Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

DOW CHEMICAL CANADA ULC,
Petitioner,

v.

CARLOS ORLANDO FANDINO, CLAUDIA CASTILLO, DANIEL CASTILLO, JONATHAN CASTILLO, CARLOS RAFAEL FANDINO, KAYLIE FANDINO, ALEXIS MERCADO, ERIKA MERCADO, LIZANDRO MERCADO, SANDRA MERCADO, BOMBARDIER, INC., BOMBARDIER RECREATIONAL PRODUCTS, INC., BRP US INC., and DAN FITZGERALD'S JET WORLD, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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August 18, 2010

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QUESTION PRESENTED

This case presents the long-unsettled and recurring question, left open in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-13, 117-21 (1987), of whether placing products into the stream of commerce in a foreign country (or another State), aware that some may or will be swept into the forum State, is enough to subject a defendant to personal jurisdiction—or whether due process requires that the defendant have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within the forum State.

PARTIES TO THE PROCEEDING

Rule 14.1(b) Statement: The following lists all parties to the proceeding in the court whose judgment is sought to be reviewed:

Petitioner: Dow Chemical Canada ULC

Respondent: Superior Court of California for the County of Los Angeles

Real Parties in Interest: Carlos Orlando Fandino, Claudia Castillo, Daniel Castillo, Jonathan Castillo, Carlos Rafael Fandino, Kaylie Fandino, Alexis Mercado, Erika Mercado, Lizandro Mercado, Sandra Mercado, Bombardier, Inc., Bombardier Recreational Products, Inc., BRP US Inc., and Dan Fitzgerald's Jet World, Inc.

Rule 29.6 Statement: Dow Chemical Canada ULC is an indirect, wholly-owned subsidiary of The Dow Chemical Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dow Chemical Canada ULC (Dow Canada) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, in this case.

ORDERS BELOW

The order of the Superior Court of California for the County of Los Angeles, denying Dow Canada's motion to quash service of summons for lack of personal jurisdiction, appears at Appendix C and is unpublished. Fandino v. Bombardier Inc., No. BC413322 (Cal. Super. Ct., L.A. County, Feb. 10, 2010); *see* App. C at 4a-6a, *infra*.

The order of the California Court of Appeal, denying Dow Canada's petition for writ of mandate (challenging the Superior Court's order), appears at Appendix A and is unpublished. Dow Chemical Canada ULC v. Superior Court, No. B222609 (Cal. Ct. App. Mar. 25, 2010); *see* App. A at 1a-2a, *infra*.

The order of the California Supreme Court, denying Dow Canada's petition for discretionary review, appears at Appendix B and is unpublished. Dow Chemical Canada ULC v. Superior Court, No. S181566 (Cal. Sup. Ct. May 20, 2010); *see* App. B at 3a, *infra*.

JURISDICTION

The judgment of the California Court of Appeal, denying Dow Canada's petition for writ of mandate

on the merits of the federal question, was entered on March 25, 2010. The order of the California Supreme Court, denying Dow Canada's petition for discretionary review, was entered on May 20, 2010. This petition is being timely filed by August 18, 2010. *See* Sup. Ct. R. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Dow Canada's objection to the assertion of personal jurisdiction by the Superior Court of California as a violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States is not subject to further review in the courts of California. Under California procedure, "a defendant in a civil case may challenge only by extraordinary writ a trial court order refusing to quash service, and may not raise the issue on direct appeal from a judgment entered after trial on the merits . . . ." *Powers v. City of Richmond*, 893 P.2d 1160, 1183 (Cal. 1995) (George, J., concurring) (citing precedent).[1]

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

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[1] *See also* Cal. Code Civ. Proc. § 418.10(c) (review of jurisdiction by writ petition); *State Farm General Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573, 579-80 (Ct. App. 2010) ("a defendant who chooses to litigate the merits of a lawsuit after its motion to quash has been denied has no right to raise the jurisdictional question on appeal," citing *Jardine v. Superior Court*, 2 P.2d 756, 757-58 (Cal. 1931)).

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

This case presents on a simple, clear record the important and recurring question of personal jurisdiction left undecided by differing four-vote opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-13, 117-21 (1987) —whether a forum can assert jurisdiction over an out-of-state manufacturer simply because it deposited goods in the stream of commerce knowing that some products were likely to end up in the forum State, or whether some additional conduct, directed toward the forum, is required to meet the constitutional requirement of "minimum contacts." In the more than twenty years since *Asahi*, there have been numerous conflicting state and federal court decisions on the issue this Court did not decide. Despite the fact that the issue still arises with great regularity, confusion on the proper standard continues unabated.

Here, the Superior Court of California asserted personal jurisdiction over petitioner based on its finding that petitioner's predecessor, a Canadian component-part supplier, was told by the finished-product manufacturer (also Canadian) that the finished product would be sold in the United States, including California. App. C at 5a-6a, *infra*

(R. at 245-46).[2] Thus, jurisdiction was imposed simply because the foreign supplier placed a component part in the stream of commerce in a foreign country with the awareness that it could end up in the forum State as part of a finished product—even though the supplier did nothing to get it there.

