No. 19-____

IN THE

Supreme Court of the United States

IN RE TCT MOBILE INTERNATIONAL LIMITED,

Petitioner.

On Petition for Writ of Mandamus or, in the Alternative, Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF CERTIORARI

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QUESTION PRESENTED

There can be no personal jurisdiction over a nonresident defendant when the only contact between that defendant and the forum state results from the "unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Moreover, contacts cannot be borrowed from a third party and attributed to a nonresident defendant to find personal jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1783 (2017).

The question presented is:

1. Whether the Federal Circuit erred in denying mandamus and failing to correct a district court ruling finding personal jurisdiction over a nonresident defendant that had no contacts in the forum state and did not control the shipment of products there.

PARTIES TO THE PROCEEDING

TCT Mobile International Limited is petitioner here and was defendant-petitioner below.

TCT Communication Technology Holdings Limited is a defendant below.

Semcon IP Inc. is the plaintiff below.

CORPORATE DISCLOSURE STATEMENT

Petitioner TCT Mobile International Limited is a wholly owned subsidiary of TCT Mobile Worldwide Limited.

TCT Mobile Worldwide Limited is a wholly owned subsidiary of TCL Communication Technology Holdings Limited. Vivid Victory Developments Limited owns 13% of TCL Communication Technology Holdings Limited, and T.C.L. Industries Holdings (H.K.) Limited owns 87% of TCL Communication Technology Holdings Limited. T.C.L. Industries Holdings (H.K.) Limited is a wholly owned subsidiary of TCL Industries Holdings Company, Limited. No other publicly held company owns 10% or more of stock in TCT Mobile International Limited or TCL Communication Technology Holdings Limited.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the U.S. District Court for the Eastern District of Texas, and the U.S. Court of Appeals for the Federal Circuit:

Semcon IP Inc. v. TCT Mobile Int'l Ltd., No. 2:18-CV-00194-JRG (E.D. Tex.) (judgment entered July 1, 2019).

In re TCT Mobile Int'l Ltd., No. 20-103 (Fed. Cir.) (judgment entered November 6, 2019).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR WRIT OF CERTIORARI

There can be no personal jurisdiction over a nonresident defendant when the only contact between that defendant and the forum state results from the "unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *see also Kulko v. Superior Court of California*, 436 U.S. 84, 93-94 (1978) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.") (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Moreover, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1781 (2017) (further finding that a separate contractual relationship with a different third party was insufficient to create personal jurisdiction). The "unilateral activity" rule and the standards set forth in *Bristol-Myers Squibb* can be compromised, however—to the point of insignificance—if the stream-of-commerce doctrine is applied too broadly in the personal jurisdiction analysis. That is what happened here, which has upset the balance of precedent this Court has carefully crafted under the Constitution over the years.

The defendant, TCT Mobile International, has had no contact with the forum state (Texas) sufficient to create personal jurisdiction. TCT Mobile International has no employees, representatives, or subsidiaries in Texas. It has no domicile, place of business, bank account, or mailing address in Texas. It neither owns nor leases any real property in Texas, has not

appointed an agent for service of process in Texas, and has never been registered to do business in Texas. TCT Mobile International has not sold any products accused of infringement in Texas (to retailers or otherwise) and has no agreements with resellers in Texas. California-based TCT Mobile (US) Inc. is the TCL entity that operates within the United States—it imports and sells phones in the United States that it buys from TCT Mobile International in China.

In finding personal jurisdiction, the district court relied heavily on the fact that TCT Mobile International assisted TCT Mobile (US) with shipping products to the United States. But TCT Mobile International's role in this shipping process was minimal *and confined entirely to China*. In particular, TCT Mobile (US) buys phones made by TCL's manufacturing entity from TCT Mobile International in China and takes title to the phones there, after which TCT Mobile (US) imports them to the United States. As part of this process, TCT Mobile International delivers the phones to a carrier in China, but it does so on behalf of TCT Mobile (US) and in accordance with standardized international commercial terms that pass *all the risk* from TCT Mobile International to TCT Mobile (US) the instant TCT Mobile International delivers the goods to the carrier in China. Under this arrangement, TCT Mobile International has no obligation to ensure that the products arrive at their destination in the United States.

Despite this lack of contact with Texas, the Eastern District of Texas found personal jurisdiction over TCT Mobile International. In doing so, however, the court applied the stream-of-commerce doctrine so broadly that it rendered the "unilateral activity" rule and *Bristol-Myers Squibb* meaningless. Rather than correcting

this error on the merits, the Federal Circuit denied TCT Mobile International's petition for mandamus on procedural grounds, finding that TCT Mobile International can "obtain meaningful review" of its personal jurisdiction challenge "after final judgment." *In re: TCT Mobile Int'l Ltd.*, App. No. 20-103 (Fed. Cir. Nov. 6, 2019).

It is necessary to correct the Federal Circuit's and district court's errors *now* to stop an injustice in the Eastern District of Texas from perpetuating. That court repeatedly issues conflicting personal jurisdiction rulings—and rulings that violate this Court's precedent—so it can keep cases in Texas. For example, in deciding Rule 12 motions, the Eastern District of Texas routinely applies personal jurisdiction standards *broadly*, which allows it to find jurisdiction over defendants and keep cases in Texas. But when deciding motions to transfer under near-identical facts, the Eastern District of Texas shifts to a *narrow* interpretation of the personal jurisdiction standards so it can find no jurisdiction in the requested transfer forum and, once again, keep cases in Texas. As a result, a conflicting body of personal jurisdiction law has developed in the Eastern District of Texas, which has led to TCT Mobile International and similarly situated nonresident defendants being haled into court there despite having no ties to Texas. A decision from this Court is necessary *at this time* to stop these injustices from proliferating.

