No. 09-

IN THE

Supreme Court of the United States

J. Mc INTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a "new reality" of "a contemporary international economy" permit a state to exercise, consonant with due process under the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream–of–commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

LIST OF PARTIES

Petitioner J. McIntyre Machinery, Ltd. is company organized and existing under the laws of the United Kingdom. Its principal place of business is in Nottingham, England.

Respondents Robert and Roseanne Nicastro, husband and wife, are residents of the State of New Jersey.

Defendant McIntyre Machinery America, Ltd. filed for bankruptcy in 2001 and has not participated in this action.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner is a company formed under the laws of the United Kingdom. Petitioner is not a publicly traded company and no publicly traded company owns 10% or more of Petitioner's equity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The February 2, 2010 opinion of the Supreme Court of New Jersey is reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), and is reprinted in the Appendix (App.) at 1a. The Supreme Court of New Jersey affirmed the April 9, 2008 decision of the Superior Court of New Jersey, Appellate Division, reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super. 539, 945 A.2d 92 (App. Div. 2008), and reprinted at App. 73a. The New Jersey Appellate Division reversed the unpublished November 3, 2006 decision and order of the New Jersey Superior Court, Law Division granting Petitioner's motion to dismiss for lack of personal jurisdiction, reprinted at App. 111a. In its unpublished decision dated May 26, 2005, reprinted at App. 154a, the New Jersey Appellate Division reversed (and remanded for jurisdictional discovery) the March 5, 2004 decision and order of the New Jersey Superior Court, Law Division granting Petitioner's first motion to dismiss for lack of personal jurisdiction, reprinted at 160a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Supreme Court of New Jersey's opinion was rendered on February 2, 2010, and the issue of personal jurisdiction over Petitioner consistent with the Due Process Clause of the 14th Amendment to the United States Constitution is not subject to further review in the courts of the State of New Jersey. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment XIV, Section 1, Clause 3:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION

In a sweeping departure from this Court's due process jurisprudence, a divided New Jersey Supreme Court held that, in light of a purported "radical transformation of today's global market," a manufacturer anywhere in the world is now subject to *in personam* jurisdiction in a products liability action in New Jersey state court under the stream-of-commerce theory if that defendant targets the United States economy for the sale of its product and it is purchased by a New Jersey consumer. Although New

Jersey is but one state, the impact of this decision resonates far beyond its borders. New Jersey has 8.7 million people,[1] consumers all, who buy products manufactured across the world. By this decision, New Jersey will exercise worldwide jurisdiction, without constitutional limits. The decision is wrong and the impact is profound.

STATEMENT OF THE CASE

1. This petition arises from a products liability action in which Respondent Robert Nicastro alleges that he was injured on October 11, 2001, while using a three-ton shear machine manufactured by Petitioner J. McIntyre Machinery, Ltd. ("J. McIntyre") in the course of his employment with Curcio Scrap Metal, Inc. in Saddle Brook, New Jersey. On September 22, 2003, Mr. Nicastro, with his wife Roseanne in consortium, filed this action in the Superior Court of New Jersey against J. McIntyre and an unaffiliated distributor called McIntyre Machinery of America, Inc. ("MMA") located in Stow, Ohio. On December 22, 2003, J. McIntyre answered the complaint and soon thereafter raised the defense by motion to dismiss that the New Jersey court lacked personal jurisdiction over it.

The allegedly involved shear machine appears to have been manufactured by J. McIntyre in 1995 in Nottingham, England. It was then sold and shipped to MMA in Ohio. J. McIntyre and MMA were distinct

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1. *See* U.S. Census Bureau, State and County Quick Facts for New Jersey, web page at http://quickfacts.census.gov/qfd/states/34000.html.

corporate entities, independently operated and controlled, and without any common ownership. J. McIntyre had no written contract or agreement with MMA other than the invoices that accompanied the J. McIntyre products purchased by MMA.

The owner of Curcio Scrap Metal, Frank Curcio, attended a scrap metal recycling industry convention in Las Vegas, Nevada in 1994 or 1995 where he visited MMA's demonstration booth. In 1995, Curcio purchased the shear machine from MMA in Ohio. The machine was shipped from MMA's headquarters in Stow, Ohio to Saddle Brook, New Jersey. The invoice for the purchase instructed Curcio to make a check payable to "McIntyre Machinery of America, Inc."