The Superior Court recognized that its conclusion, that this was enough to subject petitioner to personal jurisdiction in California, cries out for appellate review to settle the governing legal standard.

> The Court of Appeal is going to look at this ruling and it's going to be real simple for them. Either they're going to say, "This is not a sufficient contact." Or they're going to say, "We agree. This is evidence of purposeful availment of the jurisdiction."

App. D at 9a, *infra* (R. at 232).

The outcome of this case turns squarely on the question left open in *Asahi*. If this Court were to adopt the stream-of-commerce test advocated by Justice Brennan (joined by three other justices) in *Asahi*, 480 U.S. at 117-21, then (given the Superior Court's finding) petitioner would indeed be subject to jurisdiction in California in this case. On the other hand, the decision below would have to be

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[2] Record citations are to the consecutive page numbers of the record documents filed in the California Court of Appeal.

reversed if this Court were to adopt Justice O'Connor's approach (joined by three other justices) in *Asahi*, *id.* at 108-13 (Part II-A, the stream-of-commerce-plus test) and hold that something more is required in addition to placing products into the stream of commerce, with the awareness that some may or will be swept into the forum State.

* * * * *

Plaintiffs filed their lawsuit in the Superior Court of California for the County of Los Angeles. (R. at 1.) Plaintiffs asserted personal-injury claims involving a 1996 Sea-Doo personal watercraft (essentially a floating snowmobile) manufactured by Canadian defendant Bombardier Inc. (R. at 3-7, 12, 59, 83.) Bombardier and its related companies marketed Sea-Doo watercraft in Canada and the United States. (*See* R. at 83, 97, 100.) The Bombardier defendants appeared in the underlying action without contesting jurisdiction. (See R. at 137-38.) Plaintiffs alleged that the Sea-Doo, including its gas tank, had defects that contributed to an injury-causing explosion. (R. at 7-9, 17-18.)

Plaintiffs sued petitioner Dow Canada, the successor to Union Carbide Canada, Inc., for supplying the gas tank to Bombardier. (R. at 7, 24, 56-59.) A former division of Union Carbide Canada supplied gas tanks to Bombardier—exclusively in Canada. (R. at 58-59.) Dow Canada is a Canadian corporation, as was Union Carbide Canada; neither has ever done business in California. (R. at 56-59.)

In response to plaintiffs' suit, Dow Canada moved to quash service of summons for lack of personal jurisdiction, citing federal constitutional due process limits. (R. at 24, 27-37, *e.g.*, R. at 32, 34.) It is undisputed that California courts lack general jurisdiction over Dow Canada. (*See* R. at 57, 59, 74 n.5.)[3] Plaintiffs argued, however, that the court had specific jurisdiction because Union Carbide Canada knew that its gas tanks were being installed in products that would be sold in the United States, including California. (R. 69, 74-75.) Dow Canada argued that the sale of component parts in Canada did not create the "minimum contacts" with California necessary under this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[4] (R. at 33-35.) Dow Canada argued that its predecessor did not purposefully direct its activities toward California: Union Carbide Canada's only purported "contacts" with California were the manufacture and sale of a component part in a foreign country; it was a different foreign manufacturer that incorporated the part into its own finished product

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[3] Dow Canada is not subject to personal jurisdiction as an indirect subsidiary of a corporation headquartered in the United States. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, n.13 (1984) (requiring that forum contacts of parent corporation and of wholly-owned subsidiary be assessed individually).

[4] Citing *Asahi*, 480 U.S. at 114-16, Dow Canada also argued that under principles of fairness and reasonableness, due process precluded the assertion of personal jurisdiction. (R. at 35-37, 151.) The Superior Court ignored this further ground for not finding jurisdiction. *Cf.* App. C at 4a-6a, *infra* (R. at 245-46).

and unilaterally elected to distribute that product into the United States. (R. at 33-35, 144-48.)[5]

Relying on the "stream-of-commerce-plus" test, Dow Canada argued that placing a product in the stream of commerce in a foreign country is insufficient conduct for personal jurisdiction, even if the component-part manufacturer knows that the end product will eventually be sold in the United States, including California. (*Id.*)

The Superior Court rejected the stream-of-commerce-plus standard. It denied Dow Canada's motion based solely on the declaration of a Bombardier employee (Pierre Biron) that, sometime in "the early 1990s," he told unidentified "representatives" of Union Carbide Canada that Bombardier personal watercraft, which incorporated the component gas tanks, would be sold across the United States, including California. App. C & D at 5a-6a, 8a-10a, 12a-13a, *infra* (R. at 231-34, 236, 245-46).[6]

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[5] There is no evidence that Union Carbide Canada (or Dow Canada) ever marketed or shipped any parts into California, had any control over where the finished products were sold, or otherwise conducted any activities in California. Under California procedure, plaintiffs had the burden of proving facts sufficient to establish minimum contacts for asserting personal jurisdiction. *Vons Companies, Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1094 (Cal. 1996).

