NO. 09-1343

IN THE
Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does the Due Process Clause limit the power of a forum state to exercise specific jurisdiction over a manufacturer that creates, controls, or employs a distribution scheme to deliver its products into a national market with the foreseeable consequence that they would be purchased by consumers in any state, including the forum state?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondent Robert Nicastro is a New Jersey resident who was employed by Curcio Scrap Metal, Inc., in Saddle Brook, New Jersey for approximately thirty years until October 2001, when four of his fingers were severed from his right hand by a three-ton metal-shearing machine manufactured in England by the Petitioner, J. McIntyre Machinery Ltd. (hereinafter "McIntyre England"). (J.A. 6a-8a, 58a.) The 25-inch blade of the machine amputated Mr. Nicastro's fingers because it lacked adequate safety protections and was defectively designed. (J.A. 58a-59a, 75a-76a.) But the facts of this case began six or seven years before Mr. Nicastro's accident, when McIntyre England exhibited at the Institute of Scrap Recycling Industries ("ISRI") convention in Las Vegas, Nevada. (J.A. 78a, 114a-115a.)

McIntyre England is a manufacturer of heavy equipment used in the scrap metal industry.[1] It is a United Kingdom corporation with its principal place of business in Nottingham, England. (J.A. 83a, 35a.) Despite its disdain for American law (J.A. 130a) ("American law—who needs it?!"), all McIntyre England wished to do was "sell our products in the States—and get paid!" (J.A. 134a.) Consistent with that desire, McIntyre England regularly marketed the company's heavy equipment for use in the scrap metal industry at trade shows, conventions and

[1] McIntyre England filed for liquidation in Britain in or about April 2009. The Respondents timely filed a Proof of Debt with the Joint Liquidator on March 22, 2010. (*See* Resp'ts' Br. in Opp'n App. 1a.)

conferences throughout the United States from 1990 until 2005. (J.A. 114a-117a.) The president of McIntyre England frequently traveled from the United Kingdom to attend and exhibit at these trade shows, which took place across America in major convention locations on the East, West, and Gulf coasts and in inland locations like Las Vegas and San Antonio. (*Id.*) In total, McIntyre England employees attended twenty-six events in various states during a fifteen-year period. (*Id.*)

At these trade shows, McIntyre England employees had direct contact with potential and actual U.S. customers from around the nation, and would have learned where their machines were going when they were sent to the United States. (J.A. 174a.) ISRI conventions attracted "lots of attendees, at least 3,000, probably more" (J.A. 48a), who were "interested in seeing—and purchasing—new equipment" used in the scrap processing business. (J.A. 49a.) McIntyre England would sell shears "straight off the stand at an American Exhibition" and believed these sales were an indicator of good economic times. (Appellants' N.J. Superior Ct. App. 205.)

At one such trade show in Las Vegas in 1994 or 1995, Mr. Nicastro's employer, Frank Curcio, first learned of the J. McIntyre 640 metal shearing machine (J.A. 77a-78a), a machine that is about eight feet long and six feet high, weighs more than three tons, and uses a 25-inch blade to cut with the maximum force of 180 tons. (Appellants' N.J. Superior Ct. App. 200.) McIntyre England attended that very trade show. (J.A. 115a.) The J. McIntyre 640 shear was distributed throughout the United States by McIntyre England's exclusive distributor

at the time, McIntyre Machinery America, Ltd., (hereinafter "McIntyre America"), of Stow, Ohio. (Pet. App. 76a; J.A. 43a, 52a-53a.)

McIntyre England "appointed" its exclusive distributors (J.A. 52a), who are the only companies "authorized" to sell McIntyre Machinery in the United States. (J.A. 52a-53a.) Any McIntyre England machine purchased through anyone other than an "exclusive distributor" "may not have been authorized for sale by the manufacturer, and as such may be being sold illegally and without the latest operating instructions, warning labels and operator guarding." (*Id.*) McIntyre England built machines for sale by McIntyre America only after McIntyre America received firm orders for those products. (J.A. 135a.) McIntyre England provided literature about its shears to McIntyre America (J.A. 121a), and McIntyre America provided that literature to the U.S. customers of McIntyre England's equipment, including Mr. Nicastro's employer. (J.A. 78a-79a.) This literature provided McIntyre England's address and contact information in England. (J.A. 78a.)

Although McIntyre America was a separate corporate entity from McIntyre England, it used the "McIntyre" name, and it acted as the conduit for McIntyre England machines for the entire nation, "America's link" to McIntyre England. (J.A. 78a.) McIntyre England called McIntyre America its "agent" for U.S. sales. (J.A. 52a-53a.) McIntyre America sold machines and "handled machinery repairs and warranty issues" for McIntyre England. (J.A. 126a.) McIntyre England worked closely with McIntyre America to make sure that McIntyre America was able to sell McIntyre England's products throughout the United States. (J.A. 134a-

139a.) McIntyre England offered to conduct business meetings with McIntyre America in the United States to help make this happen. (J.A. 135a-139a.) McIntyre America structured its advertising and sales efforts in accordance with the "direction and guidance" of McIntyre England's president. (J.A. 123a-124a.) McIntyre America placed full-page ads for the full line of McIntyre England's products in trade publications in the United States. (J.A. 128a.) McIntyre America also shared booths with McIntyre England at national trade shows. (*Id*.)

McIntyre England's relationship to finished products sold in the United States continued even after it put those products into a container to ship to McIntyre America. McIntyre England reminded its American distributor that machines in the distributor's possession "are our property until they have been paid for in full." (J.A. 134a.) It remained involved with McIntyre America's stock and sales of McIntyre England's products even after McIntyre America took possession (J.A. 135a-139a), suggesting at one point that McIntyre America liquidate its stock (J.A. 135a-136a) and offering to send McIntyre England employees to "clarify" the "spares/stock situation." (J.A. 138a.) If McIntyre America were unable to sell the machines, McIntyre England would "collect" them from McIntyre America and "bring . . . th[em] back." (J.A. 135a.) McIntyre America sold McIntyre England's products on a commission basis, which was the subject of some tension. (J.A. 131a-132a.) McIntyre America was permitted to bill McIntyre England for its commission only after McIntyre England received payment in full from the American customer. (J.A. 131a.) McIntyre England maintained a £5 million insurance policy to pay for any liabilities it incurred

due to its defective products, including the shearing machine that amputated Mr. Nicastro's fingers. (*See* Interrog. Resp. 8.) In other lawsuits involving its products, McIntyre England assured McIntyre America that any losses caused by a defect in McIntyre England's product would be covered by McIntyre England's insurance policy, not by McIntyre America. (J.A. 129a-130a.) It wasn't until six years into their business relationship, in 2000, that McIntyre America even acquired separate liability insurance. (J.A. 126a.) After "the demise of [McIntyre England's] former agent McIntyre America in 2001," Strip Technology Inc. in Fort Worth, Texas was "appointed sole agents" for the sale of McIntyre England's shears. (J.A. 52a-53a.)

As a direct result of McIntyre England's marketing of its machinery for sale throughout the United States, Mr. Nicastro's employer in 1995 purchased, through McIntyre America, the J. McIntyre 640 metal shearing machine that injured Mr. Nicastro. (J.A. 43a.) His employer paid approximately $25,000 for the machine. (*Id.*) McIntyre America knew that the machine in question was headed to New Jersey. (J.A. 78a-79a.) Affixed to the machine was a metal plate bearing the model and serial numbers for the machine, as well as McIntyre England's address and telephone number. (Appellants' N.J. Superior Ct. App. 138.) The machine had not been not altered in any material way since it had been manufactured by McIntyre England in 1995. (J.A. 6a-8a.) It was accompanied by documentation about, and an instruction manual for, the machine, both of which had McIntyre England's address in England, and its telephone and fax numbers. (J.A. 78a, 44a-45a.) Mr. Nicastro's employer attested that if the company had needed

any repair parts, he would have called McIntyre England. (J.A. 78a.)

