

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 J. MCINTYRE MACHINERY, LTD., :

4 Petitioner : No. 09-1343

5 v. :

6 ROBERT NICASTRO, ET UX. :

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8 Washington, D.C.

9 Tuesday, January 11, 2011

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:13 a.m.

14 APPEARANCES:

15 ARTHUR F. FERGENSON, ESQ., Ellicott City, Maryland; on
16 behalf of Petitioner.

17 ALEXANDER W. ROSS, JR., ESQ., Marlton, New Jersey; on
18 behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-1343, J. McIntyre
5 Machinery, Ltd. v. Nicastro.

6 Mr. Fergenson.

7 ORAL ARGUMENT OF ARTHUR F. FERGENSON

8 ON BEHALF OF THE PETITIONER

9 MR. FERGENSON: Mr. Chief Justice, and may
10 it please the Court:

11 Because J. McIntyre did not direct any
12 activity at residents of New Jersey either itself or by
13 directing its distributor MMA to do so and had no
14 awareness or knowledge that the distributor took the
15 action that it did toward New Jersey, New Jersey lacked
16 adjudicative jurisdiction.

17 JUSTICE SCALIA: When you say "its
18 distributor," was this distributor at all controlled by
19 the defendant?

20 MR. FERGENSON: No, Your Honor. It was not.
21 And both under Ohio law, Wells v. Komatsu America, and
22 under the Restatement (Second) Agency, section 1(1), the
23 right to control is essential to ascribe actions to
24 create an agency, and it's on a per-purpose basis.

25 JUSTICE SCALIA: It might be better to refer
Alderson Reporting Company

1 to it as the company that distributed its product,
2 rather than calling it "its distributor."

3 MR. FERGENSON: Very good, Your Honor.

4 JUSTICE SCALIA: It's loaded, it seems to
5 me.

6 MR. FERGENSON: Very good, Your Honor.

7 JUSTICE KAGAN: Mr. Fergenson, in your
8 question presented to this Court, you ask whether
9 there's personal jurisdiction -- and I'm quoting here --
10 "solely because the manufacturer targets the United
11 States market for the sale of its product."

12 So I'm taking from that, that you
13 acknowledge that this manufacturer, McIntyre, a British
14 manufacturer, targeted the United States market for the
15 sale of its product. That's correct, yes?

16 MR. FERGENSON: Your Honor, that's what the
17 New Jersey Supreme Court held, and that's how we
18 fashioned the --

19 JUSTICE KAGAN: That's your question
20 presented.

21 MR. FERGENSON: -- the test.

22 JUSTICE KAGAN: Did this -- well, I'll just
23 ask you, then: Did this manufacturer target the United
24 States market? Did it want to sell its products in the
25 United States?

1 MR. FERGENSON: Yes, Your Honor.

2 JUSTICE KAGAN: Okay. So what does that
3 mean, exactly, Mr. Fergenson? Because the United States
4 is the United States. It's made up of 50 States. So I
5 assume that what that means is the manufacturer wanted
6 to sell its products in each of the 50 States. Is that
7 right?

8 MR. FERGENSON: No, Your Honor.

9 JUSTICE KAGAN: It only wanted to sell its
10 product in a few States?

11 MR. FERGENSON: No, Your Honor. It wanted
12 to sell its product anywhere that the distributor could
13 find. The distributor was the market manager.

14 JUSTICE KAGAN: Right. Anywhere. So if the
15 distributor came up with California, that was great. If
16 the distributor came up with a customer in New Jersey,
17 that was great. As many as possible, more the better,
18 all over the United States. Is that right?

19 MR. FERGENSON: As many as possible,
20 wherever the -- the distributor could find a customer,
21 yes, Your Honor.

22 JUSTICE KAGAN: Exactly. So you targeted
23 New Jersey no less than you targeted California or New
24 York or Illinois or Massachusetts or anything else.

25 MR. FERGENSON: Well --

1 JUSTICE KAGAN: You targeted the entire
2 United States. Why shouldn't there be jurisdiction in
3 each of the States you targeted?

4 MR. FERGENSON: Well, Your Honor, because,
5 first, this Court's jurisprudence looks to a direct act,
6 from World-Wide Volkswagen and even before, as it
7 brought forward Hanson. As this Court has applied
8 World-Wide Volkswagen, Burger King and Justice
9 O'Connor's concurrence in Asahi and the other
10 occurrence -- concurrence, Justice Brennan's concurrence
11 in Asahi, look toward a specific State --

12 JUSTICE SCALIA: Mr. Fergenson, I suppose
13 you could say the same thing about any United States
14 manufacturer --

15 MR. FERGENSON: Yes.

16 JUSTICE SCALIA: -- who would desire to sell
17 his product in any of the States that would buy it.

18 MR. FERGENSON: Yes, Your Honor.

19 JUSTICE SCALIA: And to say that this
20 foreign manufacturer is therefore suable in any State
21 would mean that any American manufacturer is suable in
22 any State, which --

23 MR. FERGENSON: Yes, Your Honor.

24 JUSTICE SCALIA: -- none of our cases hold.

25 JUSTICE KAGAN: Well, suable in any State

1 where the incident arises. This is not general
2 jurisdiction. This is specific jurisdiction. So the
3 question is, when you target the entire United States
4 and each of the 50 States within that and an accident
5 occurs within one of those States, are you subject to
6 jurisdiction in that State for that accident, for a
7 claim based on that accident? Not generally, but just
8 for a claim based on that accident.

