No. 12-525

IN THE

Supreme Court of the United States

CHINA TERMINAL & ELECTRIC CORP., *et al.*,
Petitioners,

v.

JEFFREY WILLEMSEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KARLENE J. WILLEMSEN, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

RULES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar ("DRI") is an international membership organization of more than 23,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys in furtherance of their clients' interests. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and consistent. To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

DRI is particularly well-suited to provide this Court with context for the important constitutional issues raised by this case. DRI's members routinely defend domestic and international clients in product liability litigation across the United States, in both federal and state courts. DRI and its members have extensive experience defending individuals and companies in jurisdictions where their due process rights under the Constitution are at stake. When defendants lack either the requisite qualitative contacts

1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae,* its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received timely notice of amicus curiae's intent to file this brief. Petitioners and respondent have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of the Court.

or quantitative activity for the exercise of personal jurisdiction, they should not be haled into a state's courts in violation of their constitutional rights. DRI members have a significant interest in enforcing and protecting those rights.

DRI submits this brief to underscore the limits that due process principles place on a court's exercise of personal jurisdiction over a foreign defendant, and to illustrate the profound consequences for foreign product manufacturers of all kinds—in Oregon and elsewhere—if the Oregon Supreme Court's exercise of adjudicative jurisdiction over such defendants based solely on the number of their products that make their way into that state is permitted to stand.

SUMMARY OF ARGUMENT

By exercising personal jurisdiction over a Taiwanese component product manufacturer with no connection to Oregon, the Oregon Supreme Court committed a fundamental error in purporting to apply the concurrence in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) ("*J. McIntyre*"). *J. McIntyre* requires a foreign product manufacturer or seller to have both quantitative activity and qualitative contacts with a state before adjudicative jurisdiction may be exercised. The Oregon Supreme Court conflated these two distinct jurisdictional requirements into just one–sales volume–ignoring the critical requirement that a defendant have some qualitative contact with the forum state. Despite professing adherence to Justice Breyer's concurrence, the Oregon Supreme Court reached the unconstitutional result that personal jurisdiction may be exercised in

Oregon's courts based solely on the volume of a foreign defendant's goods that end up in Oregon (so long as it is adequately greater than one), even where, as here, a component manufacturer had no contacts with Oregon.

The Oregon Supreme Court conceded that the four Justices in the *J. McIntyre* plurality would likely conclude that due process would be violated by the exercise of personal jurisdiction over the defendant Petitioners, China Terminal & Electric Corp. and CTE Tech Corp. (collectively, "CTE"). To reach its decision that the exercise of jurisdiction over CTE in Oregon was proper, the lower court relied primarily on its analysis of the concurrence in *J. McIntyre*. In doing so, however, the lower court turned a discussion by the concurrence on its head, converting Justice Breyer's statement that this Court's precedents do not find that a single isolated sale alone is enough for personal jurisdiction into a blanket rule that a regular course of sales is all that is required to satisfy constitutional due process for the exercise of adjudicative jurisdiction.

The Oregon Supreme Court's substitution of the "more than a single sale" factor for the bedrock due process requirement that a defendant have minimum qualitative contacts with the forum state does violence to the *J. McIntyre* concurrence and the plurality, and to the due process rights of CTE and countless other foreign manufacturers of components in finished products sold to Oregonians. An adequate quantum of a defendant's product found in the forum state may be necessary but is not a sufficient condition. Although the Oregon Supreme Court found constitutional solace in quantum as the singular operative requirement, its decision does not,

on its face and in application, comport with this Court's mandate on remand to the Oregon Supreme Court to consider the entirety of *J. McIntyre*.