The J. McIntyre 640 shear is used "throughout the world" (J.A. 44a) and is "well established in America." (Appellants' N.J. Superior Ct. App. 205.) McIntyre England represented in the literature that accompanied the 640 shear that the machine conformed to American safety standards (J.A. 61a), and McIntyre England advised United States buyers to familiarize themselves with safety standards governing its use in the United States. (J.A. 46a, 78a-79a.)

In the late 1990s, around the time when the machine that injured Mr. Nicastro was sold in the United States, the United States was a robust market for McIntyre England shears while markets in the rest of the world were "lousy." (J.A. 136a.) At least two container[2] loads of McIntyre England's shears were imported into the United States in just one six month period in 2003. (J.A. 52a-53a.) At least four model 640 machines were sold into New Jersey. (J.A. 141a.) Consumers in the United States were advised to contact McIntyre England directly for the supply of replacement parts. (J.A. 78a.)[3]

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[2] A standard 40 foot container holds volume of about 2400 cubic feet and weight of about 36 tons. German Balikbayan Quality Service, Container Measurement, *available at* http://www.gbqs-muc.com/contmeas.html (last visited Nov. 15, 2010).

[3] The 640 is only one of many machines manufactured by McIntyre England and marketed by McIntyre England in the United States. The complete line includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment, and TARDIS, the world's best aluminum dross

Although McIntyre England held out that the 640 shear conformed to American safety standards (J.A. 61a), the J. McIntyre 640 shear involved in this case "did not meet American National Standard Institute requirements . . . or the Regulations from the Occupational Safety and Health Administration," nor did it conform to "the recognized guidelines published by the National Safety Council and the American Society of Mechanical Engineers for protecting machine operators." (J.A. 76a.) On October 11, 2001, Mr. Nicastro's right hand got caught in the J. McIntyre 640 shear (J.A. 7a.), amputating Mr. Nicastro's fingers. (J.A. 76a.)[4]

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pressing and cooling system." (J.A. 31a.) TARDIS was introduced "to the U.S.A." in Florida in 1996, in Las Vegas in 1997, and in San Francisco in 1998. (J.A. 125a.) It is protected by at least seven European and American patents (J.A. 36a), at least four of which are American.

[3] At least 80 TARDIS units had been sold into the United States as of early 1999. (J.A. 136a.) McIntyre England had a "Commissioning Engineer" in the United States to install TARDIS systems here, including in states of Virginia, Illinois, Washington, Iowa, and Kentucky. (J.A. 119a.)

[4] Curcio Scrap Metal's New Jersey-based workers compensation insurance has paid benefits to Mr. Nicastro for some of his lost wages and medical expenses. In New Jersey, workers compensation provides compensatory benefits to injured employees on a no-fault basis in lieu of the employer's liability to its employee. *See generally* N.J. Stat. Ann. § 34:15-7 (West 2010); *Naseef v. Cord, Inc.*, 225 A.2d 343 (N.J. 1966). As of March 10, 2010, the insurer had paid $443,698.72, of which $238,373.72 was for medical expenses and $185,325 was for lost wages for the eight-and-a-half years between Mr. Nicastro's injury and March 10, 2010. This equals approximately $20,000 per year in lost wages. Under New Jersey law, in the event that Mr. Nicastro recovers any damages from McIntyre England, either by settlement or by judgment, he will be required to re-pay the insurance carrier 66 percent of all the benefits he

Mr. Nicastro sued McIntyre England for product liability under New Jersey law in New Jersey state court. (J.A. 5a-11a.) His wife Roseann Nicastro[5] asserted claims for loss of consortium. (J.A. 9a.) Although McIntyre America was named as a defendant in the complaint, McIntyre America went bankrupt and dissolved in 2001 (J.A. 91a-93a), just after Mr. Nicastro's accident and two years before this lawsuit was filed.[6]

On March 18, 2004, the complaint was served on McIntyre England in England under the provisions of the Hague Convention. (Appellants' N.J. Superior Ct. App. 76.) McIntyre England moved to dismiss on the grounds that the New Jersey court did not have personal jurisdiction over it. After the trial court dismissed the complaint (Pet. App. 159a), the court of appeals remanded the case for jurisdictional discovery (Pet. App. 157a), which revealed the essential jurisdictional facts of this case, including the fact that McIntyre England is defending and has defended several other cases in various states around the country, (J.A. 145a-152a); *see also Whitaker v. J. McIntyre Machinery, Ltd.*, No.

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received before he can keep any of his recovery from this lawsuit. *See* N.J. Stat. Ann. § 34:15-40 (West 2010); *Frazier v. New Jersey Mfrs. Ins. Co.*, 667 A.2d 670 (N.J. 1995).

[5] Mrs. Nicastro recently passed away. Mr. Nicastro is seeking to be appointed administrator *ad prosequendum* under New Jersey law and, upon appointment, anticipates making an appropriate motion under Supreme Court Rule 35 to substitute himself, in capacity as administrator, as a party.

[6] Even if McIntyre America still existed, it likely would not be liable under New Jersey law for the design defect claim asserted here against McIntyre England. N.J. Stat. Ann. § 2A:58C-9 (West 2010).

2003-CA-001429, 2004 WL 1586989 (Ky. Ct. App. July 16, 2004) (in which personal jurisdiction over McIntyre England was exercised in Kentucky when one of its shears injured a worker). McIntyre England again moved to dismiss the complaint, and the trial court again granted McIntyre England's motion. (Pet. App. 110a.)

On April 9, 2008, the Superior Court of New Jersey, Appellate Division, unanimously held that sufficient minimum contacts exist under the "stream-of-commerce-plus" rationale espoused by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). (Pet. App. 74a.) Following this Court's "stream-of-commerce" jurisprudence, as well as binding precedent from the New Jersey Supreme Court on the "stream-of-commerce" theory of personal jurisdiction, the Appellate Division found that McIntyre England purposefully established a distribution scheme by which McIntyre America would serve as its conduit for sales of McIntyre England's products in all fifty states, including New Jersey. (Pet. App. 96a, 98a, 105a.) In doing so, McIntyre England purposefully availed itself of the benefits and protections of all fifty states. (*Id.*) Additionally, McIntyre England designed the 640 shear to conform to U.S. specifications and requirements, and senior personnel attended national trade shows in the U.S. in an effort to make sales to customers in any or all of the fifty states. (Pet. App. 96a.) The court further concluded that exercising jurisdiction over McIntyre England in New Jersey would not offend traditional notions of fair play and substantial justice. (Pet. App. 108a.)

McIntyre England petitioned the New Jersey Supreme Court for review. (J.A. 3a.) McIntyre England suggested at oral argument that there was likely personal jurisdiction over it in Ohio (J.A. 167a-168a), and that in terms of hardship or unfairness to McIntyre England, it made no difference to McIntyre England whether the case was litigated in Ohio or New Jersey. (J.A. 174a-175a).

While the New Jersey Supreme Court found that "minimum contacts" in the traditional sense, as outlined by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), were not present, it held that the "stream-of-commerce theory" of specific personal jurisdiction, as outlined by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and as adopted by the New Jersey Supreme Court in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986), applied in this case to bring McIntyre England within the jurisdiction of New Jersey state courts. (Pet. App. 31a-32a, 38a-42a.) The court affirmed its decision in *Charles Gendler* and held "that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to in personam jurisdiction of a New Jersey Court in a product-liability action." (Pet. App. 31a.)