9 Didn't even Justice O'Connor -- you
10 referenced the Asahi opinions, but Justice O'Connor said
11 as long as there's purposeful availment, there is
12 specific jurisdiction, and there is purposeful availment
13 when there's an active effort to target a market.

14 MR. FERGENSON: Well, Your Honor, in Burger
15 King, in Hanson, in World-Wide Volkswagen, the
16 purposeful availment is defined as conducting activities
17 within the forum State. The -- this Court, through
18 those opinions, foreseeability, clear notice, reasonably
19 anticipate -- all converge.

20 JUSTICE GINSBURG: In all of those cases,
21 there was a forum in the United States where someone
22 injured in the United States could sue. Your
23 proposition is that a company can deliberately send its
24 products, wants to exploit a U.S. market. But I take it
25 that there is no place in the United States, because New

1 Jersey is no different than California or any other
2 place -- is it your position that there is no forum in
3 which McIntyre can be sued, even though it set up this
4 distribution arrangement for the very purpose of having
5 its machines in as many locations in the United States
6 as it could? Is there a forum in the United States
7 where it could be sued?

8 MR. FERGENSON: Yes, Your Honor.

9 JUSTICE GINSBURG: Which one?

10 MR. FERGENSON: Ohio. It could have been
11 proceeded against in Ohio.

12 JUSTICE GINSBURG: It could be reached in
13 Ohio. Now, does that make a whole lot of sense? Is it
14 any more convenient for McIntyre to come to Ohio than
15 New Jersey? It's a lot less convenient for
16 Mr. Nicastro, who had his fingers removed by this
17 machine.

18 But you -- you are conceding that there is a
19 forum where this British company can be sued on a tort
20 that occurred in New Jersey. Explain to me why, since
21 there is a forum in the United States, the logical one
22 isn't New Jersey rather than Ohio.

23 MR. FERGENSON: Well, Your Honor, first, the
24 issue of convenience, choice of law, conflict of law, as
25 a determinative factor was rejected by this Court --

1 JUSTICE GINSBURG: I'm asking you --

2 MR. FERGENSON: What?

3 JUSTICE GINSBURG: -- the question: Where
4 can it be sued? Well, something happened in New Jersey.
5 The machine, allegedly defective machine, caused a harm
6 there. What happened in Ohio? What basis for specific
7 jurisdiction is there in Ohio? There was no tort in
8 Ohio.

9 MR. FERGENSON: Well, Your Honor, under Ohio
10 law, the -- there can be an assignment. There was no
11 written contract between MMA and J. McIntyre. There can
12 be an assignment in return for a release of a common law
13 indemnification right.

14 JUSTICE GINSBURG: I don't understand.

15 JUSTICE KAGAN: Yes, but, Mr. Fergenson,
16 just picking up where Justice Ginsburg left off, Ohio is
17 a perfectly good place for jurisdiction over a claim
18 between the British manufacturer and its distributor in
19 Ohio. Any kind of contract claim, a claim based on the
20 agreement between the two -- Ohio is the appropriate
21 place for jurisdiction. But Ohio does not seem the
22 appropriate place for jurisdiction -- and again, we're
23 talking about specific jurisdiction, not general -- as
24 to a claim based on an accident that occurred in New
25 Jersey.

1 The entire idea of specific jurisdiction is
2 that you need a relationship between the defendant and
3 the forum and the claim. And here the claim arose in
4 New Jersey and was in fact not related to Ohio.

5 MR. FERGENSON: Well, Your Honor, Ohio
6 explicitly provides, and they -- it's arisen in statute
7 of limitation cases, and it goes back to Travelers
8 Indemnity v. Trowbridge, that an action under both
9 express and common law indemnity arises under contract.
10 So, upon the assignment -- and there need
11 not be a judgment under Ohio law; that's Fort Defiance
12 Construction v. Village of Grover Hill -- there can be
13 an assignment of a common law indemnity under strict
14 product liability.

15 JUSTICE GINSBURG: What kind of common law
16 indemnity are we dealing with here? Where does
17 Mr. Nicastro sue? He hasn't got any assignment, any
18 indemnity. Mr. Nicastro is injured in the United States
19 by a machine manufactured in England, and he wants to
20 sue, understandably, in the United States. Why are we
21 talking about assignments, indemnity? That has nothing
22 to do with Mr. Nicastro.