Oregon and New Jersey are both sovereign states of the United States whose courts are obligated to afford due process protections to foreign defendants before exercising personal jurisdiction over them. In *J. McIntyre*, the highest court of New Jersey, impatient that this Court had not altered the law of minimum contacts for 24 years following *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), to accommodate perceived changes in global commerce, formulated its own personal jurisdiction doctrine, which was soundly rejected by this Court. In this case, the highest court of Oregon has demonstrated its impatience with the re-affirmation in *J. McIntyre* of this Court's personal jurisdiction jurisprudence as it stood before *Asahi*. The effect is the same: both courts changed what this Court decided are the rights of putative defendants to face justice only where they have voluntarily established a connection with the forum state. If allowed to stand, the decision below would require any component product manufacturer whose products make their way into Oregon to submit to Oregon's jurisdiction provided only that the quantity of those products reaching Oregon, by any means, is at some level sufficiently above one. Contorting the Constitution to permit the exercise of jurisdiction over a foreign defendant that had no contact with the forum state or expectation that its products would end up there is a result that both the plurality and the concurrence rejected in *J. McIntyre*.

The Oregon Supreme Court was wrong and its *sub silentio* rejection of the full extent of the *J. McIntyre*

concurrence under the guise of taking it into account invokes the same concern as the explicit rejection of this Court's precedent by the New Jersey Supreme Court. Summary reversal is warranted because: (1) this case does not involve any "new commerce" considerations reserved against by the concurrence in *J. McIntyre*; (2) the Oregon Supreme Court failed to follow the concurrence, and wrongly held that the quantum of a putative defendant's product that makes its way to Oregon (so long as it is adequately greater than one) is the sole requirement for the exercise of personal jurisdiction; and (3) the result in this case is the same as sought by the New Jersey Supreme Court, where a nationwide distribution system that might lead to products being sold in any state authorized a state court to exercise adjudicative jurisdiction over the product's manufacturer. In *J. McIntyre*, this Court confirmed that such a result is unconstitutional.

ARGUMENT

AFTER REMAND BY THIS COURT, THE OREGON SUPREME COURT FAILED TO GIVE FULL CONSIDERATION TO THE OPINIONS IN *J. MCINTYRE* AND VIOLATED PETITIONERS' DUE PROCESS RIGHTS.

A. The *J. McIntyre* Decision

In *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), six Justices of this Court re-affirmed the longstanding principle that a plaintiff must establish a defendant's purposeful availment of the benefits and protections of a state's laws before that state's courts may lawfully exercise jurisdiction over the defendant.

Absent the requisite purposeful conduct by the defendant toward the forum state, personal jurisdiction cannot lie, notwithstanding the "metaphor" of the "stream of commerce." *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011). This Court concluded that because petitioner J. McIntyre Machinery, Ltd. did not itself have any contacts with New Jersey and, therefore, did not purposefully avail itself of conducting activities within that state, New Jersey's exercise of adjudicative jurisdiction over it was unconstitutional. *J. McIntyre*, 131 S. Ct. at 2790-91 (opinion of Kennedy, J.).

B. The *J. McIntyre* Concurrence

Writing a separate opinion concurring in the judgment, Justice Breyer, joined by Justice Alito, stated that the New Jersey Supreme Court premised its finding of jurisdiction over J. McIntyre upon "a broad understanding of the scope of personal jurisdiction" based on a claim that "'[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade.'" *J. McIntyre*, 131 S. Ct. at 2791 (opinion of Beyer, J.) (*quoting Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 52, 987 A.2d 575, 577 (2010)). While conceding that there have been "many recent changes in commerce and communication," adverting particularly to the Web and internet commerce, Justice Breyer stated that the case did not present any of those issues, and concluded that its outcome was determined by application of this Court's precedents. *Id*. (opinion of Breyer, J.). Concerned that those precedents, and the jurisdictional standards they contain, might not adequately address developments in technology and internet-based commerce that could arise in future cases, the concurrence declined to go beyond

what it deemed to be the application of what this Court had previously decided. *Id.* at 2793.

Justice Breyer recounted the facts of the case precisely as found by the New Jersey Supreme Court: (1) J. McIntyre's American distributor had sold and shipped one machine to New Jersey; (2) J. McIntyre wanted the distributor to sell its machines to anyone in this country willing to buy them; and (3) J. McIntyre's representatives attended trade shows in some states, but not in New Jersey. *Id.* at 2791 (*citing Nicastro*, 201 N.J. at 54-55, 987 A.2d at 578-79). Justice Breyer stated that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary." *Id.* at 2792 (opinion of Breyer, J.). Invoking each of the plurality opinions in *Asahi*, *supra*, Justice Breyer located in this Court's jurisprudence the principle that a single sale "does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *Id.* (*citing Asahi*, 480 U.S. 102 at 111-112, 117 (opinions of O'Connor, J. and Brennan, J.)).