After an exhaustive review of this Court's jurisprudence of specific jurisdiction (Pet. App. 15a-27a), the New Jersey Supreme Court reaffirmed its 1986 decision in *Charles Gendler*, and held that McIntyre England is subject to specific jurisdiction in New Jersey in this case because it knew or reasonably should have known that its distribution

scheme would make its products available to New Jersey consumers. (Pet. App. 31a, 38a-42a.) The court found that McIntyre England targeted the United States market for the sale of its products by engaging McIntyre America as its exclusive U.S. distributor for seven years. (Pet. App. 38a-39a.) The court also found that McIntyre England and McIntyre America worked together to promote and sell McIntyre England's products in the United States, and that McIntyre America earned commissions from McIntyre England for the sale of McIntyre England's products. (Pet. App. 40a.) While acknowledging that a manufacturer wishing to avoid being haled into New Jersey courts "must take some reasonable step to prevent the distribution of its products in th[e] State" (Pet. App. 38a), the court found nothing in the record to suggest that McIntyre England had taken any such steps. (*Id.*) In the absence of any such steps, it concluded that a manufacturer "cannot shield itself merely by employing an independent distributor—a middleman—knowing the predictable route the product will take to market." (Pet. App. 37a-38a.) The court further held that McIntyre England did not demonstrate that defending the suit in New Jersey would offend traditional notions of fair play and substantial justice. (Pet. App. 40a-41a.)

SUMMARY OF ARGUMENT

The machine that injured Mr. Nicastro weighs three tons and costs twenty-five thousand dollars. Heavy industrial machines like it are not sold through local merchants, like the car involved in *World-Wide Volkswagen*; they are sold at national trade shows. That is where McIntyre England peddled them, knowing that they would be

purchased for delivery to business places around the country.

There is nothing remarkable about New Jersey's exercise of specific jurisdiction over McIntyre England. Specific jurisdiction over a manufacturer of finished products is permissible when the manufacturer "'delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Asahi*, 480 at 109 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98). The Court in *World-Wide Volkswagen* was talking about manufacturers of finished goods. Its admonition became clouded when, in *Asahi*, the Court struggled with the question of whether the admonition applied with equal force to a foreign manufacturer of component parts on a cross-claim, by another foreign manufacturer, for indemnification. This case does not involve component parts and it does not involve an indemnification claim. It involves a finished product and manufacturer who delivered it with the expectation it would be purchased anywhere in the United States, just like the manufacturer of the finished tire over whom jurisdiction was exercised in *Asahi* and the manufacturer of the finished automobile over whom jurisdiction was exercised in *World-Wide Volkswagen*.

McIntyre England had clear notice, from numerous American judicial decisions, that, on the basis of its conduct, it could be haled into court where its products were sold and caused harm. McIntyre England's worldwide distribution of machines created an expectation that it could be haled into court in any state of a federated nation-

state in which its product causes harm. The law of McIntyre England's domicile and the only extant multilateral international treaties governing adjudicative jurisdiction prescribe that result. Those laws indicate that a judgment rendered in New Jersey would be enforceable and final, a venerable concern.

McIntyre England contends that due process constrains the exercise of sovereign power outside of territorial boundaries. Territoriality is not textually or historically linked to due process values. This Court in *Pennoyer v. Neff*, 95 U.S. 714 (1877) did forge such a link, but the Court severed it, long ago, in *International Shoe*.

In affording a forum in this case New Jersey was discharging a constitutional duty and implementing Respondents' fundamental constitutional right of access to courts. The fundamental constitutional values involved weigh heavily in favor of upholding a state's exercise of its sovereign power.

An otherwise just exercise of jurisdiction can be precluded if well-recognized factors that further assure fairness so require. In *Asahi*, those factors precluded exercise of jurisdiction because neither the disputants nor the dispute was significantly connected to the forum. That is not the case here, where a New Jersey resident who worked in New Jersey and was injured at work sued in New Jersey. McIntyre England has otherwise not challenged in this Court the lower court's finding that the exercise of jurisdiction here comports with traditional notions of fair play and substantial justice.

McIntyre England's purposeful conduct linked it to New Jersey. The activities it sought to have occur in New Jersey caused injury there. A New Jersey resident sued it there, over those injuries. Charged with knowledge of the law and knowing from experience that it was amenable to this kind of suit in state courts in the United States, McIntyre England was capable of structuring its affairs to avoid jurisdiction. It did not. The Due Process Clause does not preclude New Jersey from requiring McIntyre England to answer Respondents' claim.

ARGUMENT

I. MCINTYRE ENGLAND HAD SUFFICIENT CONTACTS WITH NEW JERSEY SUCH THAT THE DUE PROCESS CLAUSE DOES NOT PRECLUDE NEW JERSEY FROM REQUIRING IT TO DEFEND THIS TORT SUIT THERE

New Jersey's exercise of personal jurisdiction in this case is consistent with this Court's due process precedents, which permit a State to hale a foreign manufacturer into its courts where the manufacturer places its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state, and the product causes injury there. It is unremarkable, consistent with decisions over the last two decades in which state and federal courts have exercised jurisdiction in virtually identical factual circumstances. These decisions, and the decisions of this Court, gave McIntyre England fair warning that it could be haled into a New Jersey court to defend a suit on the facts of this case.

A. McIntyre England Purposefully Marketed Its Product Nationwide and Put Its Product into a Distribution Scheme for National Sales.

In *World-Wide Volkswagen*, the Court recognized that the stream-of-commerce theory can provide a constitutionally sufficient basis for the exercise of personal jurisdiction over a foreign manufacturer. 444 U.S. at 297-98. In that case, New York residents were injured in an automobile accident while driving through Oklahoma on the way to their new home in Arizona in a car they had purchased in New York. The plaintiffs sued the manufacturer, importer, regional distributor, and retail dealer, alleging that the car was defectively designed. The manufacturer and importer did not contest personal jurisdiction, but the regional distributor and retail dealer did. The Court held that, because the distributor and retailer conducted no activities in Oklahoma, they could not be subject to suit there. It found that the regional distributor's and retail distributor's only connection with Oklahoma was that they had sold a car to the New York plaintiffs in New York, who were then injured while driving the car through Oklahoma. That connection was constitutionally insufficient, the Court determined, to support haling them into court in Oklahoma.[7] It did not matter to the Court

[7] While jurisdiction was presumably proper at least in New York, ensuring that there was a forum somewhere in the United States for redress of the *World-Wide Volkswagen* plaintiffs' injuries, McIntyre England's brief here suggests that no state in the nation would have jurisdiction over it under these facts.

whether it was *in fact* foreseeable to these defendants that the Court might be driven to Oklahoma. The Court explained, "the 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 287.

Based on this understanding of foreseeability, the Court ruled that, consistent with due process, a manufacturer or national distributor of products could be subject to personal jurisdiction in the states which comprise the market for its products. In the Court's words:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297-98. Applying this rule, the Court concluded that the stream-of-commerce theory could not subject the *retailer* and *distributor* to personal jurisdiction in Oklahoma, because the retail dealer's sales were made only in New York, and the regional distributor's market was limited to dealers in New York, New Jersey, and Connecticut.

This case involves a *manufacturer* of heavy industrial equipment, the analog of Audi, over which jurisdiction was exercised, and not the analog of the dealer over which jurisdiction was not permitted. The stream-of-commerce standard announced by the Court in *World-Wide Volkswagen* is readily met here, because in this case the sale of the shear to Curcio in New Jersey arose from the efforts of McIntyre England to serve a national market for its products. Thus, it is "not unreasonable to subject it to suit" in one of those states—here, New Jersey—where its allegedly defective shear caused an injury. *See id.*

The record is replete with evidence that the sale of the shear arose from McIntyre England's efforts to establish and foster a national market for the sale of its products through an exclusive distributor, McIntyre America. By its own admission, all McIntyre England wanted was to "sell [its] products in the United States—and get paid!" To that end, McIntyre England worked closely with McIntyre America to establish and foster a market for the sale of its products that would encompass all fifty states, with no effort to prohibit sales in New Jersey.

For instance, McIntyre England's employees, including its president, attended industry trade shows and conventions throughout the United States from at least 1990, prior to McIntyre England's association with McIntyre America, until at least 2005. High-level personnel from McIntyre England traveled from the United Kingdom to attend and exhibit their products at these trade shows, which took place across America in major convention locations on the East, West, and Gulf coasts and in inland locations like Las Vegas and San Antonio,

often working alongside McIntyre America. Thousands of professionals in the specialized industry of metal recycling traveled from all around the nation to attend these trade shows. At these shows, McIntyre England employees had direct contact with potential and actual American customers from around the nation. One notable example: McIntyre England's president attended the trade show where Mr. Nicastro's employer, Curcio, first learned of the J. McIntyre 640 metal shear. The promotion of the shear at this trade show culminated in a sale to Curcio in New Jersey. McIntyre England thus succeeded in establishing a market for its product for sale by McIntyre America in New Jersey, and it derived benefits from the indirect sale of its special-order products in the United States market.

