No. 16-481

In the Supreme Court of the United States

TV AZTECA, S.A.B. DE C.V., PATRICIA CHAPOY, AND PUBLIMAX, S.A. DE C.V.,

v.

GLORIA DE LOS ANGELES TREVINO RUIZ, INDIVIDUALLY AND ON BEHALF OF A MINOR CHILD, A.G.J.T., AND ARMANDO ISMAEL GOMEZ MARTINEZ,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR TEXAS ASSOCIATION OF BROADCASTERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NATIONAL CHAMBER OF THE INDUSTRY OF RADIO AND TELEVISION IN MEXICO, AND INDEPENDENT RADIO ASSOCIATION OF MEXICO AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

THOMAS S. LEATHERBURY
Counsel of Record
MARC A. FULLER
MEGAN M. COKER
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201
(214) 220-7700
tleatherbury@velaw.com
mfuller@velaw.com
megancoker@velaw.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit associations that support and advocate for broadcasters and reporters in the United States and Mexico on issues relating to freedom of speech and the press:

- The Texas Association of Broadcasters ("TAB") is a non-profit organization that represents more than 1,300 free, over-the-air television and radio broadcast stations licensed by the Federal Communications Commission to serve communities throughout Texas. Founded in 1951, TAB provides numerous services on behalf of its members, including the publication of guidebooks on legal issues relating to open government and media law. TAB also advocates for interests important to its membership before the Texas Legislature and in courts.
- The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to this brief's preparation and submission. Counsel of record for all parties received timely notice of the intent to file this brief and consented to its filing.

First Amendment and Freedom of Information Act litigation since 1970.

- The National Chamber of the Industry of Radio and Television in Mexico (Cámara Nacional de la Industria de Radio y Televisión, or "CIRT") is a legal nonprofit organization comprised of individuals licensed to operate commercial radio and TV stations throughout Mexico. Founded in 1937, CIRT advocates for the interests of its affiliates and the public. The organization emphasizes the importance of social and cultural participation and encourages, among other industry values, broadcasting that promotes the education of adolescents, that respects the rights of victims of violence, and that adheres to Mexican laws applicable to telecommunication and radio. CIRT also regularly consults and collaborates with various levels of government to promote free expression and the continued vitality of radio and television throughout Mexico.
- The Independent Radio Association of Mexico (Asociación de Radio Independiente de México A.C.) is a nonprofit organization comprised of more than one hundred AM and FM radio stations throughout thirty Mexican states. The organization promotes social, economic, and technological development through local broadcasting, which it values as an ideal method of spreading information to the communities it serves. Asociación de Radio Independiente de México also defends and advocates for the

interests of its member stations before the courts, as well as other public and private organizations.

Amici share Petitioners' interest in clear and predictable personal jurisdiction standards. The decision by the Texas Supreme Court creates confusion for broadcasters and other publishers because the court found specific jurisdiction based on an unspecified combination of forum contacts that were unrelated to the allegedly defamatory reports being challenged in the case. This imprecise and uncertain standard makes it difficult for national, local, and international broadcasters and other publishers to predict where they might face suit. As described below, this unpredictability will result in self-censorship by the news media, will chill reporting on matters of public concern, and will impose unreasonable burdens on foreign and U.S.-based news organizations and on radio and television organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the dual principles of fair warning and predictability have been at the core of this Court's personal jurisdiction jurisprudence. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980). The Court has consistently favored clear jurisdictional standards that permit defendants "'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (quoting *Burger King*, 471 U.S. at 472). This jurisdictional predicta-

bility "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). When companies know where they may be sued, they can identify the laws that will govern their conduct and ensure compliance with those laws.

In cases involving news reporting on matters of public concern, a defendant's interest in jurisdictional predictability is not merely commercial. Libel, privacy, and other related claims are often governed by state laws that may differ materially across jurisdictions. In light of these varying standards, broadcasters and other publishers need to know, with as much certainty as possible, which jurisdiction's laws will likely govern their newsgathering and reporting activities. Uncertainty breeds self-censorship, as publishers may feel compelled to conform their activities to the legal standards of jurisdictions that provide the least protection for free speech.