[6] As the court explained, " . . . I reduced it to the simplest element, which is the declaration of Mr. Biron. Mr. Biron describes a conversation he had with a representative where

(*continued on next page*)

Pursuing the only procedure available under California law for appellate review of the Superior Court's decision, Dow Canada filed in the California Court of Appeal a timely petition for writ of mandate to direct the Superior Court to enter an order quashing service of summons for lack of personal jurisdiction. (*See* pet. for writ of mandate (filed Mar. 2, 2010) at 2-9, 31; *see also* R. at 249-52 (timely filing).)

In support of its petition for writ of mandate, Dow Canada again relied on federal constitutional due process limits in objecting to personal

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he gave . . . notice that he was going to use these parts for watercraft to be used in California." App. D at 9a, *infra* (R. at 231-232). "It was entirely Mr. Biron's declaration . . . ." App. D at 10a, *infra* (R. at 233-234). As to this contention that "Union Carbide was informed"—"that's all that I thought of any probative weight." App. D at 12a-13a, *infra* (R. at 236).

The Superior Court accorded no weight to materials plaintiffs cited that indicated Bombardier specified gas tanks that met both Canadian Coast Guard and U.S. Coast Guard standards. *Cf.* App. D at 8a-10a, 12a-13a, *infra* (R. at 231-34, 236; *see* R. at 93, 100, 103, 109.) In any event, Union Carbide Canada's role was to make the components in accordance with Bombardier's specifications—whatever they might be. (*See* R. at 59, 92-93, 102-03, 108-09.) A second Bombardier-employee declaration submitted by plaintiffs confirmed that it was Bombardier that was concerned that the gas tanks comply with a U.S. Coast Guard standard, because of its own plan to distribute its Sea-Doo watercraft for sale in the United States. (R. at 100.)

On review, California gives deference to the trial court's fact-finding regarding personal jurisdiction. The trial court's factual determinations on conflicting evidence are reviewed under the substantial evidence test. *Vons*, 926 P.2d at 1094.

jurisdiction. (*See, e.g.*, pet. for writ of mandate at 1, 7, 12-19, 21-27, 29-31.) Dow Canada reiterated that California cannot assert personal jurisdiction over it based on Bombardier's unilateral activity in selling its Sea-Doo personal watercraft in California—regardless of whether Bombardier informed Union Carbide Canada of its intentions. (Pet. for writ of mandate at 1, 12-14, 21-27.) Dow Canada marshaled support for its due process contentions from this Court's repeated statements that (1) the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State and (2) it is essential in each case that there be some act by which *the defendant* purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985); *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297-98; *Hanson v. Denckla* (1958) 357 U.S. 235, 253. (Pet. for writ of mandate at 13, 17, 21-22, 30 n.6)[7]

The California Court of Appeal summarily denied Dow Canada's petition for writ of mandate, noting that the court had read and considered the petition, the preliminary opposition, and the reply. *See* App. A at 2a, *infra*.

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[7] Dow Canada also argued, as it had in the trial court, that due process principles of fairness and reasonableness precluded personal jurisdiction. (Pet. for writ of mandate at 14-15, 29-31.)

This decision was a determination on the merits of the federal question presented. While in many instances writ review by a California Court of Appeal is discretionary, it is not where—as here, following the denial of a motion to quash for lack of personal jurisdiction—there is no right of appeal. In "situations in which a writ petition [is] the only authorized mode of appellate review. . . . an appellate court *must* judge the petition on its procedural and substantive merits, and a summary denial of the petition *is necessarily on the merits.*" *Leone v. Medical Bd. of Cal.*, 995 P.2d 191, 197 (Cal. 2000) (emphasis added). The court in *Fink v. Shemtov*, 103 Cal. Rptr. 3d 509 (Ct. App. 2010), quoted *Leone* and then observed that: "Examples of instances in which appellate review may be obtained only through a writ petition include challenges to . . . an order denying a motion to quash service of process based on a lack of personal jurisdiction [citation]." *Id.*, 103 Cal. Rptr. 3d at 518 (citation omitted).

The California Supreme Court denied Dow Canada's timely petition for discretionary review. *See* App. B at 3a, *infra.* That petition again presented the federal question, again citing federal constitutional due process limits.[8]

Because the California Court of Appeal necessarily decided the merits of the federal

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[8] *See* pet. for review (filed Apr. 5, 2010) at 1 (presenting questions, including the substance of the question presented in this petition); *id.* at 6-8, 12-13, 15-16 (citing Fourteenth Amendment Due Process Clause and decisions of this Court).

question presented, it is the highest court of California in which a decision could be had, and Dow Canada therefore petitions for a writ of certiorari to that court. *See* 28 U.S.C. § 1257(a). Because California does not permit the objection to personal jurisdiction to be raised on appeal from a judgment entered after trial on the merits in the underlying action, the California Court of Appeal's disposition of the federal question presented here is final and reviewable by this Court. *See Kansas v. Marsh*, 548 U.S. 163, 168 (2006) (finding jurisdiction under 28 U.S.C. § 1257 " 'where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case,' " quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975)); *Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48 (1987) (same).