That is not all. McIntyre England, in its effort to cultivate a national market in its products, designated McIntyre America its exclusive distributor in the United States and allowed McIntyre America to trade on the "McIntyre" name. McIntyre America was never an end-user of McIntyre England's products, but a distributor that served as McIntyre England's sales agent in New Jersey and every other state in the United States. If anyone in any state wanted to purchase a McIntyre England machine between 1994 and 2001, he or she was required to purchase it from McIntyre America.

McIntyre America structured its advertising and sales efforts for McIntyre England's products in accordance with the "direction and guidance" of McIntyre England's president. (J.A. 124a.) McIntyre America's advertising of McIntyre England's products included the placement of full-page ads for the full line of McIntyre England's products in trade

publications in the United States. Its claim that it designed its product to satisfy American standards was designed to entice American consumers. Its instruction manual for American consumers not only bore its name, but provided its contact information. Indeed, the J. McIntyre 640 shear that injured Mr. Nicastro bore not only the model and serial numbers, but McIntyre England's name and contact information, as well; it did not, however, bear McIntyre America's information. (Appellants' N.J. Superior Ct. App. 138a.)

These purposeful acts of McIntyre England demonstrate that *it* intended to serve the national market, which by definition includes New Jersey. In response, McIntyre England argues that the New Jersey Supreme Court failed to consider whether "the putative defendant [was] aware of the forum state," thereby suggesting that, had the lower court so inquired, it would have learned that McIntyre England did not "even [know] that [New Jersey] exist[ed]." (Pet'r's Merit Br. 10, 29.) Particularly on this record, which demonstrates that McIntyre England's employees, including its president, traveled extensively throughout the United States to promote McIntyre England's products both before and after the sale of the shear in question here, it is unthinkable that it or any other sophisticated manufacturer would not know that the United States is comprised of states, including New Jersey, which "has always been a portal state." (Pet'r's Merit Br. 33.)

Although McIntyre England notes that its distributor—not it—sold and shipped the shear to New Jersey, suit in New Jersey was foreseeable even if McIntyre England did not know of this particular

sale. *World-Wide Volkswagen* states that fair warning must be assessed in view of a manufacturer's efforts to serve a market for products that are indirectly sold—and not simply in view of where the chattel could foreseeably end up. *See id*. at 296-97. In other words, the manufacturer's efforts to serve a large geographical market make it foreseeable that a distributor would sell the product to an individual within that market, regardless of in which state within the larger market the individual buyer is located. As discussed above, McIntyre England's own efforts to establish and foster a national market render the sale in New Jersey foreseeable. If, as the Court held in *World-Wide Volkswagen*, knowledge of where a chattel *could* foreseeably end up is not material to the fair warning inquiry, *id*. at 296, then actual knowledge also is not material. It would not have mattered in *World-Wide Volkswagen* if the local car dealership knew that the customer buying the car was traveling to Oklahoma; suit in Oklahoma still would have violated due process because the local dealership had made no effort, directly or indirectly, to serve the market in Oklahoma.

Unlike the local retailer or distributor at issue in *World-Wide Volkswagen*, whose distribution chain was constrained to a few states, McIntyre England did not seek to cultivate a local market covering, for example, Las Vegas or the other cities in which the trade shows took place, or Ohio, the location of its distributor; it sought to establish a national market for its products so that they could be sold throughout the country. The assertion of jurisdiction is consistent with McIntyre England's actions and a reasonable manufacturer's expectations.

McIntyre England criticizes the New Jersey Supreme Court for adopting, according to it, a rule of "non-purposeful availment" (Pet'r's Merit Br. 34) that imposes "jurisdiction by default" and then asks whether a defendant manufacturer sought to avoid a particular state. (*See* Pet'r's Merit Br. 15-16.) The lower court adopted no such rule. It simply noted that McIntyre England, after structuring its *primary* conduct to serve (indirectly) the market in each state, never then altered its conduct to exclude certain states. This is not "jurisdiction by default" (Pet'r's Merit Br. 15); it is jurisdiction based on McIntyre England's primary conduct.[8]

B. McIntyre England's Contacts Are Sufficient for the Exercise of Jurisdiction Under Both Plurality Opinions in *Asahi*.

Asahi also supports the exercise of jurisdiction by New Jersey here. The evidence in the record satisfies both stream-of-commerce tests articulated in *Asahi*, both which, at their core, recognize that a manufacturer makes minimum contacts with a forum when it seeks to serve, directly or indirectly,

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[8] McIntyre England also states that there are practical difficulties in marketing products nationwide but then seeking to avoid the market of an individual state. Of course, if a manufacturer wanted to market its products in certain states but not others, one would not expect it *first* to adopt a nationwide marketing plan. Even so, McIntyre England could have instructed McIntyre America not to sell its shears in particular states or regions; and it could have indicated, on the machine itself, and in the documentation and instruction manual accompanying the shear, that sale was not intended or permitted in particular states. There are no obvious "practical" difficulties in taking these steps.

the market in the forum state and its product causes injury there.

In *Asahi*, the Court held that it is not reasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the non-resident defendant. In that case, a California plaintiff injured in a motorcycle accident brought a product liability action in California against Cheng Shin Rubber Ind. Co., Ltd. (Cheng Shin), the Taiwanese corporation that manufactured the allegedly defective motorcycle tire. Cheng Shin brought a third-party indemnification action against Asahi Metal, the manufacturer of the valve assembly on the tire. The plaintiff and Cheng Shin settled the plaintiff's tort claims, leaving only the indemnity action against Asahi, who contested jurisdiction in California. Asahi's sales of the valves occurred in Taiwan and Asahi had no control over the distribution system that brought its valves, as a component of the tires manufactured by Cheng Shin, into the United States. The Court unanimously agreed that the exercise of jurisdiction did not comport with "fair play and substantial justice," and was thus unreasonable and unfair under the due process clause. The Court was divided, however, over the proper test of the stream-of-commerce theory.

In discussing the stream-of-commerce theory, Justice O'Connor stated that, in her view, due process requires that the defendant's conduct "indicate an intent or purpose to serve the market in the forum State." 480 U.S. at 112 (O'Connor, J.). That statement of law is consistent with *World-Wide Volkswagen's* conclusion, which Justice O'Connor quoted approvingly, that a manufacturer makes minimum contacts with a forum when it seeks to

serve, directly or indirectly, the market in the forum state and its product causes injury there. *See id.* at 110 (O'Connor, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). She otherwise indicated that the placement of a product into the stream of commerce, without more, would not establish that the defendant's conduct was purposefully directed at a forum State. Additional conduct was required, such as "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112 (O'Connor, J.). Such conduct would also include "creat[ing], control[ing], or employ[ing] the distribution system that brought [the product] into" the forum state. *Id.* By contrast, "mere awareness" that a manufacturer's product in the stream of commerce might end up in the forum state was constitutionally insufficient to establish purposeful direction toward the forum. *Id.* at 112-13 (O'Connor, J.).

Justice Brennan, like Justice O'Connor, agreed with *World-Wide Volkswagen's* conclusion that a manufacturer makes minimum contacts with a forum when it seeks to serve, directly or indirectly, the market in the forum state and its product causes injury there. *See id.* at 119 (Brennan, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). But he rejected Justice O'Connor's view that due process required a showing of additional conduct. In his view, stream of commerce "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distributor to retail sale." *Id.* at 117 (Brennan, J.). Thus, purposeful availment is satisfied by the placement of a product in the stream of commerce with awareness that the final product is being marketed in the forum state. *Id.*

This case is not *Asahi*. We are not dealing with a cross-claim for indemnification between two foreign manufacturers, nor are we dealing with the manufacturer of a *component* part who had no control over the choice of distribution scheme that brought its product into the forum state.[9] In this case, the foreign manufacturer of a finished product, an allegedly defective machine, actively participated in the distribution scheme that brought its product into New Jersey where it injured Mr. Nicastro. McIntyre England also was plainly aware that its final product was being marketed in all fifty states, including New Jersey, when it placed its product into the stream of commerce, thus satisfying Justice Brennan's test.