The Eastern District of Texas's conflicting personal jurisdiction rulings are a consequence of this Court's ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), which made it tougher for plaintiffs to establish venue against domestic corporations in patent cases, and thus tougher to

keep lawsuits in the Eastern District of Texas. Because *TC Heartland*'s venue restrictions only applied to domestic parties, the venue laws for foreign parties remained flexible. To avoid *TC Heartland*, plaintiffs began suing *only* foreign corporations in the Eastern District of Texas and declining to name the related domestic corporations as parties. This approach may be viable in situations where the nonresident foreign corporation has sufficient contacts with the forum state. But in situations where there are no contacts—such as here—the Eastern District of Texas must issue broad-sweeping stream-of-commerce rulings to keep cases in Texas that run afoul of the "unilateral activity" rule and *Bristol-Myers Squibb*. Granting certiorari at this time is necessary to stop the Eastern District of Texas from perpetuating its misapplications of this Court's personal jurisdiction standards and continuing to subject nonresident defendants to litigation in Texas who have no contacts there. The United States Constitution bars the Eastern District of Texas from doing what it is doing.

OPINIONS BELOW

The Federal Circuit's decision is available at 2019 WL 5784977 and is reproduced at App.1a-3a. The district court's opinion is reported at 2019 WL 2774362 and is reproduced at App.4a-15a.

JURISDICTION

The Federal Circuit issued a nonprecedential order on November 6, 2019, denying TCT Mobile International's petition for a writ of mandamus. This Court has jurisdiction over the writ of mandamus petition under 28 U.S.C. § 1651 and the petition for certiorari under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 4 is titled "Summons." Subsection (k)(1)(A) provides as follows:

> (k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.
>
> (1) *In General.* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

Section 1 of the 14th Amendment of the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. Code § 1400 is titled "Patents and copyrights, mask works, and designs." Subsection (b) provides as follows:

> (b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. § 1404 is titled "Change of venue." Subsection (a) provides as follows:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

STATEMENT OF THE CASE

A. Background on TCL Entities

TCL is a Chinese multinational electronics company that designs, develops, manufactures, and sells consumer products including mobile phones, tablets, televisions, washing machines, refrigerators, and other small electrical appliances. The mobile phone portion of TCL's business is relevant here. In the United States, TCL sells handsets under its own brand name, as well as the brand names Alcatel, Blackberry, and Pepito. App.40a(10:15-11:17). Major carriers such as T-Mobile, Verizon, and AT&T buy TCL phones. App.40a(11:18-12:10).

TCT Mobile (US), which is headquartered in California and incorporated in Delaware, is responsible for buying and selling TCL phones in the United States. App.41a(15:3-17:21); App.18a; App.21a. TCL's presence in California extends far beyond TCT Mobile (US) being headquartered there—TCL owns the naming rights to the iconic Hollywood theater formerly known as Mann's Chinese Theater.

B. Role of TCT Mobile International Within the TCL Framework

There are several TCL entities around the world, including Huizhou TCL Mobile Communication Company Limited ("TCL Huizhou"), TCT Mobile International, and TCT Mobile (US). App.46a(35:22-37:16). TCL Huizhou manufactures TCL- and Alcatel-branded phones in Huizhou City, China. App.42a (21:21-24); App.24a-25a; App.27a; App.16a-18a. TCT Mobile International, which has its principal place of business in Hong Kong (where it is headquartered), does not manufacture any products. App.26a-27a; App.32a-33a; App.16a-18a.

TCL Huizhou sells phones to TCT Mobile International in a transaction that occurs entirely in China. App.24a-25a. TCT Mobile International pays for the phones by remitting money to a Chinese bank account owned by TCL Huizhou. App.49a-50a(49:18-50:6). TCL Huizhou sends the purchased phones to TCT Mobile International in Hong Kong. App.43a(24:22-25:19).

TCT Mobile International then sells certain phones it buys from TCL Huizhou to TCT Mobile (US). App.43a(22:22-23:22); App.24a-25a. This transaction also takes place entirely in China. TCT Mobile (US) pays for the phones by remitting money to a Chinese HSBC account owned by TCT Mobile International, and title is transferred in China. App.49a(47:24-50:6). The relationship between TCT Mobile (US) and TCT Mobile International is one of "selling and buying." App.44a(29:7-14). Once this Chinese transaction occurs, TCT Mobile (US) has its phones imported from Hong Kong to the United States. App.43a(24:22-25:23). TCT Mobile (US) sells the phones it imports to various cell phone carriers in the United States such as Verizon and AT&T. App.43a(22:22-23:22); App.24a-25a.

TCT Mobile International has no ties to Texas. It has no bank account, office, mailing address, or place of business in Texas, and it has no employees, representatives, or subsidiaries there either. App.17a; App.20a-21a; App.34a. Moreover, it neither owns nor leases any real property in Texas, has not appointed an agent for service of process in Texas, and has never been registered to do business in Texas. App.21a.

And because TCT Mobile International is not a manufacturer, it has not made any of the products accused of infringing in this case. App.20a. It also has not imported any accused products into the United States. App.17a. Further, TCT Mobile International has not sold any accused products in Texas (to retailers or otherwise) and has no agreements with resellers in Texas. App.17a-18a; App.20a-21a; App.34a. As mentioned, TCT Mobile (US) is the TCL entity that operates in the U.S. market, importing and selling the phones it buys from TCT Mobile International in China to various customers in the United States, including resellers. App.18a; App.21a.

C. TCT Mobile International's "Incoterm CIP" Role in the Shipping of TCT Mobile (US)'s Phones

After TCT Mobile (US) buys phones in China, it has them shipped to different warehouses in the United States. *See, e.g.*, App.84a (shipment to California); App.85a (shipment to Virginia); App.87a (shipment to Minnesota); App.88a (shipment to Illinois). As part of this process, TCT Mobile (US) enlists the help of TCT Mobile International. TCT Mobile International initiates shipping in China *on behalf of* TCT Mobile (US).