In Part II of the concurrence, following the Part I discussion of the single act doctrine, Justice Breyer stated that the New Jersey Supreme Court's "absolute approach" to personal jurisdiction "abandon[s]" what he identified as "the heretofore accepted inquiry of whether, focusing upon the relationship between 'the defendant, the *forum*, and the litigation,' it is fair in light of the defendant's contacts *with that forum*, to subject the defendant to suit there." *Id.* at 2793 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204

(1977)) (emphases added by the concurrence to both its own language and that quoted by it from *Shaffer*). The New Jersey Supreme Court's opinion—based as it was on nothing more than the occurrence of a product-based accident in the forum state—would allow a defendant's amenability to suit to travel with the chattel, a result rejected by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). Such an approach cannot be reconciled with this Court's longstanding recognition of "the constitutional demand for 'minimum contacts' and 'purposeful availment,' each of which rest upon a particular notion of defendant-focused fairness." *J. McIntyre*, 131 S. Ct. at 2793 (citation omitted).

No fair reading of Justice Breyer's concurrence would conclude that the volume of products that make their way into the forum state is enough, in and of itself, for a constitutionally permissible exercise of personal jurisdiction by a state court over a foreign product manufacturer; such a reading would render Part II of the concurrence a nullity.

C. The *J. McIntyre* Plurality and Concurrence, Compared

The core of the difference between the *J. McIntyre* plurality and concurring opinions is found not in their fundamental analyses of this Court's precedent, which were consistent, but rather in the conclusions they reached about the law's applicability to contemporary and evolving commercial practices. The plurality concluded that the common law development of the law of specific jurisdiction is a sufficiently supple mechanism to "clarify the contours of [the] principle" derived from Justice O'Connor's opinion

in *Asahi*, taking into account both a "defendant's conduct and the economic realities of the market the defendant seeks to serve." *Id.* at 2790. Thus, the general rule of specific jurisdiction announced by the plurality can meet future conditions, be they Web-based contacts or some other market circumstance yet to be developed.

The concurrence, on the other hand, concluded that the contingencies are too great to settle finally on a jurisprudential rule that finds application through common law development. *Id.* at 2794. The contingencies, which the concurrence described generally as "modern concerns," are identified by example as having to do with contemporary forms of Web-based commerce, none of which were implicated in *J. McIntyre*, as they are not in the instant case. *Id.* at 2792-93. As in *J. McIntyre,* this case concerns things that are shipped from overseas to Ohio and later sold by a third party from Ohio to the forum state.

The concurrence states that it is not fashioning jurisprudence, but rather finding it. Yet, even as it locates principles in this Court's precedents, because formulating a rule in new language is too fraught with uncertainty in the face of modern circumstances, the concurrence issues a warning that unless and until such contingencies require a change in the law, it will stay where it is, firmly rooted in defendant's contacts with the forum. As the concurrence states: any change in the law purportedly based upon "contemporary commercial circumstances," must be derived from "considerations [that] are relevant to any change in present law . . .." *J. McIntyre*, 131 S. Ct. at 2794 (opinion of Breyer, J.). The New Jersey Supreme Court pronounced that "[t]oday, all the world is a market,"

Nicastro, 201 N.J. at 52, 987 A.2d at 577, but generalities, as this Court found in *J. McIntyre*, are insufficient to justify a change in the law.