Justice O'Connor's formulation described a non-exclusive list of additional conduct that may indicate a manufacturer's intent to serve the market of the forum state and would thus support the

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[9] Amicus PLAC states that "this case could [not] possibly pass Justice Stevens's test, which would find purposeful availment where 'a regular course of dealing . . . results in deliveries [in the state] of over 100,000 units annually over a period of several years,'" because in this case there were only four sales of McIntyre England's shears to entities in New Jersey. (PLAC Amicus Br. 21-22 (quoting *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment)).) What PLAC ignores, however, is that Justice Stevens was suggesting that, in an appropriate case, the Court make "a constitutional determination [in view of] . . . the volume, the value, and the hazardous character of the *components*." 480 U.S. at 122 (emphasis added). This case, in contrast, does not concern component parts, and thus the figures Justice Stevens found to be sufficient in a case concerning component parts are not transferable to a case concerning a three-ton machine sold exclusively to discrete members of a small, highly specialized industry.

exercise of jurisdiction over the manufacturer. This included "creat[ing], control[ing], or employ[ing] the distribution system that brought [the product] into" the forum state. 480 U.S. at 112. Because Justice O'Connor found no evidence of this additional conduct in *Asahi*, she concluded that the assertion of jurisdiction did not satisfy the stream of commerce test. *See Id.* Justice O'Connor stated that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" can support a finding that the manufacturer purposefully availed itself of the laws of the forum state. *Id.* In *Asahi*, the valve manufacturer "did not create, control or employ the distribution system that brought its valves to California." *Id.*

In this case, McIntyre England did control the type of distribution system that brought its product into the forum state as it purposefully chose a distribution system that would target the entire United States. Even before appointing McIntyre America as its exclusive distributor in the United States, McIntyre England attended national industry trade shows to foster sales here. If McIntyre England wished only to target particular states, and thus avoid jurisdiction in others, it could have chosen a regional distributor or it could have directed McIntyre America to limit distribution to a particular area or exclude a particular state. Instead, McIntyre England authorized McIntyre America to market and sell McIntyre England's products across the nation, wherever there was a potential buyer. McIntyre America effectively served as McIntyre England's sales agent to New Jersey and every other state in the United States. McIntyre England's own conduct suffices to meet the jurisdictional test articulated by Justice O'Connor, because McIntyre

England controlled the choice of and employment of the distribution scheme that brought its product to the forum state of New Jersey. McIntyre England's conduct indicates "an intent or purpose to serve the market in the forum state" because it "market[ed] the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112.

In addition, McIntyre England directed and guided McIntyre America's advertising and sales efforts in the United States. McIntyre England maintained a close working relationship with McIntyre America to facilitate the sale of McIntyre England's products throughout the nation, and even arranged visits of McIntyre England personnel to McIntyre America to help liquidate its stock. Furthermore, McIntyre England retained ownership of its products in McIntyre America's possession until McIntyre England received payment in full for the machines. McIntyre England didn't simply sell its products to McIntyre America, which McIntyre America then sold to end users; McIntyre England paid McIntyre America a commission for the sales of McIntyre England machines. Finally, McIntyre England's product liability insurance covered the products that McIntyre America distributed throughout the fifty states, including the machine that caused Mr. Nicastro's injuries in this case. In short, McIntyre England's relationship to the products that it sent to its exclusive distributor in the United States did not end when McIntyre England put those machines in a container in the United Kingdom.

McIntyre England's assertion that it did not have actual knowledge of each individual product's

sale, even if true, does not mean that it cannot be said to have controlled distribution. (*See* Pet'r's Merit Br. 42 (stating that it lacked "specific awareness that the product was being sold into the forum state").) Justice O'Connor's test does not require actual knowledge of where a particular product is going. This is evident because, prior to discussing control of distribution, Justice O'Connor cited *World-Wide Volkswagen* for the view that it is not constitutionally relevant whether a manufacturer could foresee where a particular chattel ends up. 480 U.S. at 109-10 (O'Connor, J.). To Justice O'Connor, the constitutionally relevant question was whether a manufacturer's actions evidenced "an intent or purpose *to serve the market* in the forum state." *Id.* at 112 (O'Connor, J.) (emphasis added). McIntyre England's actions in this case do in fact evidence its intent to serve a national market, which necessarily includes New Jersey, even assuming it lacked actual knowledge that this particular shear was being sold to Curcio in New Jersey.

There are sound reasons to adhere to the rule that a defendant manufacturer that intends to serve, directly or indirectly, a market in the forum state may be sued there if its product injures an individual in the forum. First, looking to the direct or indirect actions of a manufacturer to serve a particular market in a particular region is consistent with this Court's requirement that the substantial connection between a defendant and a forum state must be based on the actions of the defendant. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475-76 (1985). Unlike local and retail distributors, which are at the end of the distribution chain, "manufacturers and distributors, which are at the start of a distribution chain, serve a larger market and 'purposely conduct

their activities to make their product available for purchase in as many forums as possible.'" *Charles Gendler*, 508 A.2d at 1136 (citation omitted) (explicating the rationale of *World-Wide Volkswagen*). A sale by such a manufacturer in a particular state is not an isolated incident "but the result of the corporation's efforts to cultivate the largest possible market for its product." *Id*. Also, such manufacturers derive economic benefits from indirect sales to forum residents, and they benefit from the legal protections provided by the laws of the forum state. *See Burger King*, 471 U.S. at 475-76. Accordingly, it is fair to subject such manufacturers to jurisdiction in states which comprise the market they intend to serve.

Second, looking both to direct *and indirect* action is consistent with stream-of-commerce theory generally, which by definition "involves a sale *not* by the manufacturer, but by another entity in the chain of distribution." *Charler Gendler*, 508 A.2d at 1138 (emphasis added). As the New Jersey Supreme Court explained in discussing *World-Wide Volkswagen*, foreign manufacturers rarely deliver products directly to consumers in the United States, but instead employ middlemen, many of whom are independent, for distribution purposes. *Id.* at 1136.

> To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit "a legal technicality to subvert justice and economic reality in the worst sense." Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution

> or by professing ignorance of the ultimate destination of their products.

Id. at 1137 (citation omitted). Accordingly, the indirect actions of a manufacturer to serve the market in a forum state, no less than its direct actions, are sufficient to establish the reasonableness of a state's assertion of personal jurisdiction.

Third, and lastly, the rule is fully consistent with this Court's precedents, *see World-Wide Volkswagen*, 444 U.S. at 297, and with both plurality opinions in *Asahi*. McIntyre England criticizes Justice Brennan's analysis in *Asahi* and exalts Justice O'Connor's. (*E.g.*, Pet'r's Merit Br. 39-49.) Though these Justices disagreed in that case concerning a cross-claim for indemnification between two foreign manufacturers, one of which manufactured a component part, neither disagreed that a foreign manufacturer makes minimum contacts with the forum when it seeks to serve—directly or indirectly—the market in the forum state and its product thereby causes injury in that state. *See* 480 U.S. at 110, 112 (O'Connor, J.); *id.* at 119 (Brennan, J.). In view of the record in this case, and under the rationale of either Justice, McIntyre England intended to serve the market for its products in New Jersey and thus may be sued there consistent with due process.