On March 5, 2004, the trial court granted J. McIntyre's motion and dismissed the Complaint for lack of personal jurisdiction, finding that J. McIntyre did not have sufficient contacts with New Jersey to justify the exercise of jurisdiction over it. The trial court held that under even the most liberal accepted form of the stream–of–commerce theory, J. McIntyre would not be subject to jurisdiction in New Jersey. (App. 170a-171a).

2. Respondents appealed to the Superior Court of New Jersey, Appellate Division. On May 26, 2005, the Appellate Division opted not to decide the merits, but remanded the case to the trial court for jurisdictional discovery. (App. 156a-157a). After Respondents conducted jurisdictional discovery, J. McIntyre again moved, on September 11, 2006, to dismiss the complaint for lack of personal jurisdiction.

3. On November 3, 2006, the trial court granted J. McIntyre's motion and again dismissed Respondents' complaint for lack of personal jurisdiction, finding that despite jurisdictional discovery, no evidence was presented to support the exercise of personal jurisdiction over J. McIntyre. (App. 130a). The trial court held that J. McIntyre was not subject to personal jurisdiction in New Jersey because there was no basis to conclude that J. McIntyre had any expectation that one of its products would be sold and shipped to New Jersey. (*Id.*)

4. Respondents again appealed to the New Jersey Superior Court, Appellate Division. On April 9, 2008, the New Jersey Appellate Division reversed the trial court's decision, holding J. McIntyre satisfied the "stream-of-commerce plus" test articulated by Associate Justice Sandra Day O'Connor in *Asahi Metal Indus. Co. v. Sup. Court*, 480 U.S. 102, 112 (1987), because: 1) J. McIntyre does business in the United States through a single distributor; and 2) New Jersey is one of the fifty United States and, thus, a possible location for end users of its products. (App. 105a-106a). J. McIntyre timely petitioned the New Jersey Supreme Court for review by certification.

5. On February 2, 2010 the New Jersey Supreme Court upheld the Appellate Division's finding of personal jurisdiction. In a decision that begins with the sentence, "[t]oday, all the world is a market," a five-justice majority found that although J. McIntyre had none of the traditional minimum contacts with New Jersey for purposes of jurisdictional analysis, and was not involved in the sale of the product, it was

nevertheless amenable to jurisdiction in the state. (App. 1a, 14a, 38a). The court found that because J. McIntyre sold products in the United States generally through a single unaffiliated distributor, it was engaged in what the court deemed to be a "distribution scheme" that targeted the "entire United States, including New Jersey." (App. 39a-40a). The court stated that "by targeting the United States economy for the sale of its products," J. McIntyre knew or reasonably should have known that this "distribution scheme" would "make the subject shear machine available to a New Jersey consumer." That was enough, held the court, to allow New Jersey state courts to exercise jurisdiction without violating the Due Process Clause of the United States Constitution. (App. 40a-41a). In finding jurisdiction over J. McIntyre, the Court expressly premised its finding upon a judicially-noticed global economy "driven by startling advances in transportation of products and people and instantaneous dissemination of information." (App. 14a-15a). Claiming New Jersey's strong interest in protecting its citizens from presumptively defective products, the court contended that traditional notions of fair play and substantial justice in a jurisdictional analysis should reflect what it termed "the radical transformation of the international economy." (App. 35a). The case was remanded to the trial court.

6. Petitioner will apply to this Court, pursuant to Rule 32.3, for leave to lodge an affidavit to place before this Court the following facts of the current status of J. McIntyre, facts not present in the record: On April 22, 2009, J. McIntyre filed for Administration in the United Kingdom under the Insolvency Act 1986 and is presently in liquidation proceedings. Respondents filed proofs of

unliquidated monetary claims in those proceedings. The liquidation proceedings remain pending and dissolution has not been sought.

REASONS FOR GRANTING THE PETITION

I. Using The "Global Marketplace" As A Premise For Limitless Jurisdiction Eliminates Constitutional Protections For Foreign Manufacturers With No Connection To The Forum State That Seek To Enter The United States Market.