But even as the concurrence merely locates the law, rather than purporting to pronounce it, its analysis richly synthesizes this Court's precedents, embracing earlier pronouncements that are quite consistent with the statements of the plurality. The concurrence, always taking care only to find the principles in precedent, fairly states the following: First, one product sale is not enough. *J. McIntyre*, 131 S. Ct. at 2792. Second, the accepted inquiry is to focus on the relationship among the defendant, forum and litigation "in light of the defendant's contacts *with that forum*," and find jurisdiction if and only if the "constitutional demand for 'minimum contacts' and purposeful availment" are met. *Id.* at 2793 (emphasis in original). Third, special care must be taken when the defendant is foreign. *Id*. at 2793-94. Fourth, the constitutional demand for minimum contacts and purposeful availment "rest[s] upon a particular notion of defendant-focused fairness," which fairness may be violated by dragging a defendant into a jurisdiction, with its particular laws and procedures, where the defendant has had no purposeful contact. *Id*. at 2793. Finally, don't tamper with the law of personal jurisdiction without a reason that has a direct relevance to the principles at stake. *Id*. at 2792-93.

D. The Oregon Supreme Court's Failure to Consider the Second Prong of the *J. McIntyre* Concurrence

After this Court granted CTE's petition for certiorari, vacated the lower court's order, and remanded for further

consideration in light of *J. McIntyre*, the Oregon Supreme Court reaffirmed its earlier determination that personal jurisdiction existed.

In its analysis of *J. McIntyre*, the Oregon Supreme Court concluded that if the plurality opinion by Justice Kennedy and joined in by three other Justices was "controlling, it might be difficult for plaintiff to show that, on this record, CTE's contacts with Oregon were sufficient to establish jurisdiction over it." (Pet. App. 19a). Having effectively conceded that four of the six Justices who joined in the reversal in *J. McIntyre* would not support its exercise of jurisdiction over CTE, the Oregon Supreme Court was left to rely upon the concurrence to support its decision.

This is not the only constraint on the Oregon Supreme Court: the facts here are virtually the same as those in *J. McIntyre*. In both cases, the defendants were foreign manufacturers that had no contacts with the forum state, the defendants' products (a metal shearing machine in *J. McIntyre* and component part battery chargers here) were sold and shipped directly to Ohio, not the forum state, and third parties not within the defendants' control transferred the defendants' products into the forum state. And in each case, the sale or sales of the foreign manufactured product into the forum state by the third party constituted the sole connection with the forum state. "Otherwise, CTE had no contacts with Oregon." (Pet. App. 9a); *and see J. McIntyre*, 131 S. Ct. at 2790 (the New Jersey Supreme Court ". . . could 'not find that J. McIntyre had a presence or minimum contacts in this State–in any jurisprudential sense–that would justify a New Jersey court to exercise jurisdiction in this case.'") (*quoting Nicastro*, 201 N.J. at 61, 987 A.2d at 582). Even the dollar amount of sales

was nearly the same in each case. The invoice amount for the metal shearing machine sold into New Jersey by the Ohio corporation was $24,900.00, *id.* at 2795 (Ginsberg, J., dissenting), and "CTE received approximately $30,929 from Invacare for the battery chargers that Invacare provided to Oregon purchasers." (Pet. App. 9a).

Upon those facts, and claiming authority from Justice Breyer's concurring opinion, the Oregon Supreme Court held: "[T]he volume of sales in this case was sufficient to show a 'regular course of sales' and thus establish sufficient minimum contacts for an Oregon court to exercise specific jurisdiction over CTE." (Pet. App. 19a). There are only two factual distinctions between *J. McIntyre* and this case: (1) that J. McIntyre manufactured the entirety of the product that was sold to Ohio and then re-sold into New Jersey, and CTE manufactured only a component part of a wheelchair; and (2) that only one of J. McIntyre's product found its way into New Jersey, while 1,102 wheelchairs sold by their Ohio manufacturer into Oregon over two years came with CTE battery chargers. It is upon the latter distinction that the Oregon Supreme Court solely relied.

To support its exercise of personal jurisdiction over CTE, the Oregon Supreme Court distorted the *J. McIntyre* concurrence's reasoning in two fundamental ways. First, it elevated Justice Breyer's recognition of the "single sale" doctrine to be the sole requirement for the sufficiency of minimum contacts. The Oregon Supreme Court held that the concurring opinion was based only on the absence of "evidence of a 'regular ... flow' or 'regular course' of sales in New Jersey (or, in the absence of that evidence, evidence of 'something more' . . .)." (Pet. App. 16a).