C. A Finding of Minimum Contacts Here Is Consistent with the Principle of Fair Warning.

There is nothing remarkable about New Jersey exercising jurisdiction over McIntyre England under a stream of commerce theory, either as

described by this Court in *World-Wide Volkswagen*, or by Justice O'Connor or Justice Brennan in *Asahi*. Despite its assertions to the contrary, McIntyre England had fair warning that its use and direction of a sales and marketing scheme that sought to distribute its products to each of the fifty states would subject it to specific jurisdiction in any state where its products caused injury. Apart from the notice provided by *World-Wide Volkswagen* and both plurality opinions in *Asahi*, numerous lower courts have, based on facts similar to the facts in this case, exercised jurisdiction over foreign manufacturers under state long-arm statutes. Indeed McIntyre England has itself been a party to several suits in the United States (J.A. 145a-152a), and has defended, in Kentucky, a suit similar to this one, initially contesting service under the Hague Convention but, after service was perfected, subsequently answering the complaint and challenging the suit on the merits. *Whitaker v. J. McIntyre Machinery, Ltd.*, 2004 WL 1586989, at *2.

McIntyre England had fair warning since 1986 that, pursuant to New Jersey's long-arm statute, which extends to the limits of due process, a foreign manufacturer could be haled into New Jersey provided the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state. *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1137 (N.J. 1986). Although *Charles Gendler* was decided one year prior to *Asahi*, New Jersey confirmed the *Charles Gendler* approach after *Asahi* as well. *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 649 A.2d 379, 387 (N.J. 1994). Despite the clear state of the law in New Jersey, at no point did McIntyre England seek to "alleviate the

risk of burdensome litigation" there. *World-Wide Volkswagen*, 444 U.S. at 297.

At issue in *Charles Gendler* was whether a foreign manufacturer could be haled into New Jersey state court to defend a breach of contract claim arising from the sale of an allegedly defective telephone system. In that case, Nippon, a Japanese corporation with its principal place of business in Tokyo, manufactured telephone and other electronic equipment. It sold its equipment to a wholly-owned subsidiary, NEC America, Inc., which was authorized to do business in New Jersey and in turn wholly owned another subsidiary, NEC Telephones, Inc. The plaintiff, Gendler, bought a Nippon-manufactured phone system from Telecom Equipment Corporation, a New Jersey corporation with its principal place of business in Long Island, New York, which had purchased the phone from NEC Telephones. Alleging that the system was defective, Gendler filed suit against Nippon and Telecom for breach of contract and breach of warranty. Nippon challenged personal jurisdiction.

The New Jersey Supreme Court, based on its reading of *World-Wide Volkswagen*, held that "[a]s applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." *Id.* at 1137. After adopting this stream-of-commerce theory, it then remanded for jurisdictional discovery.

The decision in *Charles Gendler* is one of several examples in which courts have held that conduct similar to McIntyre England's in this case,

was sufficient to support specific jurisdiction over foreign manufacturers. The court itself cited six cases supporting that view. *Id.* at 1137 (collecting cases). In addition, other state and federal appellate courts have found that such conduct supports personal jurisdiction under similar circumstances.[10] For instance, in *A. Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995), an Italian gun manufacturer's intent to sell its product "across America" justified a finding of jurisdiction in Arizona. *Id.* at 1362-64. In that case, parents of a two-year-old who was fatally shot in a handgun accident in Tucson, Arizona, sued the Italian manufacturer of the gun in Arizona. The manufacturer knowingly and intentionally manufactured its products for the United States, and exported to the United States through its independent American distributor, knowing that its product would flow into local markets across America. The court noted:

> Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona,

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[10] Of the cases to be discussed, all preceded the sale of the shear at issue here in 1995, except for *A. Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995), and *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999). These cases are nonetheless instructive because McIntyre England never altered its conduct to "alleviate the risk of burdensome litigation" in these states or regions. *World-Wide Volkswagen*, 444 U.S. at 297.

> Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America.

Id. at 1362.

On similar facts, the Eighth Circuit in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, found jurisdiction over a Japanese fireworks manufacturer in Nebraska, the place of harm, because the manufacturer sold its products throughout the United States, including Nebraska, using regional distributors. 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994), . The court held that personal jurisdiction in Nebraska was proper because the Japanese manufacturer reaped the benefits of its distributors, and had purposefully reaped the benefits of the laws of Nebraska. *Id.* at 615. Even though the Japanese company claimed to have no actual knowledge that fireworks were distributed into Nebraska, the court said that such ignorance "defies reason and could aptly be labeled 'willful,'" in part because the location of its distributors suggested an effort to reach much of the country through a limited number of regional distributors. *Id.* at 613. The court held that it was only reasonable and just that the Japanese manufacturer should be held accountable in the forum of the plaintiff's choice. *Id.* at 615.

Again, on facts similar to those in this case, national marketing and sales served as the basis for New York's exercise of personal jurisdiction over a Japanese manufacturer in *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999). The Japanese manufacturer's machine caused plaintiff's injuries in

New York after the manufacturer's distributor in Pennsylvania sold the machine to plaintiff's employer in New York. The Second Circuit held that an "exclusive sales rights" agreement between the Japanese manufacturer and the Pennsylvania company—an agreement analogous to the one here—contemplated that the Pennsylvania company would sell the machines in North America and throughout the world, and served as evidence of the Japanese company's attempt to serve the New York market, albeit indirectly. *Id.* at 242-44.

Efforts to serve the U.S. market were equated with purposeful availment "of the vast, lucrative markets of *each state* in the United States" in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543 (6th Cir.) (emphasis added), *cert. denied*, 510 U.S. 914 (1993) (relying on Justice O'Connor's opinion in *Asahi*). The plaintiff filed a products liability claim in Kentucky against the Dutch manufacturer of a drug distributed nationwide by an American company. The product was designed for the U.S. market, the Dutch manufacturer sought and approved regulatory approval to sell the product in the United States, and the Dutch manufacturer used a distributor that would market the drug throughout the United States. *Id.* at 543-44. The Sixth Circuit found that these factors indicated intent to serve "each state," including the forum state, Kentucky. *Id.* at 544.

The West Virginia Supreme Court of Appeals similarly found that a Japanese manufacturer of a tainted drug which allegedly caused plaintiff's blood disorder should have an expectation of being haled into court in West Virginia. *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609 (W. Va. 1992). The

manufacturer solicited business in West Virginia through a distributor and derived substantial benefit from the use of its product in that state. "Given the distribution pattern of the product, this and the many other lawsuits filed as a result of the use of the contaminated L-tryptophan cannot come as a surprise." *Id.* at 616 (citing *Asahi*, 480 U.S. at 117).

These cases demonstrate a significant consensus that the ruling in *Charles Gendler* is correct and that McIntyre England had fair warning, both before and after this Court decided *Asahi*, that it could be haled into court in New Jersey if it employed a distribution scheme for its products that targeted each of the fifty states, and its product caused harm there.

To undermine the consensus, McIntyre England focuses on a single case involving an attempt to obtain jurisdiction over a company that supplied component parts—filters—to a cigarette manufacturer, not a company, like McIntyre England, that manufactures a finished product for sale through an exclusive distributor to end users. (Pet'r's Merit Br. 26 (citing *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940 (4th Cir. 1994)).)[11] Given this difference, and the fact that here there are many other contacts that McIntyre England had with New Jersey in connection with the sale of

[11] In citing *Lesnick*, McIntyre England fails to note that the Louisiana Supreme Court, under virtually identical facts, upheld personal jurisdiction over the very same defendant for the very same conduct. *See Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 890 (La. 1999).

equipment of the kind that injured Mr. Nicastro, *Lesnick* is not instructive.[12]

II. THERE ARE NO REASONS FOR BARRING NEW JERSEY FROM EXERCISING SPECIFIC JURISDICTION OVER MCINTYRE ENGLAND

A. The Assertion of Jurisdiction Here Does Not Interfere with International Relations.

McIntyre England contends that its conduct does not satisfy constitutional standards of jurisdiction because the exercise of jurisdiction by New Jersey would impermissibly interfere with interstate and international relations. (Pet'r's Merit Br. 9, 37.)

New Jersey's sovereign assertion of jurisdiction is consistent with a world consensus on fair procedure. It in no way interferes with international relations, and it does not represent "parochialism [that] threatens our relationship with other countries and their judicial systems." (Pet'r's Merit Br. 37.)