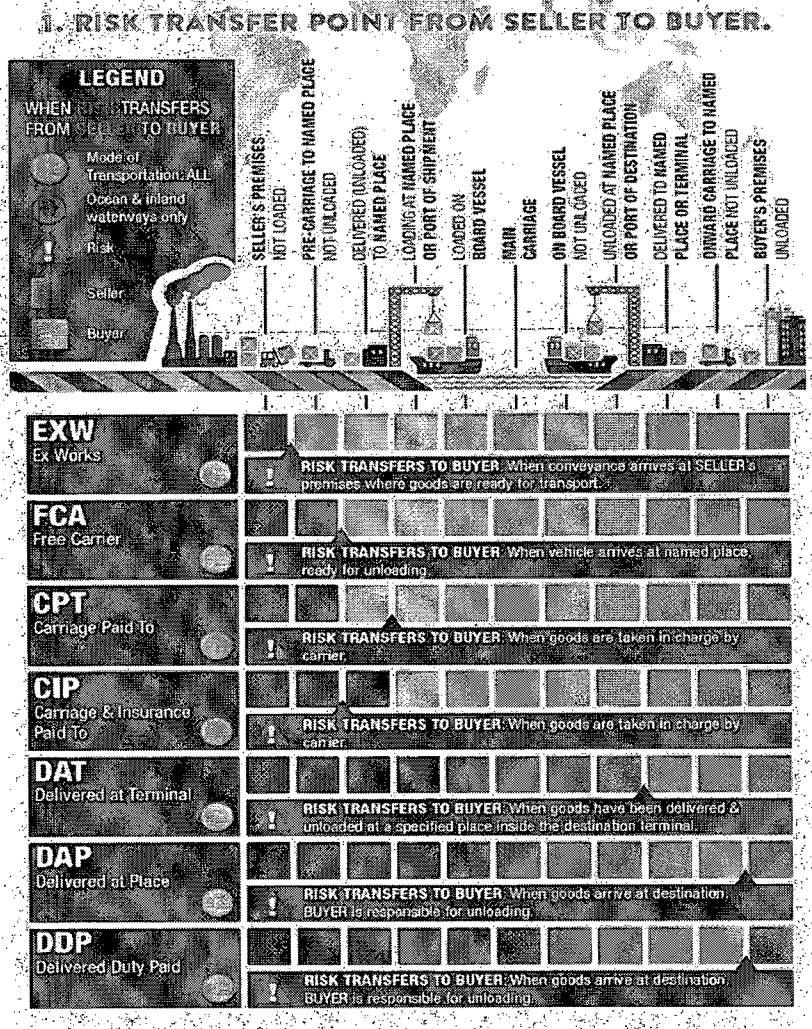
In particular, TCT Mobile (US) and TCT Mobile International use an Incoterm CIP arrangement to

govern their shipping relationship. App.51a(55:12-56:6). Incoterms are a series of predefined and standardized commercial terms published by the International Chamber of Commerce that parties can use to allocate risk in international commercial transactions. There are eleven primary Incoterms, three of which are traditionally used when the intent is to assign the most risk to the buyer and the least risk to the seller: CFR ("Cost and Freight"), CIF ("Cost, Insurance and Freight"), and CIP ("Cost and Insurance Paid to"). 1 Randall Anderson, *Int'l Exporting Agreements* § 5.02[3][b][iii] (Matthew Bender ed., rev. ed. 2018).

In a CFR arrangement, the seller pays the shipping costs, but its "obligation to deliver the goods is complete when the goods are placed on board the vessel for shipment." *Id.* § 5.02[3][b][iii][A]. "The risks of loss and damage to the goods transfers to the Buyer when the goods are loaded on the vessel." *Id.* (explaining that one "should not assume from the naming of the destination port that the Seller has any obligation to deliver to that port"); *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 338 (5th Cir. 2003) ("Shipments designated 'CFR' require the seller to pay the costs and freight to transport the goods to the delivery port, but pass title and risk of loss to the buyer once the goods 'pass the ship's rail' at the port of shipment. . . . In the event of subsequent damage or loss, the buyer generally must seek a remedy against the carrier or insurer.").

CIF is "identical to CFR" except that the seller must also "purchase cargo insurance." 1 Anderson, *supra*, § 5.02[3][b][iii][C]. And the "only significant difference" between CIF and CIP is "the requirement in CIF that delivery be made on board a vessel, whereas delivery under CIP is made by handing over the goods to a

carrier contracted to carry the goods to the destination named in the contract." *Id.*, § 5.02[3][b][iii][D]. The graphic below confirms that, of the eleven Incoterms, CIP is one of the terms that assigns the most risk to the buyer and the least risk to the seller.



Incoterms® Rules 2020 (Int'l Commerce Terms), Trade Finance Global, https://www.tradefinanceglobal.com/freight-forwarding/incoterms/ (last visited Oct. 5, 2019).

Invoices provide details on the shipping relationship between TCT Mobile (US) and TCT Mobile International. App.86a. Some of these invoices show California-based TCT Mobile (US) importing phones to a facility in Fort Worth, Texas. App.86a. This facility is not owned or controlled by any TCL or TCT entity—it is a distribution warehouse owned by a third-party logistics provider. App.86a; App.44a(26:21-29:1); App.47a-48a (39:13-43:14). TCT Mobile (US) uses this warehouse to temporarily store phones on their way to their final retail destination. App.44a(26:21-29:1); App.47a-48a(39:13-43:14).