REASONS FOR GRANTING THE PETITION

I. The Decisions among Various Federal Courts of Appeals and State Courts of Last Resort Are in Conflict over the Competing Personal Jurisdiction Tests Offered in *Asahi*

Differing four-vote opinions in *Asahi* left unsettled whether merely placing products into the stream of commerce, aware that some such products may or will be swept into the forum State, constitutes sufficient contacts to subject a foreign defendant to personal jurisdiction. *Compare Asahi*, 480 U.S. at 108-13, *with id.* at 117-21.

The facts in *Asahi* are comparable to this case. *Asahi* arose from a California action involving a motorcycle accident. 480 U.S. at 105-06. The plaintiff alleged the sudden deflation and failure of a tire tube made by a Taiwanese manufacturer. *Id.* at 106. The Taiwanese manufacturer (Cheng Shin) cross-complained against Asahi, the Japanese supplier of a valve stem used in the tire tube. *Id.* The record suggested that a substantial number of tire tubes containing Asahi valve stems were sold in California, but that Asahi took no active role in marketing those products to the United States. *Id.* at 106-07.

The California Supreme Court concluded that "Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components." *Asahi*, 480 U.S. at 106. The California Supreme Court found Asahi's placement of its valve stems "into the stream of commerce—that is, by delivering the components to Cheng Shin in Taiwan—coupled with Asahi's awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause." *Id.*

This Court reversed, holding that the requirement of reasonableness and fairness in light of private and public interests—a criterion that must be satisfied independently of finding requisite minimum contacts—was not satisfied. *Asahi*, 480 U.S. at 113-16 (O'Connor, J., Part II-B, for eight

justices). But the critical question of whether the minimum-contacts test is satisfied merely by putting component parts into the stream of commerce, with knowledge that they will or are likely to reach the forum State, was left undecided. Four Justices agreed with the California Supreme Court's "stream of commerce" approach, but four others would have adopted what has since been called the "stream-of-commerce-plus" approach. *Id.* at 108-13, 117-21. Decades later, the issue remains unresolved, even though it recurs with great regularity.

Various federal courts of appeals and state courts of last resort have split on which of these two minimum-contacts approaches to apply. Courts including the First Circuit, the Fourth Circuit, the Sixth Circuit, the Ninth Circuit, and the high courts of Arizona, Maryland, Mississippi, New Hampshire, Texas, and Utah have expressly adopted the stream-of-commerce-plus standard.[9] Courts including the Fifth Circuit, the Seventh Circuit, and the high courts of Alabama, Kansas, South Carolina, West Virginia, and Wisconsin have

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[9] *See, e.g., Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992); *Lesnick v. Hollingsworth*, 35 F.3d 939, 946-47 (4th Cir. 1994); *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 479-80 (6th Cir. 2003); *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1362-63 (Ariz. 1995); *CSR, Ltd. v. Taylor*, 983 A.2d 482, 507 (Md. 2009); *Sorrells v. R.R. Custom Coach Works, Inc.*, 636 So.2d 668, 674-75 (Miss. 1994); *Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co.*, 914 A.2d 818, 828 (N.H. 2006); *Spir Star AG v. Kimich*, 310 S.W.3d 868, 876 (Tex. 2010); *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 666-67 (Utah 1989).

expressly adopted the stream-of-commerce standard.[10] More importantly, regardless of the labels courts have placed on the approaches, state high courts and federal courts of appeals are split on the specific situation presented here, providing disparate holdings on similar facts, sometimes even involving the same defendant.

For example, courts in the First Circuit, the Fourth Circuit, and Maryland have held that an out-of-state defendant's knowledge that its products may end up in the forum State (indeed, even with the general intent to sell to the United States market as a whole) does *not* constitute sufficient minimum contacts with the forum to confer personal jurisdiction over the defendant:

- *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992) (affirming dismissal, for lack of personal jurisdiction, of defendant Indiana manufacturer of hot air gun in product-liability action; holding that providing a product to a nationwide distributor with knowledge that some products would end up in Maine, without more, did not constitute sufficient minimum

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[10] *See, e.g., Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 419-21 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Ex parte DBI, Inc.*, 23 So.3d 635, 654-55 (Ala. 2009); *Merriman v. Crompton Corp.*, 146 P.3d 162, 184 (Kan. 2006); *State v. NV Sumatra Tobacco Trading Co.*, 666 S.E.2d 218, 222-23 (S. Car. 2008); *W. Virginia ex rel CSR, Ltd. v. MacQueen*, 441 S.E.2d 658, 660-61 (W. Va. 1994); *Kopke v. Hartrodt S.R.L.*, 629 N.W.2d 662, 675-76 (Wis. 2001).

contacts with Maine to confer personal jurisdiction over defendant).

- *Lesnick v. Hollingsworth*, 35 F.3d 939, 946-47 (4th Cir. 1994) (affirming summary judgment for lack of personal jurisdiction in favor of defendant Massachusetts cigarette filter manufacturer in wrongful-death action; holding that selling filters to Kentucky and New Jersey companies for sale across the United States, with knowledge that some filters would go to Maryland, did not constitute sufficient minimum contacts with Maryland to confer personal jurisdiction over defendant).

