No. SC-2024-0515

IN THE SUPREME COURT OF ALABAMA

Ex Parte

INV PERFORMANCE SURFACES, LLC, PETITIONER

IN RE: *THE WATER WORKS AND SEWER BOARD OF THE CITY OF GADSDEN*, PLAINTIFF

V.

DUPONT DE NEMOURS, INC., ET AL.,DEFENDANTS

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PETITIONER

From the Circuit Court of Etowah County, Alabama, CV-2023-900332.00

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STATEMENT REGARDING ORAL ARGUMENT

Amici curiae the Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center, Inc. defer to Petitioner's judgment on whether oral argument is necessary in this case. *Amici* will not file a motion to participate in oral argument. *See* Ala. R. App. P. 29(f).

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small

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[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

SUMMARY OF THE ARGUMENT

The trial court's assertion of personal jurisdiction is directly at odds with U.S. Supreme Court precedents. The trial court concluded that it could exercise personal jurisdiction over an out-of-state business, INV Performance Surfaces, LLC, that sold topical formulations containing poly-fluoroalkyl substances ("PFAS") to carpet manufacturers in Dalton, Georgia. The court did so even though INV did not direct any of its suit-related conduct toward Alabama, and wastewater allegedly containing

PFAS entered Alabama only through the actions of multiple independent third parties.[2]

Due process demands more. Exercising personal jurisdiction consistent with due process requires more than "foreseeability" that a product could cause injury in the state. *Ex parte City Boy's Tire and Brake, Inc.*, 87 So.3d 521, 533 (Ala. 2011). And "a defendant's relationship with a … third party, standing alone, is an insufficient basis for jurisdiction." *Walden v. Fiore*, 571 U.S. 277, 286 (2014). The U.S. Supreme Court has long required "'minimum contacts'" between "*the defendant* and the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (emphasis added). But Petitioner INV has zero suit-related contacts with Alabama. INV simply sold a product to companies (carpet mills) that had contacts with a company in Georgia

[2] To be clear, this appeal does not present any merits questions, including any questions about the nature and scope of any potentially relevant water quality standards. The question in this case is jurisdictional: whether the Constitution permits Alabama to haul INV before its courts for the out-of-state and extremely attenuated conduct at issue in this case.

(Dalton Utilities) that discharged water that eventually entered Alabama.

If the lower court's clear violation of precedent is not corrected, it threatens serious consequences for the nation's businesses. Both federal and Alabama due process jurisprudence allow businesses to structure their conduct to limit where they may be sued. The exercise of personal jurisdiction in these circumstances is inconsistent with that guarantee. Specifically, if a business could be haled into court for any foreseeable result of the sale of a product, then personal jurisdiction could be found any time (as here) that a plaintiff imagines an attenuated causal chain between the defendant's out-of-state actions and effects in the forum state. That approach would make it impossible for businesses to "act to alleviate the risk of burdensome litigation," as the Constitution guarantees. *Id.* at 297. This Court's intervention is needed to keep Alabama courts off this "slippery slope." *Ex parte Aladdin Mfg. Corp.*, 305 So. 3d 214, 233 (Ala. 2019) (plurality).

ARGUMENT

This petition presents a question that the U.S. Supreme Court and this Court have already answered: Is an out-of-state defendant subject to specific personal jurisdiction merely because its out-of-state conduct has

foreseeable "effects" in the forum state through the independent actions of third parties? At least since *Calder v. Jones*, 465 U.S. 783 (1984), the answer has been "no." "The mere fact that [a defendant] can 'foresee' that [its out-of-state action] will … have an effect in [the forum state] is not sufficient for an assertion of jurisdiction." *Id.* at 789; *see, e.g.*, *Walden*, 571 U.S. at 289 (same); *Brooks v. Inlow*, 453 So. 2d 349, 354 (Ala. 1984) (same). The decision below conflicts with these precedents and generates needless uncertainty. The Court should thus issue a writ of mandamus directing the trial court to dismiss INV from this case.