The invoices also define the shipping relationship between TCT Mobile International and TCT Mobile (US) as "Incoterm: CIP." App.86a. This aligns with the TCT Mobile Standard Operating Procedures, which state that TCT Mobile International, also referred to as "TCT HK," "will pay all the US local charges including duty & tax as well as the local transportation charges *on behalf of TCT US*, while maintaining *CIP incoterm* for TCT HK." App.67a-68a (emphases added).

In sum, TCT Mobile International sells its products to TCT Mobile (US) in China and initiates the shipping of those products on behalf of TCT Mobile (US) under the Incoterm CIP arrangement. Because of this arrangement, TCT Mobile (US) assumes the risk for the products it owns the instant TCT Mobile International delivers the products to the initial carrier in China. Under the Incoterm CIP arrangement, even though the destination is listed as DFW (Dallas/Fort Worth), this does not mean TCT Mobile International has an obligation to deliver the products there—it satisfies its obligations when it delivers the products to the carrier in China.

D. TCT Mobile (US)'s Use of Third-Party Warehouses

As mentioned, TCT Mobile (US) has its products shipped to various third-party warehouses throughout the United States. *See, e.g.*, App.84a; App.85a; App.86a; App.87a; App.88a. TCT Mobile (US) uses these warehouses to temporarily store products before they go to their final retail destinations. App.44a(26:21-29:1); App.47a-48a(39:13-43:14). Under this model, there is no guarantee that a phone shipped to a particular warehouse will end up in a retail store in the same state.

In concluding that personal jurisdiction existed in Texas over TCT Mobile International, the district court relied on deposition testimony from a TCL employee named Mr. Eric Chan, who mentioned that he and some other TCL employees visited the third-party Fort Worth warehouse described above (*see* Section C) in 2013 and 2018. App.44a(26:21-29:1); App.47a-48a(39:13-43:14). Not one of these employees, however, including Mr. Chan, was a TCT Mobile International employee. App.39a(8:1-17); App.44a (26:21-29:1); App.47a-48a(39:13-43:14). Moreover, Mr. Chan explained that the TCL employees merely passed through the facility to see if boxes of products from TCL were there—the TCL employees never opened the boxes or inspected the phones inside. App.44a(26:21-29:1); App.47a-48a(39:13-43:14).

E. District Court and Federal Circuit Proceedings

Semcon IP Inc., a nonpracticing entity, filed a complaint in the Eastern District of Texas alleging that TCT Mobile International and TCL Communication Technology Holdings Limited ("TCL Communication") infringed four U.S. patents. To date, Semcon has not

served TCL Communication. Moreover, Semcon did not sue TCT Mobile (US), the only U.S.-based TCL subsidiary, which allowed Semcon to forum shop.

TCT Mobile International moved under Federal Rule of Civil Procedure 12 to dismiss for lack of personal jurisdiction, which the district court denied after allowing jurisdictional discovery. App.4a-15a. In finding that TCT Mobile International's actions satisfied the stream-of-commerce rule, the court relied on shipping invoices and Mr. Chan's visit to the Fort Worth warehouse to find that TCT Mobile International acted in "in consort" with TCT Mobile (US) to "deliberately and purposefully ship Accused Products to Texas." App.7a-12a. The court also found that exercising personal jurisdiction was reasonable and fair. App.12a-14a.

In making these rulings, the court failed to consider that *none* of the TCL employees who visited the warehouse, including Mr. Chan, were TCT Mobile International employees. It also failed to consider that TCT Mobile International sold the products at issue to TCT Mobile (US) *in China*, that TCT Mobile International had no obligation to deliver TCT Mobile (US)'s goods to Texas, and that all risk in the shipment passed to TCT Mobile (US) in China under the Incoterm CIP arrangement.

The Federal Circuit declined to address the merits of the district court's ruling. Instead, it denied TCT Mobile International's petition for a writ of mandamus because TCT Mobile International could "obtain meaningful review . . . after final judgment." App.3a. The court concluded that the circumstances were not sufficiently exceptional to justify review. App.3a.

REASONS FOR GRANTING THE PETITION

This case presents an important personal jurisdiction question involving the stream-of-commerce doctrine and its relationship with the "unilateral activity" rule and *Bristol-Myers Squibb*. In particular, the Eastern District of Texas applied the stream-of-commerce doctrine so broadly that it rendered the "unilateral activity" and *Bristol-Myers Squibb* doctrines meaningless. This error relates to a systemic problem in the Eastern District of Texas, which is keeping cases in Texas by issuing contradictory personal jurisdiction rulings for nonresident defendants.

For example, in deciding Rule 12 motions, the Eastern District of Texas routinely applies personal jurisdiction standards *broadly*, which allows it to find jurisdiction over defendants and keep cases in Texas. But when deciding motions to transfer under near-identical facts, the Eastern District of Texas shifts to a *narrow* interpretation of the personal jurisdiction standards so it can find no jurisdiction in the requested transfer forum and, once again, keep cases in Texas. This has led to TCT Mobile International and similarly situated nonresident defendants being haled into court in the Eastern District of Texas despite having no ties to Texas.

The conflicting personal jurisdiction rulings are a consequence of this Court's ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), which made it tougher for plaintiffs to establish venue against domestic corporations in patent cases, and thus tougher to keep lawsuits in the Eastern District of Texas. *TC Heartland*, however, did not tighten the venue requirements for *foreign* parties. To avoid *TC Heartland*, plaintiffs began suing *only* foreign corporations in the Eastern District of Texas

and declining to name the related domestic parties. This approach may be viable in situations where the nonresident foreign corporation has sufficient contacts with the forum state. But in situations where there are no contacts—such as here—the Eastern District of Texas must issue broad-sweeping stream-of-commerce rulings to keep cases in Texas that run afoul of the "unilateral activity" rule and *Bristol-Myers Squibb* (which is what happened here).