- *CSR, Ltd. v. Taylor*, 983 A.2d 492, 508-11 (Md. 2009) (overturning reversal of order granting motion to dismiss for lack of personal jurisdiction by defendant Australian asbestos mining company in products-liability action; holding that knowledge that the product would go to Maryland, coupled with nationwide advertising in trade magazines, did not constitute sufficient minimum contacts with Maryland to confer personal jurisdiction over defendant).

By contrast, courts in Alabama, South Carolina, and West Virginia have held that merely putting products into the stream of commerce of the United States as a whole is enough, standing alone, to constitute sufficient minimum contacts with the

forum State to confer personal jurisdiction over an out-of-state defendant:

- *Ex parte DBI, Inc.*, 23 So.3d 635, 654-55 (Ala. 2009) (finding personal jurisdiction over defendant Korean seat-belt manufacturer in personal-injury survivor action; selling parts for automobiles marketed to all 50 States, standing alone, constituted sufficient minimum contacts with Alabama to confer personal jurisdiction over defendant).

- *State v. NV Sumatra Tobacco Trading Co.*, 666 S.E.2d 218, 222-23 (S. Car. 2008) (upholding claim of personal jurisdiction over defendant Indonesian cigarette manufacturer in action to require contribution to state tobacco escrow fund; selling products to the entire United States as a whole constituted sufficient minimum contacts with South Carolina to confer personal jurisdiction over defendant).

- *W. Virginia ex rel CSR, Ltd. v. MacQueen*, 441 S.E.2d 658, 660-61 (W. Va. 1994) (West Virginia court had personal jurisdiction over defendant Australian asbestos mining company in consolidated asbestos personal-injury action; selling to the "United States market" means directing sales to each of the 50 States, including West Virginia, and therefore constitutes sufficient minimum contacts with West Virginia to confer personal jurisdiction over defendant).

Courts have recognized the split—and the impact that application of one standard or the other would have had on their decisions. *See Lesnick*, 35 F.3d at 946 & n.1 (noting the split among the circuits; defendant conceded that, if the stream-of-commerce approach applied, it would be subject to personal jurisdiction); *Kopke v. Hartrodt S.R.L.*, 629 N.W.2d 662, 679 (Wis. 2001) (dissent) (noting that "the *United States Supreme Court may need to settle finally the scope of the stream of commerce test*") (emphasis in original); *CSR*, 983 A.2d at 484-85 (specifically disapproving the intermediate appellate court's reliance on the *Kopke* decision, which applied the stream-of-commerce test); *DBI*, 23 So.3d at 645 & n.4, 649, 655 (recognizing split among federal courts and among state courts; overturning prior decision that adopted stream-of-commerce-plus test, and switching to stream-of-commerce test); *Commissariat à l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1321-1322 (Fed. Cir. 2005) ("The regional circuits . . . remain divided on the proper due process standard"; finding that evidence in record likely satisfied stream-of-commerce test but not stream-of-commerce-plus test; not choosing test, but remanding for jurisdictional discovery).[11]

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[11] *See also State ex rel. Edmondson v. Native Wholesale Supply*, No. 107241, __ P.3d __, 2010 WL 2674999, at *4 (Okla. July 6, 2010) ("The *Asahi* decision has created *significant confusion in lower courts* over the constitutional standard for minimum contacts under the stream-of-commerce theory. Most courts that have addressed this problem have approached it as a choice between Justice

(*continued on next page*)

Courts are also split on this issue among cases purporting to follow the same standard. *Compare Boit, Lesnick, and CSR* (under stream-of-commerce-plus standard, sales for distribution to United States as a whole were insufficient for minimum contacts with forum States) *with Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993) (finding personal jurisdiction over defendant Dutch drug manufacturer in product-liability action; purportedly applying stream-of-commerce-plus test, obtaining federal regulatory approval and licensing a distributor for sales in the United States as a whole held to constitute sufficient minimum contacts with Kentucky to confer personal jurisdiction over defendant), *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1362-63 (Ariz. 1995) (finding personal jurisdiction over defendant Italian handgun manufacturer in product-liability action; purportedly applying stream-of-commerce-plus test, manufacturer's intent that distributor sell products "across America" held to constitute sufficient minimum contacts with Arizona to confer personal jurisdiction over defendant), *and State v. N. Atlantic Refining Ltd.*, No. 2009-545, __ A.2d __, 2010 WL 1816418, at *1-*2, *7 (N.H. May 7, 2010) (citing *Tobin*; purportedly applying stream-of-commerce-plus test, New Hampshire asserted personal jurisdiction over owner/operator of Canadian oil refinery that made gas with U.S. EPA-mandated MTBE for another entity, knowing

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O'Connor's 'stream-of-commerce plus' version of the analysis and Justice Brennan's less rigorous standard." (emphasis added; footnote omitted)).

that gas would be sold primarily in "the northeastern United States, which necessarily includes New Hampshire").