The Texas Supreme Court's decision in this case threatens such a chilling effect. As Petitioners have demonstrated, the Texas Supreme Court eschewed this Court's "focal point" test from *Calder v. Jones*, 465 U.S. 783 (1984), and rejected the majority causation approach for determining the "arises out of or relates to" element of specific jurisdiction. Instead, the Texas Supreme Court relied on an uncertain combination of forum contacts that were unrelated to the reporting being challenged in the case. This decision deprives the news media of the jurisdictional predictability it needs to investigate and report vigorously on matters of public concern.

The impact of the Texas Supreme Court's decision is not limited to broadcasters in border regions. Like

broadcasters whose signals venture across jurisdictional lines, online publishers generally lack the ability to aim their content at or away from specific states or countries. And with so many publishers embracing online platforms for disseminating content, the impact of the Texas Supreme Court's decision will be felt by the entire news media nationally and internationally.

Moreover, that impact will only intensify if current media-industry trends continue. Facing a harsh economic environment and the erosion of traditional revenue sources, broadcasters and publishers are embracing diversified business models that include a wide variety of products, platforms, and services unrelated to any specific reporting. For example, in addition to reporting the news, many broadcasters and publishers also produce concerts, conferences, and other special events for local communities, sell branded merchandise, operate e-commerce businesses, and design digital products and tech solutions for other companies. These new revenue streams make it possible for news organizations to continue to invest in their journalism operations, which are often more vital to the public interest than to the corporate balance sheet. But the Texas Supreme Court's decision threatens to subject television and radio broadcasters and news organizations to near-universal jurisdiction based on such general business and promotional activities. At a minimum, the decision leaves broadcasters and publishers unable to identify which of these activities could give rise to specific jurisdiction.

Jurisdictional unpredictability is not the only problem created by the Texas Supreme Court's deci-

sion. Under the decision, a Mexican broadcaster and a Mexican journalist have been haled into U.S. court in a libel suit filed by Mexican citizens over reporting on events that transpired predominantly in Mexico and entirely outside the United States. This unreasonable exercise of jurisdiction threatens to spark reciprocal, retaliatory measures against U.S. broadcasters and publishers by foreign jurisdictions that lack First Amendment-style speech protections. In short, the Texas Supreme Court's decision exposes foreign broadcasters and publishers to more litigation in the United States and U.S. broadcasters and publishers to more litigation in foreign jurisdictions.

REASONS FOR GRANTING THE PETITION

In determining whether Petitioners are subject to suit in Texas, the Texas Supreme Court began its analysis by recognizing that personal jurisdiction could not be based solely on the fact that the challenged broadcasts were accessible in Texas. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 44-47 (Tex.), *as amended and reh'g denied* (June 10, 2016). This holding was correct, consistent with well-established precedent and this Court's personal jurisdiction jurisprudence. *Id*. at 44-47. From there, however, the Texas Supreme Court went astray, applying uncertain standards and reaching an unreasonable result that will chill reporting on matters of public concern by all types of broadcasters and news organizations.

I. The Texas Supreme Court's Decision Will Adversely Impact Broadcasters and All Online Publishers.

Although this case involves broadcast signals that drifted from Mexico into South Texas, the Texas

Supreme Court's decision has far broader implications. The decision's impact will be felt by broadcasters in numerous multi-state media markets and by all news organizations that publish content online. And the decision comes at a time when these organizations are relying increasingly on new ventures and revenue streams that are unrelated to any specific reporting. In sum, the adverse impact of the decision will be felt broadly and intensely by the entire news media.

A. Signal spillover affects major media markets across the United States.

Even if this case only affected broadcasters whose signals crossed state and national borders, its impact would be significant. Broadcast signals cannot be aimed in a specific direction or kept away from a specific state or country without violating the provisions of the licenses granted by the Federal Communications Commission. *See generally* Andrew L. Stoler, *The Border Broadcasting Dispute: a Unique Case Under Section 301*, 6 INT'L TRADE L.J. 39, 40-41 (1980-1981). As a result, broadcasters operating in border regions are unable to prevent their content from "spilling-over" jurisdictional lines and thus becoming accessible outside their home state or country. This phenomenon is not limited to television broadcasters; AM and FM radio broadcasters also experience signal spillover.