Granting certiorari *at this time* is necessary to stop the Eastern District of Texas from continuing to abuse this Court's personal jurisdiction standards by subjecting nonresident defendants to litigation in Texas who have no contacts there. The 14th Amendment of the United States Constitution prohibits exercises of personal jurisdiction in these situations. This Court's supervisory authority is the only procedural mechanism left that can stop this injustice.

I. Personal Jurisdiction Legal Standards

Federal Rule of Civil Procedure 4(k)(1)(A) requires federal courts to "follow state law in determining the bounds of their jurisdiction over persons." The Due Process clause of the 14th Amendment confines state court jurisdiction to defendants who have "certain minimum contacts" with the forum so as to not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Personal jurisdiction comes in two forms, general and specific. General jurisdiction exists when the defendant has *extensive* contacts with the forum—e.g., it is domiciled or incorporated there, has its principal place of business there, or makes itself "at home" there. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

Specific jurisdiction applies to nonresident defendants and arises from the contacts that the defendant has with the forum state. *Int'l Shoe*, 326 U.S. at 316. There can be no specific jurisdiction if a defendant lacks "minimum contacts" with the forum and does not "purposefully avail[] itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "[P]urposeful availment" is lacking where the defendant's contacts with the forum are "'random,' 'fortuitous,' or 'attenuated,'" or the result of the "unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted). Moreover, contacts unrelated to the claims at issue cannot give rise to specific jurisdiction. *Bristol-Myers Squibb*, 137 S. Ct. at 1780.

II. There Is No General Jurisdiction over TCT Mobile International in Texas Because It Does Not Reside There and Is Not Incorporated There

TCT Mobile International has no domicile or principal place of business in Texas. App.20a-21a. It has no employees, representatives, or subsidiaries in Texas, and it has no bank account, office, mailing address, or place of business there either. App.7a; App.20a-21a; App.34a. It neither owns nor leases any real property in Texas, has not appointed an agent for service of process in Texas, and has never been registered to do business in Texas. App.20a-21a. Moreover, TCT Mobile International has not sold any accused products in Texas (to retailers or otherwise) and has no agreements with resellers in Texas. App.17a; App.20a-21a; App.34a. California-based TCT Mobile (US) is the TCL entity that operates within the U.S. market, importing and selling the phones it buys

from TCT Mobile International in China to various customers in the United States, including resellers. App.17a; App.20a-21a.

For these reasons, Texas lacks general jurisdiction over TCT Mobile International. As this Court stated in *Daimler*, the "paradigm" indicators for general jurisdiction over a corporation are "the place of incorporation and principal place of business." 571 U.S. at 137. TCT Mobile International is not incorporated in nor has a principal place of business in Texas. It resides in and does business in Hong Kong. Even the district court did not find general jurisdiction over TCT Mobile International. App.4a-15a.

III. This Court Should Grant Certiorari to Preclude the Stream-of-Commerce Rule from Rendering the "Unilateral Activity" Rule and *Bristol-Myers Squibb* Doctrine Meaningless

A. The "Unilateral Activity" Rule Precludes a Court from Finding Jurisdiction by Attributing Contacts from a Third Party to a Nonresident Defendant

There can be no minimum contacts or purposeful availment—and thus no specific jurisdiction—when the contacts result from the "unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475. This Court's decision in *Kulko v. Superior Court of California* is instructive. 436 U.S. 84 (1978). There, two New York residents divorced, after which the wife moved to California while the husband remained in New York. *Id.* at 86-87. Under the custody agreement, their two children were to live with their father in New York during the school year, and with their mother during holiday and summer vacations. *Id.* at 87. In the first year of this arrangement, the

father sent the children to California to live with their mother during the contemplated vacations. *Id.* at 87-88. The daughter ultimately decided she wanted to live with her mother full time in California, and the father bought her a one-way plane ticket to California for the move. *Id.* After the son moved to California as well, the mother commenced a lawsuit in California seeking full custody of her children. *Id.* at 88.

The husband argued that the California court lacked personal jurisdiction over him. *Id.* The personal jurisdiction issue ultimately turned on whether the husband's consent to send his kids to California for vacations, and his assistance in sending his daughter to live there permanently (by buying her a plane ticket), constituted sufficient minimum contacts for specific jurisdiction. *Id.* This Court found that these facts did not amount to purposeful availment because "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 93-94.

The "unilateral activity" rule that this Court applied in *Kulko* to find no personal jurisdiction was rooted in *Hanson*. 357 U.S. 235. There, a woman domiciled in Pennsylvania created a trust where she named a Delaware company the trustee. *Id.* at 238. The woman later moved to Florida, where she executed a will that governed the distribution of her assets, including the assets in the Delaware trust. *Id.* at 238-39. After the woman died, a dispute arose in Florida over her will, and the Delaware trustee was named as a defendant. *Id.* at 239-41, 251.

This Court found that the Florida court lacked personal jurisdiction over the Delaware trustee because the trustee had "no office in Florida" and never trans-

acted or solicited business there. *Id.* at 251. While others in the case had ties to Florida, including the decedent who had moved there and conducted business there involving her will, the most the Delaware trustee did was remit trust income to the decedent in Florida, which this Court found insufficient for personal jurisdiction. *Id.* at 253-54. The Court refused to impute the decedent's conduct in Florida to the Delaware trustee, stating that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 253. Thus, there was no purposeful availment. *Id.*

This Court has applied the "unilateral activity" rule in scenarios involving commercial products. In *World-Wide Volkswagen Corp. v. Woodson*, victims of a car accident in Oklahoma sued several parties there, including a dealer who only did business in New York and a distributor who only did business in New York, New Jersey, and Connecticut. 444 U.S. 286, 288-89 (1980). The Court found no jurisdiction over the dealer or distributor in Oklahoma, explaining that, while it was "foreseeable that the purchasers of automobiles sold by" the dealer or distributor "may take them to Oklahoma," the "unilateral activity" rule prohibited imputing a purchaser's conduct onto the dealer or distributor and using that conduct to satisfy the minimum contacts standard. *Id.* at 298.