Even courts declining to expressly adopt either of the *Asahi* standards are split on the question presented here, sometimes within the same jurisdiction. *Compare Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614-15 (8th Cir. 1994) (affirming denial of motion to dismiss for lack of personal jurisdiction by defendant Japanese fireworks manufacturer in personal-injury action; selling fireworks for nationwide distribution held to constitute sufficient minimum contacts with Nebraska to confer personal jurisdiction over defendant) *with Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) (affirming dismissal, for lack of personal jurisdiction, of defendant Massachusetts heart-valve component manufacturer in wrongful death action; even assuming that defendant knew or should have known that its product would end up in Nebraska, this would not constitute sufficient minimum contacts with Nebraska to confer personal jurisdiction over defendant); *see also Grange Ins. Assoc. v. State*, 757 P.2d 933, 938 (Wash. 1988) (holding, in dicta, that Washington would continue to follow its pre-*Asahi* state case law that "purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state").

This split results in inconsistent rulings not only among jurisdictions, but even for the same defendant based on the same conduct. The varied holdings of cases addressing the Australian asbestos mining company, CSR Ltd., illustrate this concern. In *CSR*, Maryland's highest court held that the defendant Australian mining company was not subject to personal jurisdiction in Maryland based solely on the fact that it sold asbestos across the United States. 983 A.2d at 511; *accord CSR Ltd. v. Link*, 925 S.W.2d 591, 595-96 (Tex. 1996) (holding by Supreme Court of Texas that CSR's selling of asbestos nationwide, even with knowledge that its product might end up in Texas, did not constitute sufficient minimum contacts with Texas to confer personal jurisdiction over CSR).

However, based on the same contacts, West Virginia's highest court held that CSR was subject to personal jurisdiction in West Virginia based on the same sales of asbestos across the United States. *W. Virginia ex rel CSR, Ltd.*, 441 S.E.2d at 61; *accord W.R. Grace & Co. v. CSR Ltd.*, 666 N.E.2d 8, 11 (Ill. App. 1996) (holding that CSR's sale of asbestos nationwide, with knowledge that its product might end up in Illinois, constituted sufficient minimum contacts with Illinois to confer personal jurisdiction), *appeal denied sub nom. W.R. Grace & Co. v. Ensey*, 671 N.E.2d 745 (Ill. 1996).[12] At least one court has recognized the

[12] As Justice O'Connor noted in *Asahi*, the Court did not determine "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the

untenable position in which this places a defendant. *See W. Virginia ex rel CSR, Ltd.*, 441 S.E.2d at 660 (noting CSR's "plight," that "it is subject to suit in all fifty states," but a ruling in its favor in one state "will, nonetheless, not be binding in any other jurisdiction").[13]

Some courts have even gone so far as to create a burden on foreign defendants to take affirmative steps to *prevent* sales to a particular State to avoid being haled into court there, creating yet another split of authority. *Compare Uberti*, 892 P.2d at 1363 n.8 (noting that defendant could have avoided personal jurisdiction in Arizona by "making some affirmative effort to preclude distribution of its

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aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits." 480 U.S. at 113 n.* (emphasis in original).

[13] Dow Canada, too, has been subject to inconsistent decisions, even within California. *Cf.* Boughton v. Bombardier Recreational Products, Inc., No. 09-0165714 (Cal. Super. Ct., Shasta County, June 7, 2010) (holding in other Sea-Doo product-liability litigation that Dow Canada is not subject to personal jurisdiction in California). In still other Sea-Doo product-liability litigation, courts have found that Dow Canada is not subject to personal jurisdiction in Florida, Oregon, or Tennessee. Ball v. W & W Motor Sports, Inc., No. 2005 CA 8212 NC (Fl. Circ. Ct., Sarasota County, Oct. 26, 2006); Zdeb v. Bombardier Corp., No. 2005 CA 7916 (Fl. Circ. Ct., Orange County, Nov. 3, 2006); Cox v. Bombardier, Inc., No. 3:04-1059 (M.D. Tenn. Feb. 1, 2006); Faber v. Bombardier, Inc., No. CV-04-645 (D. Or. Oct. 20, 2005). Another state court, however, found Dow Canada subject to personal jurisdiction in Missouri. Baird v. Bombardier, Inc., No. CV503-406CC (Mo. Circ. Ct., Miller County, Nov. 17, 2005).

products in our state") *and Nicastro v. McIntyre Machinery Am., Inc.*, 987 A.2d 575, 591 (N.J. 2010)[14] ("A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State.") *with Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 666-67 (Utah 1989) (finding no personal jurisdiction even though "defendants have not placed any restrictions upon the sale of their products in any particular section of the United States").[15]

In addition to the inconsistency this split of authority has created, it also threatens to trigger a race to the bottom, as jurisdictions compete to minimize the level of contacts necessary to meet

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[14] The petition in *J. McIntyre Machinery Ltd. v. Nicastro* (No. 09-1343) requests certiorari to review this decision.