I. The trial court's assertion of jurisdiction violates U.S. Supreme Court precedents.

It has "long been settled" that "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between *the defendant* and the forum State." *World-Wide Volkswagen*, 444 U.S. at 291 (emphasis added). This "minimum contacts" test requires "some act by which *the defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (due process prohibits a state

court from issuing "a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations")). The trial court violated these basic principles.

The relevant facts do not show "minimum contacts." Petitioner INV is a Delaware company with its principal place of business in Kansas. Pet.2. It made and sold carpet fibers, as well as topical formulations to make finished carpets soil resistant, to carpet manufacturers in Dalton, Georgia. *Id.* The topical formulations contained PFAS. *Id.* INV's customers then allegedly produced wastewater containing PFAS, which they sent to Dalton Utilities in Georgia. *Id.* at 3. Dalton Utilities then allegedly released the wastewater on land in Dalton. *Id.* The wastewater then entered the Conasauga River and flowed downstream, eventually entering the Coosa River and crossing into Alabama. *Id.*

There are no allegations that Petitioner INV *itself* took any suit-related action purposefully directed at the State of Alabama. INV made no "physical entry" into Alabama. *Walden*, 571 U.S. at 285. INV did not direct or control the creation of wastewater, the discharge of wastewater, or the release and movement of wastewater into waters that flowed into Alabama. INV merely sold products containing PFAS to a Georgia

company. After that, INV had no control over the discharge of PFAS-containing wastewater through the actions of multiple, independent third parties. *See generally* App'x Tab 1, Compl.

At most, the complaint hints that INV could or should have foreseen that some PFAS would reach Alabama. *See* Pet.19. Even if the allegations about INV's knowledge were correct, that would not be enough to establish specific personal jurisdiction. As the Supreme Court has repeatedly explained, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295; *see, e.g.*, *Walden*, 571 U.S. at 283-84; *City Boy's Tire*, 87 So.3d at 533. Instead, "the defendant's suit-related conduct must create a substantial connection with the forum State" to allow an exercise of jurisdiction "consistent with due process." *Walden*, 571 U.S. at 284. The "unilateral activity of … a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). It must be "the defendant himself that create[s] a 'substantial connection' with the forum State." *Burger King Corp. v.*

Rudzewicz, 471 U.S. 462, 475 (1985) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

For this reason, the U.S. Supreme Court has repeatedly held that merely placing a product in the stream of commerce that will reach a forum state is not enough for personal jurisdiction. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 298. The defendant's conduct must also be "*purposefully directed toward the forum State*," and the "defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (plurality opinion) (citing cases); *see also City Boy's Tire*, 87 So.3d at 533 ("'[F]oreseeability' alone does not justify the exercise of personal jurisdiction."). "[I]t cannot be said that the *defendant* engaged in any purposeful activity related to the forum" simply because the defendant does business with a third-party with contacts with the forum state. *Rush v. Savchuk*, 444 U.S. 320, 328-29 (1980) (refusing to impute an insurer's forum contacts to its insured defendant where defendant had "no control" over the insurer's contacts). Due process requires more than a

foreseeability standard that would allow a seller to "be sued in Alaska or any number of other States' courts without ever leaving town." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality).

The assertion of jurisdiction here goes beyond even the most lenient approach to due process requirements. For example, some courts have found personal jurisdiction based on the foreseeability of sales in the forum state that benefit the defendant. *See, e.g.*, *Align Corp. Ltd. v. Allister Mark Boustred*, 421 P.3d 163, 171 (Colo. 2017). But even the overbroad view of those courts required some action—like marketing—in the forum state and held that jurisdiction was fair because the defendant benefited economically from its products eventually being sold in the forum state. *Asahi Metal*, 480 U.S. at 117 (Brennan, J., concurring in part) ("A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity."). Here, any PFAS entering Alabama is downstream not only from INV's placement of its products into the stream of commerce in a different state but also downstream from the

disposal of wastewater in a different state through the actions of multiple, independent actors.