Second, it ignored those aspects of Justice Breyer's reasoning that upheld the separately imposed requirements of purposeful availment and minimum contacts which serve to guarantee "defendant-focused fairness." Mistaking a partial aspect of Justice Breyer's inquiry for the whole, the Oregon Supreme Court based its exercise of personal jurisdiction over CTE on the sale, by another manufacturer, "of 1,100 of CTE's battery chargers [included in the other manufacturer's electric wheelchairs] within Oregon over a two-year period." In the opinion of the lower court, this volume of sales showed a "'regular . . . flow' or 'regular course' of sales in Oregon." (Pet. App. 19a) (*citing J. McIntyre*, 131 S. Ct. at 2972 (opinion of Breyer, J.)). Thus, for the sole reason that CTE sold a larger quantity of products to Ohio that later made their way into the forum state than did J. McIntyre, the Oregon Supreme Court concluded that the jurisdictional test was satisfied.

In rejecting a single product sale as a sufficient basis for jurisdiction, the *J. McIntyre* concurrence did not substitute a showing of a larger quantity of a defendant's products making their way into the forum for the required showing that a defendant have purposeful minimum contacts with the forum. Certainly, Justice Breyer found in this Court's precedents that more than a single isolated sale is not enough to ground specific jurisdiction. But the concurrence never states that selling some number greater than one of a product into the forum is enough. For Justice Breyer, adherence to this Court's precedents means that the sale of an adequate number of products into the forum state is a necessary condition for finding jurisdiction over a foreign defendant. However, that condition is not, in and of itself, sufficient to find personal

jurisdiction. As held by the *J. McIntyre* concurrence and plurality, purposeful contacts by the defendant, not a third party, with the forum are *also* required. *J. McIntyre*, 131 S. Ct. at 2790-91 (opinion of Kennedy, J.); *id.* at 2793 (opinion of Breyer, J.).

The Oregon Supreme Court also failed to undertake a close reading of the use of precedents by the *J. McIntyre* concurrence. The lower court plucks from the concurrence a quotation from Justice Brennan in *Asahi* concerning "regular flow" and from Justice Stephens in the same case about "regular course of dealing." *Id.* at 2792. Both of these references were employed by the concurrence, along with Justice O'Connor's "something more" language from her opinion in *Asahi*, merely to demonstrate that the single sale doctrine was supported by precedent. The Oregon Supreme Court uses the quoted phrases from the opinions of Justice Brennan and Justice Stephens in *Asahi* for its holding that the regular course of sales is sufficient to find personal jurisdiction, finding that only where such evidence is completely absent should an Oregon court look to Justice O'Connor's "something more" language, even though that language is quoted in the same passage by the concurrence.

Part II of the *J. McIntyre* concurrence states that the due process test for personal jurisdiction compels inquiry into the quality of a defendant's contacts with the forum state: that the Constitution demands minimum contacts and purposeful availment "each of which rest upon a particular notion of defendant-focused fairness." *Id.* at 2793 (*citing Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) and *World-Wide Volkswagen*, 444 U.S. at 296). Justice Brennan, whose language in *Asahi* is cherry-picked by

the Oregon Supreme Court from the concurrence in *J. McIntyre* to provide authority for its holding in this case, dissented in both *Shaffer* and *World-Wide Volkswagen*. In those dissents, Justice Brennan made it clear that he would have abandoned *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and forum state contacts, and focused instead on the plaintiff. That approach is, in operation and effect, the position taken by the Oregon Supreme Court. But the concurrence in *J. McIntyre* pointedly rejects that view, as it employs as precedent with continuing authority the two cases in which Justice Brennan presented his opposite view.

It may be that the overhang of nearly a quarter century of lack of clarity after *Asahi* will continue to cause lower courts to invade the rights of putative defendants, including those from other countries. But clarity is not absent in this case. In *J. McIntyre*, this Court, in what is plain language and pointed use of precedent, provided guidance that the Oregon Supreme Court has ignored. For this reason, this Court should grant the petition and summarily reverse.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be summarily reversed.

Respectfully submitted,

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