take into account oral modifications when deciding whether an insurance policy application contained material misrepresentations. Under New York law, however, such misrepresentations were to be evaluated solely on the basis of the written application. The Georgia court applied Georgia law. This Court reversed, finding application of Georgia law to be unconstitutional.

449 U.S. at 309-10. Most pointed of all was this Court's pithy summary of the meaning of the two "instructive examples." *Id.* at 309. The Court summarized, "*Dick*

concluded that nominal residence—standing alone—was inadequate; *Yates* held that a post-occurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law." *Id.* at 311.

To this day this Court has not abandoned the principle that neither "nominal residence" nor "a post occurrence change of residence to the forum state," standing alone, is enough to satisfy the Due Process Clause.

CONCLUSION

The Due Process Clause would clearly be offended if North Carolina were free to overlook the absence of minimum contacts, override party choice, honor a post-transaction change in domicile and uphold the application of state authority that simply could not have been predicted at any relevant point in time during the transaction. Accordingly, the judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted,

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