This Court's recent decision in *Sawyer v. Cooper Tire & Rubber Co.* confirms that personal jurisdiction requires more than the introduction of an item into the stream of commerce in another state. SC-2023-0603, 2024 WL 4096870 (Sept. 6, 2024). Due process might not require a "direct causal link" to a defendant's contacts with a state. *Id.* at *11. But it does require forum state contacts that "'relate to' the plaintiffs cause of action." *Id.* at *12. This relational link was satisfied in a suit over a defective tire when the defendant had "sold and distributed" it in Alabama, "maintained an extensive authorized dealer network" in Alabama, and "marketed and advertised" in Alabama. *Id.* at *12, 14-16.

It is thus no surprise that, in *Aladdin*, where plaintiffs proceeded against carpet manufacturers on a similar chain of alleged causation, the fractured plurality opinion emphasized that the case "d[id] not involve the sale of a product that is placed into the stream of commerce." 305 So.3d at 234. Finding personal jurisdiction against a company that merely supplied a product out of state in these circumstances would

directly conflict with the due process requirements identified by the U.S. Supreme Court.

II. The U.S. Supreme Court requires conduct directed at the forum state in intentional tort cases.

Plaintiff's assertion of intentional tort claims does not change this analysis. Members of this Court have previously described an "effects test" for personal jurisdiction in cases involving intentional torts, but even the most generous version of this test still requires conduct "directly aimed" at the forum state. *Aladdin Mfg.*, 305 U.S.So. 3d at 231 (plurality) (quoting *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d 1210, 1220 n.28 (11th Cir. 2009)). INV's conduct was not "directly aimed" at Alabama here.

Calder v. Jones illustrates the kind of conduct required for an assertion of jurisdiction based on an intentional tort. 465 U.S. 783 (1984). In *Calder*, plaintiff Shirley Jones brought a libel suit in California against a reporter and editor for the *National Enquirer* magazine in Florida who had worked on an article about Jones. The *Enquirer* sold about 600,000 copies of its magazine in California, which was "almost twice the level of the next highest State." 465 U.S. at 785. The Supreme Court held that jurisdiction in California was consistent with due process

because of the defendants' purposeful contacts with that state: their article "impugned the professionalism of an entertainer whose television career was centered in California," "was drawn from California sources," and caused harm that "was suffered in California." *Id.* at 788-89. As the Supreme Court later explained, part of the tortious conduct in *Calder* "actually occurred in California." *Walden*, 571 U.S. at 287-88. When "combined with the various facts that gave the article a California focus," this conduct was enough to support jurisdiction. *Id.* But mere effects felt in a state without "forum-focused" conduct do not suffice. *Id.* at 290.

Walden confirms that jurisdiction turns on forum-targeting actions even when intentional torts are alleged. *Walden* explained that the "same principles" from *Int'l Shoe*, *World-Wide Volkswagen*, and other cases apply. *Id.* at 286. As with other causes of action, "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* For this reason, *Walden* held that a Georgia police officer could not be pulled into a Nevada court by Nevada plaintiffs based on the officers' alleged Fourth Amendment violations during a search in Georgia. *Id.* at 279-82. Permitting jurisdiction based on

"foreseeable harm in" a forum state "improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis." *Id.* at 289.

Walden's requirement of forum-focused conduct could have been written with this case in mind. INV had no suit-related connection to Alabama. It merely sold a product that contained PFAS to Georgia companies. It was then INV's customers (not INV) who allegedly placed those chemicals into wastewater and sent that water to Dalton Utilities' treatment plant in Georgia. Dalton Utilities (not INV) then sprayed the water onto land that enabled it to eventually flow into Alabama. It was the unilateral actions of others that allegedly caused the water to flow downstream and to affect the plaintiffs in Alabama. "[T]he reality" is that "none of petitioner's challenged conduct"—the selling of products with PFAS—"had anything to do with [the forum] itself." *Id.* at 278. Thus, there is no Alabama connection sufficient for specific jurisdiction.