As the conceptual foundation for its new stream–of–commerce theory, the Supreme Court of New Jersey took judicial notice of an un-qualified and unexplained notion: the "global marketplace." *Nicastro*, 201 N.J. at 72, 987 A.2d at 589 ("In the twenty-two years since *Asahi Metal Indus. Co. v. Sup. Court*, 480 U.S. 102, 112 (1987), transnational commerce has accelerated and we realize more than ever that we live in a global marketplace."). (App 31a). The court determined that mere participation in the United States segment of the global economy, where such participation culminates in the purchase of a single product by a New Jersey consumer, is sufficient basis for jurisdiction to meet the due process requirements of the Constitution. Nothing "discovered" by the New Jersey Supreme Court warrants the abandonment of the protections afforded all persons who face suit in our Nation's state courts. Yet that is precisely what this decision accomplishes.

A. "Global Commerce" Has Not Fundamentally Changed the Distribution and Sale of Products.

Despite the stated importance to the lower court's holding, the judicially–noticed theme of the "global marketplace" was not explored or explained, much less given the heft of even the barest of evidentiary support. Unbothered by its lack of critical analysis or real information, the lower court necessarily assumed that the current status of international trade is such that large industrial machinery now flows more quickly and readily through new, previously un-realized channels. In the real world products small and large, including heavy machinery such as the shear machine at issue (manufactured and sold 15 years ago), travel across borders as they always have: they are shipped. While the United States is certainly part of an international economy, the basic methods of selling and transporting goods are the same as they were in the time of *Asahi*, *supra*, and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Nevertheless, believing that increased international economic activity somehow equates to a metaphysical change in the nature of product transportation and distribution, the lower court was content to vaguely designate the economy's "radical transformation" as grounds for an equally radical expansion of the parameters of personal jurisdiction.

The modern economy has always been global, and foreign manufacturers have been doing business in the United States since the 19th century. Commentators, including those cited by the lower court and Respondents in the proceedings below, describe the

movement as occurring over the last 200 years, not the last 20. *See* Friedman, *The World Is Flat*, 9-10, Farrar, Straus and Giroux, 2006; Licht, *Industrializing America: The Nineteenth Century* 133 (1995). Society's collective ability to communicate and transfer information through electronic means may have accelerated in recent years, and tangible consumer goods can often be ordered and shipped more rapidly to their destinations, but the conduits through which goods travel are essentially no different than they were 50 years ago. This is best illustrated by the case at hand. Here the three-ton shear machine at issue was ordered by telephone and shipped overland from MMA's Ohio facility to Curcio Scrap Metal in New Jersey, a common form of shipment used today as it has for decades. Today, as in yesteryear, products are shipped to their final destinations by air, sea, rail, or road.

Moreover, to pretend that this case exemplifies some unprecedented tide of foreign products infiltrating New Jersey without quarter, such that its courts must abandon any semblance of constitutional due process, ignores that New Jersey has always been a portal state. International trade has long figured prominently in state and national economies. Insofar as it is used by the majority to usher in a new jurisdictional theory, the "globalization" term is an empty set.

B. In Finding Jurisdiction Over Any Manufacturer Whose Product Is Sold To A New Jersey Purchaser, New Jersey's High Court Places New and Severe Burdens on International and United States Commerce.

The rule established by the lower court creates a new and substantial burden on United States and international manufacturers. The impact on trade is potentially enormous. Now, any individual or entity, no matter how small, making products anywhere in the United States or abroad that are purchased by a New Jersey consumer, may be forced to defend a lawsuit there.

As this Court has observed, a coherent and reasonable jurisdictional theory is necessary for participants in our national economic life, a core consideration in any jurisdictional analysis. *See World-Wide Volkswagen*, 444 U.S. at 292-293.[2] Over the course of our economy's growth and expansion, jurisdictional analysis has always required that nonresident defendants be given "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in

2. "The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *See World-Wide Volkswagen*, 444 U.S. at 293 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949)).

judgment)). A court's jurisdictional determination, consistent with due process, "'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.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This "predictability" allows entities doing business within our country's borders to have true—as opposed to imputed or constructive—awareness of the possible risks their primary conduct will entail. Where jurisdiction is based upon the defendant's own forum-directed conduct, the "fair notice" requirement is satisfied and, in the truest sense, a lawsuit in the forum cannot be unexpected. *See Burger King*, 471 U.S. at 472.