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[12] Even on its own terms, the Fourth Circuit's decision is flawed; for instance, its reliance on *Pennoyer* and on *dicta* in *World-Wide Volkswagen* to support the assertion that due process precludes extraterritorial effects of state action is unsupportable given this Court's rejection of that view in *Insurance Corp. of Ireland v. Compagnie Des Bauxites Guinee*, 456 U.S. 694, 703 (1982) and *Burger King*, which the court in *Lesnick* ignored. Its conclusion that *no state in the nation* would have jurisdiction over a manufacturer that worked to develop and market its product nationwide and penetrated the market to the tune of 13 billion cigarettes cannot be correct.

The sources McIntyre England and its *amici* cite with regard to international concerns about United States jurisdictional law deal primarily with general jurisdiction and transient jurisdiction, not specific jurisdiction exercised over tort claims brought in the place where harm occurred.

For example, McIntyre England quotes a law review article for the proposition that foreign courts are reluctant to enforce U.S. judgments because of a generous attitude in the U.S. toward personal jurisdiction. (Pet'r's Merit Br. 37 (quoting Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 51 (2006)).) The text following the quoted text, however, does not condemn jurisdiction exercised under the facts present here, but does note that "the rest of the world generally characterizes 'tag' or transient jurisdiction as exorbitant." *Id*. at 52-53; *see also* Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429, 511 (2003) ("Many other countries find some of the grounds for jurisdiction in the United States exorbitant (particularly the notion of 'tag' jurisdiction based on a transient presence in the United States and general 'doing business' jurisdiction when the business transacted in the United States is not particularly related to the dispute.")); *Restatement (Third) of the Foreign Relations Law of the United States* § 421 cmt. e (1987) ("'Tag' jurisdiction, i.e., jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law.").

Similarly, U.S. standards for general jurisdiction, but not for specific jurisdiction, have

been criticized for creating difficulties in U.S. foreign relations. *See, e.g.*, Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161-62 (2001) ("[T]he broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law."); Brief of United States as *Amicus Curiae* Supporting Pet'rs, *Goodyear Luxemberg Tires, S.A. v. Brown*, No. 10-76, 2010 WL 4735597, at *32-*33 (U.S. Nov. 19, 2010).

A principal source cited by McIntyre England's *amici* Organization for International Investment and Association of International Automobile Manufacturers Inc. ("OFII") (OFII Amicus Br. 4-5, 10), reports that overseas investors dislike the U.S. legal system in general, a feeling Petitioner pointedly shares: "American law—who needs it?!" (J.A. 130a.) But that report does not criticize U.S. jurisdictional rules, in particular. *See* Charles G. Schott, U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 5-6 (Oct. 2008), *available at* http://www.calchamber.com/International/Trade/Documents/LitigationEnvironment.pdf. In fact, the report advises that not even the decried U.S. legal environment is an insurmountable hurdle.

> Those who invest in the United States take comfort in understanding that (a) everyone competing in the market faces these factors; (b) the factors can be handled with strong local management and legal, accounting, and banking

> relationships; and (c) other international investors have adjusted to these factors.

Id. at 3. And it makes a critical point about fairness: domestic manufacturers are subject to the same legal environment. A foreign manufacturer peddling its wares in America and escaping accountability here for harms it causes here would have a distinct competitive advantage over domestic manufacturers. Nothing in due process supports that outcome.

There are two multilateral international instruments dealing with the reciprocal enforcement of judgments, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EEC-EFTA, Sept. 16, 1988 (Lugano Convention), *available at* http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm, and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968 (Brussels Convention), *available at* http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm. Article 31 of each convention makes judgments rendered in accordance with the terms of the convention reciprocally enforceable in subscribing states.[13]

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[13] The conventions are supplemented by the European Union's *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Dec. 22, 2000), *available at* http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT.

The regulation recites at Article 38 the same standard for enforcement as contained in the Conventions and at Article 5(3) the same standard of tort jurisdiction, discussed *infra*.

The United Kingdom, McIntyre England's domicile, is a party to both conventions. Together, they apply to all the nations of the European Union and the European Free Trade Area. Within those nations they render McIntyre England amenable to jurisdiction in any court of any jurisdiction in which its products cause harm. Article 5, Section 3, of each treaty provides:

> A person domiciled in a Contracting State may, in another Contracting State, be sued,
>
> > 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

The language does not limit the jurisdiction of the courts of sub-states (like New Jersey) of federated nation-states (like the United States, or like Germany and Switzerland, which are parties to the regime). The place of harm determines jurisdiction.

The basis of tort jurisdiction established as fair by the Brussels regime is consistent with world thinking generally as reflected in *Restatement (Third) of the Foreign Relations Law of the United States* § 421(2)(i), (j), (k) (1987)[14]:

Together, the three enactments are referred to as the Brussels regime.

[14] For example, the domestic law of the People's Republic of China, a rising trading power, employs the same formula for tort jurisdiction as the Brussels regime. *See* Civil Procedure Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress,

> (2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:
>
> > (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
> >
> > (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or
> >
> > (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

The domestic law of McIntyre England's domicile adopts the same jurisdictional rule and creates the same expectation in a reasonable observer. The Civil Procedure Rules 1998 of the Supreme Court of England and Wales, Statutory Instrument 1998 (No. 3132 L.17), as amended, provide at CPR 6.20, in relevant part:

Oct. 28, 2007, effective Apr. 9, 1991) Article 29 (2007), *available at* http://www.lawinfochina.com/law/display.asp?db=1&id=6459.

> a claim form may be served out of the jurisdiction with the permission of the court if–
>
> Claims in tort
>
> (8) a claim is made in tort where–
>
> (a) damage was sustained within the jurisdiction;

New Jersey's exercise of jurisdiction is consistent with the law of nations and provides finality, venerated values in assessing jurisdiction. *See Rose v. Himely*, 8 U.S. 241, 243 (1808) (when considering whether to enforce a judgment by comity, whether foreign court exercises jurisdiction "*consistently with the law of nations*" is key to whether enforcement is granted and finality realized) (emphasis in original).

B. The Exercise of Jurisdiction by New Jersey Would Not Interfere with Interstate Relations Because Territoriality and Federalism Do Not Operate as Independent Restrictions on a State's Exercise of Jurisdiction.

McIntyre England argues that due process requires "restricting a state's exercise of sovereignty to its territory." (Pet'r's Merit Br. 25.) It suggests that its contacts with New Jersey prior to litigation are constitutionally insufficient because it had similar, if not the same, contacts with other states. It further suggests that the exercise of jurisdiction by New Jersey would impermissibly interfere with the

sovereign interests of the other forty-nine states—interference that it claims exists even though in its briefing it fails to identify a single other state in the nation in which this suit could be heard.

There is nothing extraterritorial about New Jersey exercising jurisdiction over an injury to a New Jersey citizen in New Jersey caused by McIntyre England's product which had been sent to that state. Even so, due process does not impose territorial limitations that make a defendant's pre-litigation contacts with one state constitutionally deficient because they mirror its contacts with other states. Neither the text of the Clause, nor its history or purpose, support McIntyre England's assertion, nor do this Court's precedents. *See Ireland*, 456 U.S. at 703 (finding that the sine qua non of due process is liberty, not federalism); *Burger King*, 471 U.S. at 472 n.13 (same). Contrary to Petitioner's argument that territoriality is the "sine qua non" of personal jurisdiction (Pet'r's Merit Br. 40), for cases involving absent nonresident defendants, territoriality is, and should remain, a shibboleth.[15] *See Burnham*, 495 U.S. at 621 (distinguishing between due process standards for evaluating assertions of state-court jurisdiction against absent nonresident defendants and resident defendants or defendants present in the territory of the forum state).

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[15] *See World-Wide Volkswagen*, 444 U.S. at 494. This is especially true for corporations, like Petitioner, which "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" *Burnham v. Superior Court*, 495 U.S. 604, 610, n.1 (1990) (plurality opinion).