III. The Court's decision here is important to businesses.

The U.S. Supreme Court has recognized the importance of the Constitution's limits on the exercise of personal jurisdiction in enabling businesses to anticipate and manage the forums in which they are subject to litigation. In a system where plaintiffs can choose both the forum and

the law that applies—and where either or both may be hostile to out-of-state defendants—the Constitution's limitations on specific jurisdiction serve an essential function in securing "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. They "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). For example, "[i]f a business entity chooses to enter a state on a minimal level, it knows that under the relationship standard, its potential for suit [in a State] will be limited to suits concerning the activities that it initiates in the state." Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 S.M.U. L. Rev. 1313, 1346 (2005). As the U.S. Supreme Court has recognized, businesses should be on "clear notice" regarding where they are subject to suit so they "can act to alleviate the risk of burdensome litigation," including by "severing [their] connection" with

states where the risks of litigation and expected costs on customers "are too great." *World-Wide Volkswagen*, 444 U.S. at 297.

Permitting individuals and companies to be sued wherever their sale of an item in another state may have some minimally foreseeable effect in another state creates substantial uncertainty and will lead to burdensome litigation. Whether an out-of-state defendant can be subject to personal jurisdiction under this new regime will turn on the defendant's alleged knowledge about the potential effects of its conduct. But figuring out the extent and timing of a defendant's knowledge will likely require dueling affidavits and burdensome jurisdictional discovery. The inquiry will be complicated in even the best of cases. Worse, requiring businesses to guess about whether an alleged forum-state effect will be deemed foreseeable enough to lead to personal jurisdiction will undermine the certainty and predictability that businesses value and the law requires. *See Nicastro*, 564 U.S. at 885 (plurality) (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible").

The Court need not think very far beyond the facts of this case to see the profound ripple effects of the trial court's decision. Untold

numbers of businesses nationwide sell or may have sold products that contain various PFAS. These businesses cannot control how third parties handle those items once they have been sold. Under the trial court's reasoning, any company or individual who ever sells any product that happens to contain such chemicals could be faced with litigation anywhere in the United States—wherever those chemicals are released or found to reside. The mere act of handling or selling PFAS would effectively be treated as consent to being sued anywhere in the country.

These concerns about limitless jurisdiction are not hypothetical. Dalton Utilities' discharge ran almost 100 miles through the Conasauga River into the Coosa River, which travels through Gadsden. But the water does not stop there. The Coosa joins with the Tallapoosa to form the Alabama River, which joins with the Tombigbee to form the Mobile, which flows into Mobile Bay, which empties into the Gulf of Mexico, relatively close to both Florida and Mississippi. If INV can be haled into Alabama state court for its sale of product to a customer who transferred wastewater to Dalton Utilities, it is unclear what, if anything, would stop plaintiffs in coastal communities in those states from haling INV into court there by alleging that they too have been harmed by PFAS. In fact,

it is unclear how a business could ever avoid being sued in any jurisdiction where some harm has been alleged to flow from its product.

The causal chain in any given case may or may not be more attenuated than the one relied on by the trial court. But once courts have reached beyond forum-directed conduct, how long of a causal chain is too long? The trial court's one-page, unreasoned decision provides no answer. Our legal system cannot operate fairly, as due process requires, if jurisdiction relies on such an indeterminate and attenuated test.

CONCLUSION

The Court should issue a writ of mandamus directing the trial court to dismiss INV from this case.

Dated: September 12, 2024

Respectfully submitted,

/s/ Gilbert Dickey

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Alabama Rules of Appellate Procedure 29(c) and 21(d). Microsoft Word's word-count function indicates that this brief contains 3,294 words. I also certify this petition's compliance with the font requirements set forth in Alabama Rule of Civil Procedure 32(a)(7). The petition was prepared in Century Schoolbook font using 14-point type.

/s/ Gilbert Dickey
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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2024 the foregoing was filed with the Clerk of the Court and served by U.S. Mail, first-class, postage prepaid or electronically upon the following parties and participants:

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