Numerous major media markets in the United States are affected by signal spillover. AM radio stations hundreds of miles from the border in San Antonio, Austin, and Houston can be heard in northern Mexico. Similarly, listeners in Texas can receive broadcasts originating from deep in Mexico. For ex-

ample, the South Texas community of McAllen receives radio signals from sixty-two different stations, more than half of which are based in Mexico. Border cities like San Diego and El Paso also receive almost as many transmissions from Mexico as from the United States. And communities located near the northern border of the United States, such as Seattle and Detroit, receive stations broadcasting from Canada.

Signal spillover across state borders is even more prevalent. Nearly every state has media markets served by broadcasters from bordering states. For example, Boston-based stations transmit into Rhode Island, Connecticut, and New Hampshire. The New York television and radio markets include parts of New Jersey and Connecticut. Broadcasts from Atlanta stations reach Tennessee. Phoenix broadcasters reach California, just as San Diego broadcasters reach Arizona. And Detroit stations, which reach Canada, also send signals into Ohio. This signal spillover affects numerous major media markets and millions of viewers and listeners.

B. The Texas Supreme Court's decision also impacts all broadcasters and news organizations that publish content online.

Broadcasters in border areas are not the only news providers affected by the Texas Supreme Court's decision. The logic of the court's decision also applies to any publisher that disseminates content through an online platform. Although the Texas Supreme Court stated that it was not deciding "Internet-based jurisdictional issue[s]," it recognized the "similarities" between broadcast signals that cross borders and online content that is frequently accessi-

ble worldwide. *TV Azteca*, 490 S.W.3d at 44 n.8. These similarities make it impossible to ignore the practical effect that the Texas Supreme Court's decision will have on all online publishers.

It is equally impossible to distinguish between "online" and other types of publishers. *Cf. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014) (describing technology that involved "broadcast television programming over the Internet, virtually as the programming is being broadcast"). Today, virtually all publishers are online publishers. This is certainly true for broadcasters, nearly all of whom also publish online. Television and news radio stations publish reports on their websites, along with additional content such as extended interviews with sources, key documents, or timely updates to on-air reports. They also stream live video—sometimes the same video that is being simultaneously broadcast over the air.

The distinction between print and online media has also long since collapsed. For years, newspapers and magazines have published content through their websites. Like broadcasters, they also publish news and commentary through Twitter and through partnerships with Facebook and Snapchat. *See, e.g.*, Steven Perlberg & Deepa Seetharaman, *Facebook Signs Deals With Media Companies, Celebrities for Facebook Live*, THE WALL STREET JOURNAL (June 22, 2016, 9:44 AM), http://www.wsj.com/articles/facebook-signs-deals-with-media-companies-celebrities-for-facebook-live-1466533472 ("[Facebook's] partners include established media outfits like CNN and the New York Times [and] digital publishers like Vox Media, Tastemade, Mashable and the Huffington Post[.]").

Many broadcasters and publishers even offer content through their own smartphone and tablet apps. *See, e.g.*, Kara Bloomgarden-Smoke, *No Escape From 'The New Yorker': How the proudest and stodgiest of legacy publications transformed into a multimedia juggernaut*, OBSERVER (Jan. 27, 2016, 1:46 PM), http://observer.com/2016/01/the-new-yorker/ (print magazine publisher now also offering a podcast, web-exclusive content, and its own television series available through Amazon.com).

In this multi-platform environment, the impact of the Texas Supreme Court's decision is not limited to broadcasters. Jurisdictional standards that purport to apply only to one platform (for example, over-the-air broadcasts or magazine subscriptions) are unworkable and out-of-step with the reality of modern media. Thus, although the Texas Supreme Court may have intended that its decision be merely "advisory" as to "Internet-based jurisdictional issue[s]," online publishers cannot ignore it. And, because all broadcasters and publishers are online publishers, the Texas Supreme Court's decision impacts them all.