Kulko, *Hanson*, and *World-Wide Volkswagen* preclude a finding of personal jurisdiction over TCT Mobile International in this case. The acts that the district court relied on to find personal jurisdiction—i.e., initiating shipment of accused products to Texas—resulted from the unilateral activity of TCT Mobile (US). TCT Mobile International is simply an inter-

mediary between TCL Huizhou, which manufactures the relevant products in China, and TCT Mobile (US), which imports and sells the products in the United States. All of TCT Mobile International's activities are confined to China. It buys the phones from TCL Huizhou in China and sells them to TCT Mobile (US) in China. Title transfers from TCT Mobile International to TCT Mobile (US) in China.

While TCT Mobile International assists in shipping TCT Mobile (US)'s phones to the United States, its role in this process is negligible. TCT Mobile (US) owns the products being shipped from China and dictates where they go. App.18a; App.21a; App.84a-85a; App.87a; App.88a. Indeed, TCT Mobile (US) is the importer. App.18a; App.21a; App.86a. TCT Mobile International delivers the products to a carrier in China *on behalf of* TCT Mobile (US), at which point the risk of loss passes to TCT Mobile (US). TCT Mobile International has no obligation to ensure that the goods make it to Texas—it fulfills its obligation under the Incoterm CIP arrangement when it delivers the goods to the carrier in China.

The district court overlooked these facts when concluding that TCT Mobile (US) and TCT Mobile International "act[ed] in consort" to ship accused products to Fort Worth. App.12a. Put differently, the district court avoided the unilateral activity rule by failing to acknowledge the facts that invoke it (e.g., that TCT Mobile (US) owns, imports, and directs the shipped products *before they leave China*, and the Incoterm CIP shipping arrangement that ends TCT Mobile International's shipping obligations when the goods are delivered to the carrier in China). The Federal Circuit failed to correct the district court's error.

The district court and Federal Circuit decisions conflict with other circuit court decisions that found no

jurisdiction under similar facts. In *AFTG-TG, LLC v. Nuvoton Technology Corp.*, the Federal Circuit found no personal jurisdiction over a defendant in Wyoming—even though the defendant shipped products to Wyoming addresses—because the shipping was performed "*at the instruction of its third-party resellers*." 689 F.3d 1358, 1361-65 (Fed. Cir. 2012) (emphasis added). Thus, the *AFTG* court focused on the shipper's lack of control and the reseller's unilateral control in finding no personal jurisdiction. *See also N. Coast Indus. v. K-Mart Corp.*, No. 89-16179, 1990 WL 10521021, at *1 (9th Cir. Dec. 4, 1990) (unpublished) (relying on the "unilateral activity" rule to find no personal jurisdiction over a distributor who shipped goods to the forum state on behalf of K-Mart because K-Mart "paid for the shipping" and the "decision where [each product] was to be shipped and sold was made solely by K-Mart"). Likewise, TCT Mobile International does not control where TCT Mobile (US)'s products are sold and shipped.

B. Allowing Personal Jurisdiction over TCT Mobile International Would Expand the Stream-of-Commerce Doctrine to the Point of Rendering the "Unilateral Activity" Rule and *Bristol-Myers Squibb* Meaningless

The "stream-of-commerce" doctrine was addressed in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). There, four Justices concluded that jurisdiction would be appropriate if it was *foreseeable* that a product could end up in the forum state. *Id.* at 117. Another group of four Justices, applying a narrower standard, concluded that foreseeability was not enough, and that more purposeful activity was required to invoke jurisdiction. *Id.* at 112.

In 2011, this Court addressed the stream-of-commerce issue again in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011). There, a plurality adopted the narrower stream-of-commerce approach, stating that the "defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* at 882-85 (concluding that "foreseeability" was not enough). Applying this standard, this Court found no personal jurisdiction over a British defendant in New Jersey, even though four of the defendant's machines were sent there. *Id.* at 886.

In 2017, this Court issued a precedential stream-of-commerce decision in *Bristol-Myers Squibb*. 137 S. Ct. 1773. There, the defendant was sued in California regarding alleged injuries caused by a pharmaceutical drug. The Court addressed whether plaintiffs from outside California could rely on relationships with in-state plaintiffs to improve their standing on personal jurisdiction issues. The answer was no—the Court found that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1781 (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014)).

The Court also found another third-party relationship insufficient for personal jurisdiction, namely, a contractual relationship between the defendant and a California-based company that distributed the drug nationally for the defendant. The Court again stated that a defendant's relationship with a third party, standing alone, was an insufficient basis for jurisdiction. *Id.* at 1783 (concluding that "the bare fact that [the defendant] contracted with a California distribu-

tor is not enough to establish personal jurisdiction in the State"). *Bristol-Myers Squibb* confirms that the stream-of-commerce rule cannot be applied so broadly that it allows contacts to be borrowed from one party and attributed to another. This aligns with the "unilateral activity" rule.

The district court erred by applying the stream-of-commerce rule too broadly, improperly concluding that TCT Mobile (US) and TCT Mobile International "act[ed] in consort" regarding the shipments to Texas. App.12a. The Federal Circuit erred by failing to correct the district court's error. Both courts failed to analyze highly material facts made relevant by *Bristol-Myers Squibb* and the unilateral activity rule—i.e., facts showing the lopsided distribution of power between TCT Mobile (US) and TCT Mobile International. *Id.* At bottom, TCT Mobile (US) used TCT Mobile International merely to initiate shipments on its behalf by delivering goods to a carrier in China. When these facts are considered, it becomes apparent that *Bristol-Myers Squibb* and the unilateral activity rule apply in this case, and that there is no personal jurisdiction over TCT Mobile International.