The lower court forgets these lessons, and the impact is profound not only on foreign citizens, but also on American citizens. Now, no American individual, entity or enterprise can manufacture products anywhere without the prospect of being subject to the vicissitudes of litigation in a New Jersey court.

Consider the following hypothetical. A candle maker in Alaska starts a small candle business in Anchorage. His candles are large and can be used in most homes anywhere. He has no developed marketing or sales plan as of yet, but is interested in selling as many candles as he can. His friend in Seattle, Washington has a gift store and they have agreed to an arrangement in which the friend will sell the candle maker's products in Seattle. A New Jersey man vacations in Seattle, visits the shop and orders one of the larger candles, which the

shopkeeper agrees to ship to his home in New Jersey. The Alaskan candle maker is never informed of this sale. The day the candle arrives, the New Jersey man opens the package and lights the candle. A short time later, the candle improperly melts and a fire starts, consuming the house and injuring the man's family. The New Jersey man sues the candle maker for damages in his state court alleging product defect. Though the candle maker had no connection to New Jersey and he exhibited no intention, actions, or awareness that his product would be sold and shipped to someone there, under the lower court's holding the candle maker is nevertheless amenable to jurisdiction and is now forced to defend the lawsuit in New Jersey. That result, now sanctioned by the New Jersey Supreme Court, violates the Alaskan candle maker's due process rights guaranteed by the Constitution and is offensive to "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

C. The Lower Court's Holding Erroneously Requires That Due Process Must Yield to Globalization.

The lower court contends that because the United States economy is part of a "global" whole, there should no longer be any impediments to New Jersey courts exercising personal jurisdiction over a foreign defendant, regardless of that defendant's lack of awareness or directed activity toward the state. *Nicastro*, 201 N.J. at 79, 987 A.2d at 593. (App. 40a). However, to the extent the court has formulated a new

expansion that is informed by or premised on the "global marketplace," its ruling must still comply with the Constitution's due process requirements, which it does not. As stated by Justice Hoens in her dissent, the majority's repeated allusion to the "global marketplace" cannot mask the fact that its ruling "stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point." *Id.* at 82, 987 A.2d at 594-95 (J. Hoens, dissenting). (App. 45a).

As life in the United States—and the world—has changed, this Court's analytical framework for determining the scope of personal jurisdiction over a foreign defendant has endeavored to keep pace, while always preserving a defendant's right to due process. This Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), began an expansion of a state's ability to exercise jurisdiction over foreign defendants. As early as 1957, this Court attributed this expansion "to the fundamental transformation of our national economy," *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957), a notion that was again considered in *World-Wide Volkswagen*, 444 U.S. at 293 ("[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.").

Even in light of the ever-progressing state of technology and economic conditions, the constitutional principle underlying *International Shoe* and its progeny is that a nonresident cannot be subjected to jurisdiction unless he has purposefully established a connection with the forum. *See Burger King Corp.*, 471 U.S. at 474. As

stated by the Sixth Circuit in *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996):

> The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able "to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit."

Id. at 1262 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

While cognizant of economic progress and a changing world, this Court's treatment of personal jurisdiction has continued to focus on whether a defendant has some minimally-directed activity, contacts with, or specific awareness of its products in the forum state such that requiring the defendant to answer a suit there is consistent with due process. *See Asahi*, 480 U.S. at 112, 117; *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297. The lower court's opinion is a direct assault on the importance of state sovereignty in a jurisdictional analysis. For its new jurisdictional test, the lower court eliminates state lines, for its holding is starkly simple: the United States equals each state. Yet, this Court has held otherwise. *See World-Wide Volkswagen*, 444 U.S. at 293 ("we have never accepted

the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

Nor was the lower court bashful about the controversial nature of its ruling, speaking with a breathtaking candor that suggests that it was expecting, and even inviting, review by this Court:

> [W]e discard outmoded constructs of jurisdiction in product liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.

Nicastro, 201 N.J. at 75-76, 987 A.2d at 591. (App. 35a). To this implicit invitation, the dissenters added their own plea for this Court to take review of this case. (App. 70a, 72a).

Whatever the lower court means by "outmoded constructs of jurisdiction," the consequence is plain: it has "discarded" the always–present protections of due process in its eagerness to create a New Jersey market for lawsuits directed to manufacturers where ever they might be.