C. The adverse impact of the Texas Supreme Court's decision will deepen as broadcasters and news organizations increasingly engage in general business and promotional activities unrelated to specific reporting.

The broad impact of the Texas Supreme Court's decision will be magnified by the court's reliance on Petitioners' general business and promotional activities to find specific jurisdiction. After holding that specific jurisdiction could not be based solely on the accessibility of Petitioners' broadcasts within the forum, the Texas Supreme Court considered numerous

general business and promotional activities that Petitioners conducted in Texas. *See TV Azteca*, 490 S.W.3d at 49-51. The court failed, however, to connect any of these contacts to the specific reports being challenged by Respondents. *Id.* And by failing to identify precisely which of these general business and promotional contacts made the difference in its jurisdictional analysis, the Texas Supreme Court effectively made all of them relevant.

Unfortunately, this decision comes at a time when broadcasters and news organizations are relying increasingly on new business ventures and promotional activities to diversify their revenue streams and build their brands. These new initiatives are not tied to specific articles or reports, but they form an essential part of a broadcaster's or news organization's overall strategic plan for ensuring that its reporting operations have the necessary funding to survive in this challenging economic environment.

For example, many online publishers now operate e-commerce businesses, in addition to their publishing operations. *See* Lucia Moses, *The newest rainmaker at publishers: E-commerce editors*, DIGIDAY (April 12, 2016), http://digiday.com/publishers/newest-rainmaker-publishers-e-commerce-editors/. These e-commerce operations connect readers directly to product vendors like Amazon.com, in return for which publishers frequently receive a commission. *See* Nick Niedzwiadek, *Vox to Join Other Media Companies in E-Commerce Push*, THE WALL STREET JOURNAL (Feb. 11, 2016, 6:00 AM), http://www.wsj.com/articles/vox-to-join-other-media-companies-in-e-commerce-push-1455188401. Other e-commerce operations by media

companies focus on business-to-business technology solutions. *See* Scott Vaughan, *B2B Media Company Transformation Means More Data for Marketers*, CMO (Nov. 30, 2015), http://www.cmo.com/opinion/articles/2015/11/6/b2b-media-company-transformation-means-more-data-for-marketers.html#gs.SJYWga0.

In addition to e-commerce ventures, publishers are increasingly involved in sponsoring or organizing events such as conferences, trade shows, and leadership summits. *See, e.g.*, Paula Froelich, *Can Conferences Save the Media Industry?*, DIGIDAY (Sept. 9, 2013), http://digiday.com/publishers/conferences-and-media/. These events take place across the country, often outside the state in which a publisher is based. *See, e.g.*, http://conferences.wsj.com (listing conferences organized by *The Wall Street Journal*, including events in New York, California, and Washington, D.C.); *see also* http://www.theatlantic.com/live/events (listing conferences organized by *The Atlantic*, including events in St. Louis, Phoenix, New York, Washington, D.C., and Mountain View). The events are not focused on specific reporting, but on general topics and themes, functioning as an important component of a publisher's overall brand-building strategy. *See* Lucia Moses, *Inside the Atlantic's events juggernaut*, DIGIDAY, http://digiday.com/publishers/inside-atlantics-events-strategy (July 22, 2014) (noting that *The Atlantic* puts on more than 125 events per year).

Because these types of general business and brand-building initiatives are not connected to specific articles or reports, they should be irrelevant to the specific jurisdiction analysis in a libel suit, which focusses solely on suit-related conduct. Indeed, as Peti-

tioners demonstrate, such general contacts are irrelevant under the tests applied in most federal circuits and state courts of last resort. *See* Cert. Pet. at 23-27. But the Texas Supreme Court's reliance on "sales ties" and promotional activities unrelated to the reporting being challenged in the case opens the door to a broad and unpredictable jurisdictional inquiry into other general business activities—at a time when more broadcasters and publishers are relying more heavily on them.[2]

II. The Jurisdictional Uncertainty Created by the Texas Supreme Court's Decision Will Chill Reporting on Matters of Public Concern.