[15] The Supreme Court of Oklahoma, however, recently found that even affirmative steps by a nonresident defendant to avoid the forum did not avoid personal jurisdiction. The defendant imported cigarettes from Canada to several out-of-state locations and then sold them to various Native American tribal entities, including Muscogee Creek Nation Wholesale in Oklahoma. *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 WL 2674999, at *5-*6. Even though the defendant labeled the cigarettes "for reservation sales only," the court concluded that the substantial volume of sales to Muscogee Creek Nation Wholesale showed intent to serve "the general public in Oklahoma" and this, the court erroneously concluded, satisfied even the stream-of-commerce-plus test. *Id.* at *4-*5. On that ground, the court concluded that it could defer selection of the governing legal standard. *Id.* at *4 ("We have not heretofore chosen between these conflicting versions of the stream-of-commerce theory and we need not wade into that swamp today . . . ").

the minimum contacts standard. For example, in *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006), the court held that " 'mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce.' " The court arrived at that conclusion even though this Court has held that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. States understandably may fear that their plaintiffs will be shortchanged if they fail to adopt the most permissive standard for personal jurisdiction, once other States have done so. *See W. Virginia ex rel CSR, Ltd.*, 441 S.E.2d at 660 (expressing concern at the possibility that if West Virginia "declined jurisdiction, Mississippi plaintiffs will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs").

II. After Decades of Uncertainty, the Question of Stream-of-Commerce v. Stream-of-Commerce-Plus Should Be Settled by This Court to Guide State and Federal Courts and to Reliably Inform Foreign Participants in the Global Economy

In *World-Wide Volkswagen*, this Court addressed the importance of having settled rules and predictability in deciding questions of personal jurisdiction. 444 U.S. at 297. "The Due Process

Clause, by ensuring the 'orderly administration of the laws,' [citation], gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* (citing *International Shoe*, 326 U.S. at 319). Having different courts throughout the United States apply different standards in deciding routine issues of personal jurisdiction is directly contrary to this fundamental principle.

The concern expressed by this Court in the interstate context of *World-Wide Volkswagen* has even greater significance today in light of the expansion of the global economy. Businesses outside the United States may wish to arrange their affairs in such a way so that they are not governed from afar by the laws of California or other American States. *See Asahi*, 480 U.S. at 114 (voicing particular concern about requiring a defendant to submit to "a foreign nation's judicial system"). Yet given the law as it currently stands, a foreign component manufacturer has no way of predicting what conduct will or will not subject it to suit in the United States.

Given the significance of American markets in the global economy, the doubt and uncertainty as to what jurisdictional standards will be applied by different American courts presents a substantial problem for foreign participants seeking to order their affairs without subjecting themselves to the jurisdiction and directives of California or other American courts. And the susceptibility of foreign

companies to suit in state courts can be a substantial consideration for investing in such foreign companies.

Resolution by this Court is also needed to provide clear guidance to state courts and lower federal courts that have long taken differing views on this issue.[16] As this case illustrates, there are substantial transaction costs to litigants and the

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[16] Examples of just some of the federal district court decisions in the past few months that have cited *Asahi* illustrate the frequency with which the unsettled stream-of-commerce issue arises. *See, e.g., OneBeacon Ins. Group v. Tylö AB*, No. 3:08-cv-1167, 2010 WL 3037976, at *7-*8 (D. Conn. Aug. 4, 2010) (noting that the test is unsettled, but finding personal jurisdiction under stream-of-commerce-plus test); *Jumpp v. Jerkins*, No. 08-6268, 2010 WL 2773582, at *3 & n.5 (D.N.J. July 7, 2010) (citing stream-of-commerce-plus test, but noting that test is unsettled); *Convergence Technologies (USA), LLC v. Microloops Corp.*, No. 1:09cv1256, __ F. Supp. 2d __, 2010 WL 1931743, at *6-*7 (E.D. Va. May 11, 2010) ("the *World-Wide Volkswagen* and *Asahi* decisions have created significant confusion in lower courts"); *Recaro N. Am., Inc. v. Holmbergs Childsafety Co., Ltd.*, No. 09-12256, 2010 WL 1658033, *6-*7 (E.D. Mich. April 23, 2010) (finding personal jurisdiction over foreign suppliers under stream-of-commerce-plus test but as interpreted by *Tobin*); *Sandisk Corp. v. ITE Technologies, Inc.*, Nos. 07-cv-605, 07-cv-607, 2010 WL 1410728, at *4-*5 (W.D. Wis. April 2, 2010) ("Unfortunately, the [*Asahi*] Court could not agree on the contours of the theory"; "the Federal Circuit has managed to avoid taking a stance"). *See also Cooper v. Faith Shipping*, No. 06-892, 2010 WL 2360668, at *1, *4, *7 (E.D. La. June 9, 2010) (applying Fifth Circuit stream-of-commerce test that "mere foreseeability or awareness is a constitutionally sufficient basis" (internal quotation marks omitted); finding personal jurisdiction over foreign defendant that placed consigned product "in the stream of commerce with full awareness that it would reach Louisiana").

judicial system that result from the uncertainty of the constitutional due-process standard. Litigants and courts should not have to grapple with the same issue over and over again. Yet only this Court can resolve the simple and straightforward question of what test applies in deciding whether an out-of-state product manufacturer had sufficient minimum contacts with the forum to subject itself to jurisdiction for claims arising out of that product.