II. The Lower Court's Stream–Of–Commerce Theory Is Not Grounded In This Court's Due Process Jurisprudence.

A finding of personal jurisdiction under the stream-of-commerce approach can properly rest only upon a finding of some purposeful conduct, knowledge or awareness by the defendant such that an exercise of jurisdiction over it would not offend traditional notions of fair play and substantial justice. *See Asahi*, 480 U.S. at 112, 117; *World-Wide Volkswagen*, 444 U.S. at 298. Until now, a defendant's single act of placing an allegedly defective product into the stream-of-commerce outside the forum, without more, has never been enough to confer jurisdiction. The lower court renders any specific intent or knowledge of the role of a particular state in a distribution, sales, or marketing effort totally irrelevant to the jurisdictional determination. This is a complete departure from this Court's precedents.

A. This Court Requires More Than a State Merely Being Part of this Union to Qualify as a Constitutionally–Appropriate Forum.

1. *World Wide Volkswagen's* requirement of a defendant's purposeful activity

This Court first articulated the stream–of–commerce theory in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286. In *World-Wide Volkswagen*, the issue was whether an Oklahoma court could exercise personal jurisdiction over an automobile retailer and wholesaler, both New York corporations, in a products liability action. *Id.* at 288-289. The defendants' only

contact with Oklahoma was through the sale of a car to a non-resident consumer in New York, who then drove the car to Oklahoma where the subject accident occurred. *Id.* This Court found no "efforts [by defendants] to serve, directly or indirectly, the market for its product in [Oklahoma]," *id.* at 298, and held that defendants could not be subjected to personal jurisdiction where their alleged contacts with the forum state were based on the unilateral act of the consumer and not on any act of their own. *Id.* at 298.

The *World-Wide Volkswagen* plaintiffs argued that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that the [subject automobile] would cause injury in Oklahoma." *Id.* at 295. This Court rejected the argument, confirming that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* This Court then stated, however, that foreseeability is not "wholly irrelevant:"

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297.

This Court went on to hold that the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a

corporation that delivers its products into the stream-of-commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 298. Thus, *World-Wide Volkswagen* made plain that jurisdiction under a stream-of-commerce framework cannot be based solely upon the foreseeable unilateral actions of a consumer, but rather, must rest on the quality of the defendant's activities directed toward the forum, such that a reasonable expectation of a lawsuit in that state could not come as a surprise. *Id.* Then, as now, the proper focus was on the defendant's behavior.

2. *Asahi's* emphasis on a defendant's activities toward the forum and reasonable expectation of suit

This Court again reviewed the stream–of–commerce theory in its plurality opinions in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). *Asahi* arose from a products liability case following a motorcycle accident in California. The injured plaintiff alleged that the motorcycle tire, tube and sealant were defective. *Id.* at 105-06. Plaintiff sued the Taiwanese manufacturer of the tube, which in turn filed a cross-complaint for indemnification from Asahi Metal Industry Company, the Japanese component manufacturer of the tube's valve assembly. *Id.* at 107. Asahi had no offices, property, or agents in the forum state, solicited no business and made no direct sales in the state, and did not design or control the system of distribution that brought its product into the forum state. *Id.* at 108. Asahi challenged personal jurisdiction in California.

All nine Justices agreed that the California courts could not exercise personal jurisdiction over Asahi because to do so would not comport with traditional notions of fair play and substantial justice as due process requires. The Justices, however, did not agree on the scope of the stream–of–commerce theory or whether minimum contacts existed on the facts presented.

Four Justices joined in an opinion authored by Justice O'Connor. This plurality stated: ". . . a defendant's awareness that the stream-of-commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. In Justice O'Connor's opinion, "[t]he placement of a product into the stream-of-commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Additional conduct of the defendant could include designing a product particularly for the forum state, advertising in the forum state, establishing service channels for customers in the state, or marketing through a sales agent in the forum state. *Id.* Because there was no showing of additional conduct by Asahi, this plurality found Asahi's contacts with California insufficient for the exercise of personal jurisdiction.

Four other Justices joined in a plurality opinion authored by Associate Justice William J. Brennan, Jr., rejecting the "additional conduct" requirement:

> The stream-of-commerce refers not to unpredictable currents or eddies, *but to the regular and anticipated flow of products* from

> manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being *marketed* in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id. at 117 (emphases added). This plurality concluded that because Asahi was aware of the distribution system that brought its products into California, there were sufficient minimum contacts. *Id.* at 121.