The texts of the Fifth and Fourteenth Amendments' Due Process Clauses make no mention of territory. *See* U.S. Const. amend. V, XIV. Territoriality was not a concern of English due process, from which our due process clauses came. Martin H. Redish, *Due Process: Federalism, And Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1122 (1981) (hereinafter "Redish"). The central, if not exclusive, concern of due process in the Fifth Amendment was "secur[ing] the individual from the arbitrary exercise of the powers of government." *Bank of Columbia v. Okely,* 17 U.S. (4 Wheat.) 235, 244 (1819) (per Johnson, J.), *cited with approval in County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Federalism, which Petitioner connects with territoriality, could not have been its concern, as it limited the power of Congress over individuals, not states, and did not limit state power. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1883) (concluding that the Bill of Rights applies only to the federal government).

The Fourteenth Amendment, which closely parallels the Fifth, does not indicate that its Framers conceived of a more direct link between due process and territory.[16] When the amendment was adopted there was hardly any discussion of due process itself, R. Mott, *Due Process of Law* 164 (1925), and nothing

[16] As Professor Redish has explained, "[j]udicial decisions recognizing limitations on the reach of a state's personal jurisdiction in the pre-Civil War United States were not based on constitutional principles. These decisions all represented exceptions to the dictates of the full faith and credit clause, ..." Redish, *supra*, at 1123; *see, e.g.*, *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850) (drawing on principles of international comity, and treating such principles as exceptions to the full faith and credit clause).

in that scant discussion suggests that the Framers of the Fourteenth Amendment intended to alter existing conceptions of due process, Redish, *supra*, at 1125 n.91.

Subsequently, in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), this Court read a certain notion of territory into the Due Process Clause of the Fourteenth Amendment, concluding that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[17] But it later abandoned that "shibboleth." *World-Wide Volkswagen*, 444 U.S. at 293. Dicta in *Hanson v. Deckla*, 357 U.S. 235 (1958), and *World-Wide Volkswagen* suggest that territorial concerns could operate as an independent restriction on a forum's exercise of jurisdiction. *See Hanson*, 357 U.S. at 251 ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are the consequence of territorial limitations on the power of the respective States."); *World-Wide Volkswagen*, 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the Due Process Clause, acting as an

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[17] The Court imported this idea of territoriality from international sovereignty theories of French and Dutch continental scholars, rather than from our English heritage of due process, which does not evidence such concerns. *See* Geoffrey C. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 258-59 (1965). *See also* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956) (noting that physical power over an individual was not, at common law or in early American practice, a prerequisite to jurisdiction over the person, particularly in claims by citizens of the forum for harm realized in the forum).

instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."). But this Court itself has since clarified that due process limitations on personal jurisdiction ultimately concern liberty, not territoriality. *Ireland*, 456 U.S. at 703; *Burger King*, 471 U.S. at 13; *Omni Capital Int'l, Ltd. v. Rudolf Wolf & Co., Ltd.*, 484 U.S. 97, 104 (1987); *see Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977) (explaining that "central concern" of personal jurisdiction is the "relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest"); *id.* (explaining that "[t]he *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of the respective States,' . . . simply makes the point that the States are defined by their geographical territory").

Contrary to McIntyre England's assertion that territoriality is the sine qua non of due process in personal jurisdiction cases (Pet'r's Merit Br. 25), this Court's case law, and the text and history of the Fourteenth Amendment's Due Process Clause, refute its argument that territoriality (or federalism) should operate as an independent restriction on state power that would render constitutionally insufficient its pre-litigation contacts with New Jersey because it had similar, if not the same, contacts with other states.

C. New Jersey's Discharge of One of the "First Duties" of Any State Supports Its Exercise of Jurisdiction.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The right to call on a government to resolve disputes is a fundamental term of the social contract. When a state affords a forum to one of its own citizens, injured in that state, it is discharging this fundamental duty:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (citations and quotation omitted); *see Burger King*, 471 U.S. at 473 ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citation and internal quotation marks omitted)); *Charles Gendler*, 508 A.2d at 1139 ("A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.") It also

implements the fundamental right of access to courts. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.")

As a matter of its own policy, New Jersey has a considerable interest in providing a forum to those of its citizens who are employed and sustain industrial injuries there. *Cruz v. Robinson Eng'g*, 600 A.2d 1238, 1242-43 (N.J. Super Ct. App. Div.), *certif. denied*, 611 A.2d 648 (N.J. 1992). As the place of harm, New Jersey supplies the substantive law in this action. *See Cruz*, 600 A.2d 1238, 1242-43; N.J. Stat. Ann. § 2A:58C-1 *et seq.* (West 2010). Additionally, New Jersey has an interest in the smooth operation of its workers' compensation scheme, which requires Mr. Nicastro to re-pay his employer's insurance carrier 66 percent of all the benefits he received before he can keep any of his recovery from this lawsuit, should he ever recover anything from McIntyre England. *See* N.J. Stat. Ann. § 34:15-40; *Frazier v. New Jersey Mfrs. Ins. Co.*, 667 A.2d 670 (1995).[18]

[18] New Jersey also is the most convenient forum. Both the machine that caused the injury and Mr. Nicastro are located in New Jersey, and the accident occurred there. Mr. Nicastro's employer, doctors, and medical records are all located in New Jersey. In fact, most, if not all, of the evidence in this case, including fact and expert witnesses, is located in New Jersey. The lower court found that that the extensive presence of McIntyre England's representatives all over the United States made it impossible for it to claim that New Jersey was an inconvenient forum, "that travel to New Jersey is onerous or an unfair burden for it to bear." (Pet. App. 41a.)

The Court's instruction in *International Shoe*, 326 U.S. at 319, to measure the "quality and nature" of activity that permissibly gives rise to jurisdiction "in relation to" concerns regarding the orderly administration of laws, requires deference to the purpose New Jersey was serving in affording a forum. A state's offer of a forum in a situation like this one simply recognizes legitimate local interests and demonstrates no ill-will or unfairness toward a foreign defendant. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947). Thus, although the minimum contacts demonstrated above are more than constitutionally sufficient, the state's compelling interest in affording a forum in a personal injury case helps render the "quality and nature" of McIntyre England's contacts with the forum sufficient to support New Jersey's exercise of personal jurisdiction in this case. *See Burger King*, 471 U.S. at 477 (recognizing that the state's interest, among other considerations, "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required").[19]

[19] This conclusion is further supported by the plaintiff's interest in obtaining relief in New Jersey being at its apex, given that there is no other convenient forum or effective relief available to the Nicastros. Although McIntyre America was named as a defendant in the complaint, it went bankrupt in 2001 (J.A. 91a-93a), just after Mr. Nicastro's accident and two years before this lawsuit was filed in 2003, the same year McIntyre America's bankruptcy case was closed. The likelihood of recovery from McIntyre America's liquidated assets is non-existent. Even if McIntyre America still existed, it would be liable under New Jersey law only for its own fault. N.J. Stat. Ann. § 2A:58C-9.

D. Petitioner Has Failed to Present Any Reasons Why New Jersey's Assertion of Jurisdiction in this Case Would Be Unfair and Substantially Unjust.

Consistent with this Court's precedents, upon concluding that McIntyre England was sufficiently connected to New Jersey to render an exercise of jurisdiction prima facie fair, the court below analyzed other factors, including the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief, and found that that McIntyre England failed to make the required compelling showing that those factors would render the exercise of jurisdiction offensive to traditional notions of fair play and substantial justice. (Pet. App. 40a-42a.)

McIntyre England, in its petition and merits briefing, focuses exclusively on whether the New Jersey Supreme Court correctly determined that Nicastro made a prima facie showing of minimum contacts under the stream-of-commerce theory. (*See* Pet'r's Merit Br. 30 (Petitioner's "sole concern is whether J. McIntyre had minimum contacts with New Jersey.").) It does not contest the court's finding that McIntyre England failed to present compelling reasons why the interests of fair play and substantial justice would be violated by New Jersey's exercise of jurisdiction over this case. That finding, therefore, is not before the Court. *See United States v. Int'l Business Machines Corp.*, 517 U.S. 843, 855 n.3 (1996).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Date: December 13, 2010