C. Mr. Chan's Trips to Texas Did Not Create Personal Jurisdiction Because He Is Not an Employee of TCT Mobile International

As described in Sections C and D of STATEMENT OF THE CASE above, TCT Mobile International 30(b)(6) witness Eric Chan testified that he visited the Fort Worth warehouse in 2013 and 2018, passing through to see if boxes from TCL were there. App.44a (26:21-29:1); App.47a-48a(39:13-43:14). The district court relied on Mr. Chan's visits in concluding that TCT Mobile International acted "in consort" with TCT

Mobile (US) to "deliberately and purposefully ship[ ] Accused Products to Texas." App.12a. The Federal Circuit declined to address this finding. App.1a-3a. The district court's reliance on Mr. Chan's visit to find personal jurisdiction—and the Federal Circuit's failure to correct this finding—constitutes error because Mr. Chan *was not and is not an employee of TCT Mobile International*. App.39a(8:1-17). Thus, his visit cannot be attributed to TCT Mobile International, and there is no basis for relying on those actions to conclude that TCT Mobile International acted in consort with TCT Mobile (US).

Moreover, Mr. Chan merely passed through the warehouse, which was owned by a third-party logistics provider, to see if boxes of products from TCL were there (without ever opening a box or inspecting a phone inside). App.86a; App.44a(26:21-29:1); App.47a-48a (39:13-43:14). This amounts to nothing more than a "glancing presence" in the forum state that is not meaningfully tied to the cause of action and thus cannot create personal jurisdiction. *Kulko*, 436 U.S. at 92-93; *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1308 (Fed. Cir. 1999) (explaining that the test for specific jurisdiction "requires that the cause of action arise out of or directly relate to the defendant's activities in the forum state"); *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

IV. It Would Not Be Reasonable to Exercise Personal Jurisdiction over TCT Mobile International

Separate from the minimum contacts and purposeful availment analyses above, there can be no personal jurisdiction over TCT Mobile International because exercising it in Texas would be unreasonable. *World-Wide Volkswagen*, 444 U.S. at 292 (explaining that,

regardless of the minimum contacts and purposeful availment doctrines, there can be no personal jurisdiction over a defendant if exercising it would be unreasonable). TCT Mobile International has no employees, representatives, or subsidiaries in Texas. App.17a; App.20a-21a. It has no bank account, office, mailing address, or place of business in Texas. App.20a-21a; App.34a. It neither owns nor leases any real property in Texas, has not appointed an agent for service of process in Texas, and has never been registered to do business in Texas. App.21a. TCT Mobile International is not a manufacturer, and it has not made any of the products accused of infringing in this case. App.17a; 20a. It also has not imported any accused products into the United States. App.17a. Further, TCT Mobile International has not sold any accused products in Texas (to retailers or otherwise) and has no agreements with resellers in Texas. App.17a-18a; App.20a-21a; App.34a. It is unreasonable to require a party in this situation to litigate in Texas.

V. A Grant of Certiorari Is Necessary to Prevent Venue-Based Gamesmanship and End the Eastern District of Texas's Inconsistent Applications of Personal Jurisdiction Jurisprudence

In this lawsuit, Semcon did not sue TCT Mobile (US), the lone U.S.-based TCL subsidiary, and the only TCL entity that sells the accused products in the United States. This allowed Semcon to avoid a venue dispute and keep the case in the Eastern District of Texas, as opposed to California, where TCT Mobile (US) is headquartered, or Delaware, where TCT Mobile (US) is incorporated. Given this procedural posture, if this Court decides there is no personal jurisdiction over TCT Mobile International in Texas,

the case would be a likely candidate for dismissal (because Semcon has not served the only other defendant in the case). Thus, the erroneous personal jurisdiction ruling is all that is keeping this case in the Eastern District of Texas.[1]

It is unjust to force TCT Mobile International to litigate this case in Texas and be victimized by Semcon's forum shopping. It is equally unjust to force TCT Mobile International to wait until the end of the case to get a ruling on jurisdiction. By then, the financial harm and inconveniences associated with forcing TCT Mobile International to litigate in Texas will have been done. Moreover, if the misapplications of the stream-of-commerce theory and refusal to apply the "unilateral activity" and *Bristol-Myers Squibb* doctrines are not cured at this time, these errors will proliferate to other cases in the Eastern District of Texas. Indeed, after the district court issued its jurisdiction ruling, another non-practicing entity sued TCT Mobile International in the Eastern District of Texas. *Ancora Techs., Inc. v. TCL Corp.*, No. 4:19-cv-00624-ALM, Dkt. No. 12 (E.D. Tex. Sept. 12, 2019).

Next, a civil case can only be transferred to forums where the case "might have been brought" originally. 28 U.S.C. § 1404(a). Thus, in evaluating transfer motions, courts must determine whether the targeted forum for transfer would have personal jurisdiction over the defendants. *See Hoffman v. Blaski*, 363 U.S. 335, 342-44 (1960). While the Eastern District of Texas applies personal jurisdiction law *broadly* when deny-

[1] This does not mean Semcon has no options for seeking recourse against TCT Mobile International in the United States. It could sue in another forum where personal jurisdiction may exist, such as California. Or Semcon could include TCT Mobile (US) in the suit.

ing Rule 12 motions (to keep cases in Texas), it applies personal jurisdiction law *narrowly* when considering whether the transferee forum has jurisdiction in transfer motions (so it can keep those cases in the Eastern District of Texas as well).