The broad impact of the Texas Supreme Court's decision on broadcasters and the news media is problematic because it deprives them of the jurisdictional predictability they need to ensure that their newsgathering and reporting activities comply with the substantive legal standards in the jurisdictions where they might face suit. Although much of the law governing newsgathering and reporting has been constitutionalized, state statutes and common law standards still govern much of what broadcasters and journalists do. These state standards can vary signif-

[2] The lack of a rigorous causation standard and the rejection of a "focal point" test also causes problems for individual reporters. Petitioner Patricia Chapoy, a news anchor who is a Mexican national, exemplifies this problem. Her contacts with Texas were limited to two independent and unrelated trips to Texas that occurred years before and were not tied to the specific broadcasts at issue in this case. *See TV Azteca*, 490 S.W.3d at 49-52 (discussing Chapoy's contacts with Texas). Yet, the Texas Supreme Court found that Chapoy "expressly aimed" her conduct at Texas through these general contacts.

icantly across jurisdictions, and this variation can influence how the media investigates and reports the news.

For example, state laws often determine how the news media cover allegations made in the context of government activities and official proceedings, such as charges made in a criminal indictment or claims made in a civil lawsuit. The broadcasters and news media are generally not in a position to independently verify the truth of these allegations. Reporters might not have access to the facts that support or contradict the allegations, or those facts might not yet have been determined. Nevertheless, the fact that the allegations have been made is newsworthy.

Recognizing the critical importance of the news media's ability to report on governmental activities and official proceedings, most states have adopted some form of the "fair report" privilege. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). Where this privilege applies, the broadcasters and news media are allowed to report allegations made by government officials and others without having to independently substantiate the allegations. *Id.* Thus, application of the "fair report" privilege means that, in a libel suit, a media defendant generally must show only that the allegation at issue was made and accurately reported, not that it is true. *Id.*

The contours of each state's "fair report" privilege vary significantly. For example, in some states, communications made by government officials acting outside the course of official proceedings—but still on matters of public concern—may not be covered by the "fair report" privilege. *See, e.g.*, *Norton v. Glenn*, 860 A.2d 48, 52 n.6 (Pa. 2004) (suggesting privilege might

apply only to statements made "in the course of official proceedings"); *see also Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987) ("We conclude that unofficial statements made by police sources are outside the scope of the fair report privilege."). In other states, allegations made in preliminary criminal proceedings or allegations that commence civil proceedings may not be covered. *See, e.g.*, *Stone v. Banner Publ'g Corp.*, 677 F. Supp. 242, 246 (D. Vt. 1988) (privilege does not apply to articles relying on preliminary police investigation, including a police incident report); *see also Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1178 (D. Colo. 1999) ("Colorado courts have consistently adhered to the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone."). And allegations in sealed records or in other nonpublic documents may or may not be covered, depending on the scope of the state's "fair report" privilege. *Compare Wynn v. Smith*, 16 P.3d 424, 429-30 (Nev. 2001) (per curiam) (Nevada privilege does not protect report of contents of confidential Scotland Yard report) *with Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (California privilege protects reports on family court proceedings where general public is excluded).

In some states, however, the protections for reporting on allegations are much broader. Texas, for example, recently passed a statute that broadly protects the news media's "accurate reporting of allegations made by a third party regarding a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 73.005(b). There is no requirement that the allegations be made in public documents, or in the course of

official proceedings, or have been acted on by the government. The Texas law requires only that the allegations relate to a matter of public concern and that the media accurately report them. *Id.*; *cf.* TEX. CIV. PRAC. & REM. CODE § 73.002(b) (providing separate, narrower privilege for "fair, true, and impartial account[s]" of various official proceedings).