Despite their dispute over the scope of the stream–of–commerce theory, both pluralities agreed that a finding of minimum contacts requires some species of purposeful availment by the defendant toward the forum state. *Id.; see also Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) (under either *Asahi* view, the contact must be purposeful, rather than incidental). In *Asahi*, the two pluralities differed in their respective approach but agreed that due process requires the defendant to have engaged in some minimal activity directed toward the forum. Justice Brennan focused on actual awareness by the defendant that the product was being marketed in the forum state, while Justice O'Connor required additional indicia of purposefully directed activity. In each approach, more than merely depositing a product into the stream-of-commerce and having it unpredictably end up in any state in the Union is required.[3]

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3. In the quarter-century since *Asahi*, a division of opinion as to the proper scope of the stream–of–commerce theory has developed. Courts have interpreted *Asahi* to require that a (Cont'd)

(Cont'd)

defendant's purposeful acts be directed toward the forum before jurisdiction may be exercised. These courts reject the notion that merely depositing a product in the stream-of-commerce is sufficient to confer jurisdiction over a foreign defendant simply because the product ends up in the forum, even where that defendant is deemed to be aware of that possibility. *See Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-947 (4th Cir. 1994); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-376 (8th Cir. 1990); *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550-551 (7th Cir. 2004); *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 693-694 (8th Cir. 2003); *Vargas v. Hong Jin Crown Corp.*, 247 Mich. App. 278, 636 N.W.2d 291 (Mich. App. 2001); *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, 924 S.W.2d 907, 912 (Tenn. App. 1996); *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 374 (Mo. App. 1997).

Other courts adopt a more permissive approach, consistent with Justice Brennan's requirement of awareness of marketing in the forum state without the need for more. *See Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 418-420 (5th Cir. 1993); *Ex Parte Lagrone v. Norco Indus., Inc.*, 839 So. 2d 620, 627-628 (Ala. 2002); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1362-1364 (Ariz. 1995), *cert. denied*, 516 U.S. 906 (1995); *Grange Ins. Assoc. v. State*, 757 P.2d 933, 938 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 616 (W. Va. 1992), *cert. denied*, 508 U.S. 908 (1993); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 674 (Wis. 2001), *cert. denied*, 534 U.S. 1079 (2002).

Yet another group of courts has expressly decided not to decide the question of how to apply the stream–of–commerce theory under *Asahi's* competing pluralities. These courts instead resolve to decide each case on its own facts, creating a

(Cont'd)

Under *World-Wide Volkswagen*, or either of the *Asahi* pluralities, J. McIntyre's mere act of placing the machine into the "stream-of-commerce" outside of New Jersey, without more, is not enough to satisfy the due process requirement necessary for a state to exercise personal jurisdiction. Although a J. McIntyre shear machine may have been purchased by a New Jersey consumer, it cannot be said that J. McIntyre had anything to do with New Jersey's involvement. The lower court has wiped away an entire jurisprudence to reach its intended result: asserting jurisdiction whenever an aggrieved New Jerseyan seeks it in his home court.

Applying an unrestrained stream–of–commerce theory, as the lower court did and *World-Wide Volkswagen* rejected, would create a regime where "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296. This would offer little or no predictability to defendants such that they could be said to have "fair warning" and able to adjust their primary conduct and govern their affairs vis-à-vis the forum. *See Burger King*, *supra*, 472.

(Cont'd)

series of inconsistent results, and no discernable rule. *See Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243-244 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 203-205 (3d Cir. 1998); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993); *Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So.2d 881, 889-890 (La. 1999), *cert. denied*, 528 U.S. 1019 (1999); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 572 (Minn. 2004); *CMMC v. Salinas*, 929 S.W.2d 435, 439-440 (Tex. 1996).

The nearly nine million citizens of New Jersey, just like the citizens of every other state in our Nation, buy and consume goods manufactured from all corners of our country and of the globe. That alone is not, and cannot, be the justification for endowing the New Jersey court system with unrestrained powers to force the world to submit to its sovereignty.

CONCLUSION

For the foregoing reasons, Petitioner J. McIntyre Machinery, Ltd., respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

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