This dynamic is evident in *Wi-Lan, Inc. v. HTC Corp.*, No. 2:11-cv-00068-JRG, 2012 WL 2461112 (E.D. Tex. June 27, 2012). There, the plaintiff sued three HTC entities: HTC Corp. (based in Taiwan), HTC America (based in Bellevue, Washington), and Exedea (organized under the laws of Texas). *Id.* at *1. HTC America was "responsible for the marketing and sale of HTC cell phones in the United States" that HTC Corp. manufactured. *Id.* Exedea's "sole function within the HTC corporate structure was to take title to imported phones from overseas before transferring them to a third-party distribution center in Indiana." *Id.* Exedea signed for the HTC phones "when they arrived in the United States and verif[ied] shipping information." *Id.* at *2. At least 5,135 HTC phones imported into the United States made it to retail customers in Washington State. *Id.*

The Eastern District of Texas found that Washington State *did not* have personal jurisdiction over Exedea and declined to transfer the case there, concluding that Exedea "provided nothing more" than "inventory management services" in connection with the shipment of HTC phones from the manufacturer (HTC Corp.) to the distributor in Indiana. *Id.* The court found that Exedea "had no role in determining where or to whom the product would be shipped after it arrived" in Indiana, and that "it never sold phones to end users in Washington," "never conducted marketing activities or solicited business in Washington," and "never travelled to Washington to sell products." *Id.* Relying

on these facts, the *Wi-Lan* court found that Exedea "never purposefully directed its activities toward anyone in Washington." *Id.* It is difficult to imagine how the same court could find that Exedea did not purposefully avail itself of the forum state, but that TCT Mobile International did.

Next, in *Wellogix Technology Licensing LLC v. Automatic Data Processing, Inc.*, the defendants had ongoing contacts with suppliers in the targeted transfer forum who used the infringing software at issue. No. 6:11-cv-401-LED-JDL, 2013 WL 1729606, at *3-4 (E.D. Tex. Mar. 19, 2013). The court found no minimum contacts and thus no personal jurisdiction, however, because the defendants did not use or sell the software in the targeted transfer forum or have facilities there. *Id.* Accordingly, the court did not transfer the case. *Id.*

In *NovelPoint Learning LLC v. Leapfrog Enterprises*, one of the defendants was "a foreign company incorporated in Bermuda with its principal place of business in Hong Kong." No. 10-CV-00229, 2010 WL 5068146, at *1 (E.D. Tex. Dec. 6, 2010). The Eastern District of Texas found no jurisdiction in the targeted transfer forum and declined to transfer the case because the foreign defendant sold no products in the United States, let alone the targeted forum, and because the defendant had no "offices, facilities, distribution facilities, or employees in the United States." *Id.* at *2-3.

Many hallmarks that the Eastern District of Texas relied on to find *no jurisdiction* over the defendants in the *Wi-Lan*, *Wellogix*, and *NovelPoint Learning* transfer cases apply to TCT Mobile International. For example, TCT Mobile International does not reside in the forum state (*Wellogix*, *NovelPoint Learning*, *Wi-Lan*), has its registered place of business outside of the forum state (*Wellogix*, *Wi-Lan*), does not use or sell the allegedly

infringing products in the forum state (*Wellogix*, *NovelPoint Learning*, *Wi-Lan*), and does not have facilities, offices, distribution centers, or employees in the forum state (*Wellogix*, *NovelPoint Learning*, *Wi-Lan*). Simply put, the no-jurisdiction findings in *Wellogix*, *NovelPoint Learning*, and *Wi-Lan* directly contradict the district court's finding of jurisdiction here.

This Court can use its supervisory authority to cure the personal jurisdiction injustices in the Eastern District of Texas. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957) (permitting use of supervisory authority to ensure the "proper judicial administration in the federal system"); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018); *In re United States*, 791 F.3d 945, 958-60 (9th Cir. 2015) (issuing a supervisory mandamus where legal standards were clear, but a federal judge exhibited a "pattern and practice of arbitrarily and deliberately disregarding" them). Such relief is necessary to stop the Eastern District of Texas from continuing its selective and self-serving application of the personal jurisdiction rules.

After *TC Heartland*, it became more difficult for plaintiffs to establish venue in patent cases against domestic parties, and thus more difficult to keep lawsuits in the Eastern District of Texas. *TC Heartland*, 137 S. Ct. at 1514. Initially, the Eastern District of Texas flouted *TC Heartland* and declined to follow it, but the Federal Circuit intervened and exercised its supervisory mandamus authority to overturn the Eastern District of Texas's rulings. *In re Cray Inc.*, 871 F.3d 1355, 1359-60 (Fed. Cir. 2017); *In re BigCommerce, Inc.*, 890 F.3d 978, 982 (Fed. Cir. 2018).

Now the process has evolved to the next phase. *TC Heartland* did not tighten the venue rules for foreign parties (only domestic parties). So to avoid *TC Heartland*, plaintiffs began suing *only* foreign corporations in the Eastern District of Texas and declining to name the related domestic parties to the suit. This approach may be viable in situations where the nonresident foreign corporation has sufficient contacts with the forum state. But in situations where there are no contacts—such as here—the Eastern District of Texas must issue broad-sweeping stream-of-commerce rulings to keep cases in Texas that run afoul of the "unilateral activity" rule and *Bristol-Myers Squibb*. Granting certiorari *at this time* is necessary to stop the Eastern District of Texas from misapplying this Court's personal jurisdiction standards and continuing to subject nonresident defendants who have no ties to Texas to litigation there. The United States Constitution protects nonresident defendants from such injustices.

CONCLUSION

For these reasons, the petition for a writ of mandamus or, in the alternative, the petition for a writ of certiorari, should be granted.

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