Resolution is needed not only to assist lower courts that seek guidance, but also to enforce constitutional constraints on courts that may be less interested in searching out the governing standard. That a number of state courts of last resort, including the California Supreme Court, have not settled this issue for their respective judicial systems suggests that (as here) many state courts are simply unconcerned with federal due process limitations on their own jurisdiction. Only resolution by this Court can assure adherence to the requirements of due process.

III. This Case Is an Excellent Vehicle to Decide the Question of Stream-of-Commerce v. Stream-of-Commerce-Plus

This case presents the ideal vehicle for finally resolving the question of whether merely depositing goods in the stream of commerce, with knowledge that some will end up in the forum State, is enough to satisfy the minimum contacts standard. Union Carbide Canada manufactured the gas tanks and sold them to Bombardier exclusively in Canada. (R. at 59.) The Superior Court of California

expressly based personal jurisdiction solely on the finding that Union Carbide Canada was informed by Bombardier that Bombardier's Sea-Doo watercraft (incorporating the component gas tanks) would be sold in the United States, including California. App. C & D at 5a-6a, 8a-11a, 13a, *infra* (R. at 231-34, 236, 245-46). A case such as this, involving a component part delivered in a foreign jurisdiction most clearly presents the issue of stream-of-commerce v. stream-of-commerce-plus. The relevant distinction between a component-part supplier and a finished-product manufacturer is that the component-part supplier—whatever it is told—does not control where finished products are sold. Rather, the finished-product manufacturer is the party that makes the election whether to sell its finished products in such a manner that they are distributed into the forum State.

We expect that plaintiffs and Bombardier will argue, as they did below, that Union Carbide Canada "designed" its component for the California market by producing gas tanks that complied with Canadian Coast Guard and U.S. Coast Guard standards, in accordance with Bombardier's design specifications. *See* n.5, *supra*. The Superior Court, however, did not give this argument any probative weight, and on review, California accords deference to the Superior Court's factual findings. *Id.*

In any event, even if compliance with U.S. safety standards were attributed to Union Carbide Canada's "design," this would not constitute the kind of "additional conduct" necessary to meet the stream-of-commerce-plus test. In *Asahi*, Justice

O'Connor opined in dicta on several possible factors to find such additional conduct, including "designing the product for the market in the forum State, ..." 480 U.S. at 114. Simply meeting a U.S. safety standard, however, is not specifically designing a product for California or any other particular forum State.[17]

By meeting general U.S. safety standards, a foreign component maker does not direct the component to the forum. It simply allows a manufacturer who buys the component the subsequent option of selling the finished product in the United States. Meeting the standard, then, is

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[17] The First Circuit rejected a comparable argument for jurisdiction based on the alleged "design" of a product for the Puerto Rico market. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997). The defendant sold tire-rim components outside the forum to a wheel manufacturer for use with sand-track tires, knowing that the end products would be widely sold. *Id.* at 82, 84-85. Applying in substance the stream-of-commerce-plus test, the court held that the defendant was not subject to personal jurisdiction in Puerto Rico. *Id.* at 84-85. The court rejected an argument that the defendant should be deemed to have designed the product for Puerto Rico because it was designed for use in the sand and Puerto Rico has "an island ecosystem containing an abundance of sandy beaches ideal for dune buggies and other sandworthy vehicles." *Id.* at 85. The court found that basing jurisdiction on the design of a product for use in sand—which covers "roughly 18% of the world's land surface"—would offend constitutional limits. *Id.*

Here, plaintiffs' argument for jurisdiction based on supplying a component for a finished product designed to be used in water (and thus produced to meet Coast Guard standards in Canada and the United States) is similarly devoid of force.

at most just a surrogate for showing awareness that the component could end up in the forum as part of the end product—and awareness is not sufficient to meet the stream-of-commerce-plus test.

Further, if consideration is given to the fact that the subject gas tank was made to meet U.S. safety standards, it would not make this case anomalous but would leave it in the mainstream. *Any* product that becomes the target of a product-liability lawsuit is quite likely to be subject to one of the vast array of U.S. safety standards that concern numerous and varied products. Thus, this case is an excellent vehicle to decide the personal jurisdiction issue whether such a factor is considered or not.

This Court may grant the pending petition for a writ of certiorari in *J. McIntyre Machinery Ltd. v. Nicastro* (No. 09-1343) for the reasons stated in that petition, but this case provides the ideal vehicle to answer the longstanding conflict over stream-of-commerce v. stream-of-commerce-plus. While the New Jersey Supreme Court invoked the stream-of-commerce test, the petition itself argues that under the facts of that particular case, petitioner J. McIntyre should prevail under *either* test. *J. McIntyre* pet. at 22, 31a-32a.

Here, by contrast, this case turns on which test is applied: stream-of-commerce or stream-of-commerce-plus.

CONCLUSION

For the foregoing reasons, Dow Canada respectfully requests that the Court grant this petition.

Respectfully submitted,

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