Even where it is clear that the "fair report" privilege or some similar protection applies, there are important state-law differences affecting how broadcasters and other publishers should report on allegations made in official proceedings, such as whether they must investigate and report additional background information or the ultimate result of the proceedings. In some states, the failure to report such information can expose a broadcaster or publisher to a libel claim. *See, e.g.*, *Fortenbaugh v. N.J. Press, Inc.*, 722 A.2d 568, 574 (N.J. Super. Ct. App. Div. 1999) ("Defendants were obligated to flesh out the report to reflect the true nature of the accusation referred to and its ultimate conclusion."). In other states, the media may, but are not required to, report such information. *See, e.g.*, *KBMT Operating Co., LLC v. Toledo*, No. 14-0456, ___ S.W.3d ___, 2016 WL 3413477, at *1 (Tex. June 17, 2016) (broadcaster's reporting with and without additional information held nonactionable). And some states have held that the privilege may be defeated by the reporting of additional information outside the scope of the privilege. *See, e.g.*, *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000).

These issues relating to whether and how the news media may report on government activities and other matters of public concern represent only a few

examples of the myriad ways in which variations in state libel and privacy laws affect newsgathering and reporting. There are many others. A journalist's ability to obtain information from a confidential source may depend on state law, which may be different on opposite sides of the border. California, for example, provides stronger protections for confidential sources than does its neighbor, Arizona. *Compare* CAL. CONST., art. I, § 2(b), *with* ARIZ. REV. STAT. ANN. § 12-2237, *and Matera v. Superior Court*, 825 P.2d 971, 973-75 (Ariz. Ct. App. 1992). Arizona, however, makes it easier for reporters to use information from audio or video recordings. *Compare* CAL. PENAL CODE § 632 (recording of calls requires consent of both parties) *with* ARIZ. REV. STAT. ANN. § 13-3005 (consent of only one party required).

If broadcasters and publishers are unable to predict where they might be sued, they will be forced to conform their newsgathering and reporting activities to the least-protective state standards. This will result in a less vigorous press, as an abundance of caution will replace the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see N.Y. Times Co. v. Connor*, 365 F.2d 567, 571, 573 (5th Cir. 1966) (refusing to apply a rule finding jurisdiction over the press based on minimal contacts, citing the threat to free speech). The Texas Supreme Court's decision threatens just such a chilling effect.

III. The Texas Supreme Court's Decision Subjects Foreign Broadcasters and Publishers to Unreasonable Burdens and Exposes U.S. Broadcasters and Publishers to the Reciprocal Exercise of Jurisdiction by Foreign Countries Lacking Strong Speech Protections.

In addition to jurisdictional unpredictability, the Texas Supreme Court's decision imposes unreasonable burdens on broadcasters and other publishers in the U.S. and abroad. By eschewing *Calder*'s "focal-point" test and rejecting the majority causation approach, the Texas Supreme Court expanded the jurisdictional inquiry to include numerous contacts unrelated to the specific reporting being challenged in the case. The court cited more than a dozen different general business and promotional contacts, tacitly suggesting that all of them could be relevant in determining whether specific jurisdiction exists. *TV Azteca*, 490 S.W.3d at 50-51.

The complexity and breadth of such an analysis affects not only how jurisdictional issues are decided, but how they are litigated. Before a court can determine whether such contacts can sustain personal jurisdiction over the defendant, the plaintiff will be given an opportunity to conduct discovery into those contacts. Broad jurisdictional discovery imposes substantial burdens on the defendant and on the court, which must resolve any discovery disputes. As this Court recognized in *Hertz*, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. 559 U.S. at 94 (citing *Navarro Sav. Ass'n. v. Lee*, 446

U.S. 458, 464, n.13 (1980)); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 745 (2013) ("[J]urisdictional tests, often applied at the outset of a case, should be 'as simple as possible.'" (quoting *Hertz*, 559 U.S. at 80)). The Texas Supreme Court's analysis will result in the dramatic expansion of jurisdictional discovery in libel cases, well beyond the specific reporting being challenged, thus exposing defendants to expensive and time-consuming discovery on an increasingly wide range of commercial and promotional activities.

Such broad jurisdictional discovery is particularly problematic for foreign broadcasters and publishers, many of whom are located in countries that do not approve of U.S.-style civil discovery. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (citation omitted)); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (noting the possibility of discovery for foreign defendants could deter business activity in the United States). Indeed, some foreign nations, such as France, have even passed "blocking statutes" designed to prohibit companies from complying with U.S. civil discovery demands. *See, e.g.*, Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts*, 969-73 (5th ed. 2011). These countries require strict compliance with the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which has caused tension between foreign defendants and U.S. courts. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, No.

02CIV5571RJHHBP, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006) ("[I]n deciding whether discovery should proceed under the Hague Convention or the Federal Rules of Civil Procedure, 'American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.'" (quoting *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987))). The Texas Supreme Court's decision exacerbates this tension, placing unreasonable burdens on foreign broadcasters and publishers before the issue of personal jurisdiction is even decided.[3]

As a result of these unreasonable burdens, the Texas Supreme Court's decision also exposes U.S. broadcasters and publishers to the reciprocal exercise of jurisdiction by foreign countries. *See* American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 5, p. 82 (2006) ("[N]on-U.S. courts . . . have often applied their domestic standards of defamation, thus raising public-policy concerns when enforcement of the foreign judgment is sought in the United States."); *cf. Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 450 (1979) (noting the possibility that foreign governments would retaliate against chaotic

[3] The burdens associated with broad jurisdictional discovery in a foreign country or other state are also particularly problematic for individual anchors, communicators, and journalists such as Chapoy. These individuals may lack the resources to comply with broad jurisdictional discovery requests and thus are vulnerable to attempts by plaintiffs to chill speech through meritless, yet costly, litigation.

state standards on an issue of international importance). The prospect of such retaliatory measures is especially troubling because most foreign countries lack the strong protections for speech and press that are guaranteed under U.S. law, including the First Amendment. *See Developments in the Law — The Law of Media: Internet Jurisdiction: A Comparative Analysis*, 120 HARV. L. REV. 1031, 1037 (2007) ("The contrast between U.S. free speech jurisprudence and foreign approaches that value reputation over speech reveals that the First Amendment is 'a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.'" (quoting Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 12-13 (1980))).

Even in Commonwealth nations, with whom the U.S. shares a common-law tradition, the differences in their respective libel laws are stark:

> British law "in the main loads the dice very heavily in the plaintiff's favour." Australia similarly considers defamation a strict liability tort and does not require public figures to prove actual malice. Canada's plaintiff-friendly libel laws presume damage, do not require actual malice, and place the burden on the defendant to prove the material's substantial truth.

Id. at 1037-38 (citations omitted). These differences, and the enforcement of foreign libel law against U.S. publishers, led Congress to unanimously pass the SPEECH Act in 2012. *See generally* John B. Bellinger & R. Reeves Anderson, *Tort Tourism: The*

Case for a Federal Law on Foreign Judgment Recognition, 54 VA. J. INT'L L. 501, 534-35 (2014). The SPEECH Act "allow[s] American defendants to block enforcement of foreign defamation judgments that do not comply with the free speech requirements of the First Amendment." *Id.*; *see also* 28 U.S.C. §§ 4101-05 (2012).

Notably, the Texas Supreme Court recognized the legitimacy of these reciprocity concerns, yet it asserted that the concerns were not implicated by its decision because Petitioners had "intentionally targeted Texas[.]" *TV Azteca* 490 S.W.3d at 56. But where "intentionally targeting Texas" consists of such general sales and promotional activities as the Texas Supreme Court cited in its decision, the court's reassurance rings hollow. Indeed, the Texas Supreme Court's decision is problematic precisely because it subjects foreign broadcasters and publishers to specific jurisdiction, even where the conduct at issue does not "intentionally target Texas." Unless promptly corrected, the fallout will be felt by U.S. broadcasters and publishers, too.

CONCLUSION

For the foregoing reasons, *amici curiae* support the petition for certiorari in this case and respectfully request that it be granted.

Respectfully submitted.

THOMAS S. LEATHERBURY
Counsel of Record
MARC A. FULLER
MEGAN M. COKER
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201
(214) 220-7700
tleatherbury@velaw.com
mfuller@velaw.com
megancoker@velaw.com

Counsel for Amici Curiae

NOVEMBER 2016