23 MR. FERGENSON: Yes, Your Honor, it does.
24 Mr. Nicastro had an action under strict product
25 liability. I want to come back to more fully answer the

1 why question that you asked: Why is it just and right
2 that he go -- that he to Ohio?

3 JUSTICE GINSBURG: No, I would just like to
4 know first -- you said there is jurisdiction in Ohio and
5 not in New Jersey. In New Jersey, it's the place where
6 the accident occurred; and in Ohio, there's nothing but
7 the relationship between the distributor -- there's a
8 contract between the distributor and McIntyre. So why
9 does Ohio have jurisdiction over this New Jersey tort?

10 MR. FERGENSON: Ohio has New Jersey --
11 jurisdiction. There -- as Your Honor noticed, there are
12 three places that Mr. Nicastro, in looking over this,
13 could have chosen: United Kingdom, which he is now in,
14 in filing a claim in the liquidation proceedings; Ohio;
15 and New Jersey. The accident occurred in New Jersey.
16 That's a forum non conveniens issue that's -- -

17 JUSTICE GINSBURG: It's a forum what?

18 MR. FERGENSON: That's a convenience issue,
19 a forum non conveniens issue. And Justice Brennan was
20 clear before Burger King that that's what he wanted to
21 see the law go in the direction of. He was clear about
22 that.

23 Ohio, however, in looking at International
24 Shoe, going back to International Shoe, which talks
25 about the relationship between the defendant and the

1 forum State --

2 JUSTICE GINSBURG: And the claim in suit.

3 That's very important.

4 MR. FERGENSON: And -- and the cause of
5 action, yes. There -- the one place where both the
6 distributor, who would upon suit and then a claim over
7 under product, strict product liability, would disappear
8 -- that's why you could get an assignment -- the
9 distributor is in Ohio, and so too is the contract
10 relationship.

11 JUSTICE GINSBURG: I still don't -- I don't
12 follow how Mr. Nicastro gets involved with assignment,
13 indemnity. Mr. Nicastro has a claim against -- well, he
14 sued them both, but the distributor is now bankrupt.
15 And he says, well, this is specific jurisdiction;
16 specific jurisdiction, as International Shoe teaches, is
17 where the claim arose. International Shoe, it arose in
18 the State of Washington because that's where the shoe --
19 the people who were promoting sale of International
20 Shoe's -- International Shoe's shoes worked every day.
21 So it was a claim relating to a tax owed by
22 International Shoe based on the events that occurred in
23 California. It was not all-purpose jurisdiction.

24 And your suggestion that Ohio somehow is a
25 proper forum for Mr. Nicastro's tort claim, I really

1 don't follow that.

2 MR. FERGENSON: It -- Your Honor, it is.

3 Mr. Nicastro could have contacted MMA, and stated I have
4 a strict product liability action, or the trustee in
5 bankruptcy. The statute of limitations was 2 years in
6 both cases. Ohio would have applied New Jersey strict
7 liability law.

8 JUSTICE KENNEDY: Your answer to Justice
9 Ginsburg -- I don't want to make your argument for you,
10 but it seems to me rather strange. All of a sudden
11 you're talking about how Ohio law will help you out. I
12 thought the question was, from the standpoint of the
13 defendant at least, whether the defendant purposefully
14 availed itself of the forum. And you would say the
15 defendant here purposefully availed itself of Ohio by
16 choosing an Ohio distributor. But you don't make that
17 argument. You're talking about a contract, an
18 indemnity, which seems to me another step. That's
19 choice of law and applicable law.

20 MR. FERGENSON: I agree, Your Honor; it is
21 choice of law. And --

22 JUSTICE SCALIA: Also, I don't think it's
23 worth your time, because frankly it doesn't make a whole
24 lot of difference to me whether they can sue in Ohio or
25 not. You really think that that's --

1 MR. FERGENSON: And, Your Honor --

2 JUSTICE SCALIA: What about in the United
3 States? Would the United States have jurisdiction?

4 MR. FERGENSON: No, because --

5 JUSTICE SCALIA: The United States would
6 not? They surely targeted the United States.

7 MR. FERGENSON: Well, Your Honor, in the --
8 in Justice O'Connor's footnote on national contacts in
9 Asahi, which was not disputed and I think essentially
10 accepted by Justice Brennan -- in that footnote, it
11 states that national contacts is for the national
12 sovereign to decide.

13 JUSTICE SCALIA: That's right. But if the
14 national sovereign, the United States, provided by
15 statute that Federal district courts would have
16 jurisdiction over any -- any tort suit by a person
17 injured by a foreign manufacturer that targeted the
18 United States, would that be proper?

19 MR. FERGENSON: This Court has not evaluated
20 under the Fifth Amendment what circumstances it may be,
21 and this is speculation, how Congress would establish
22 it. It may be that Congress --

23 JUSTICE SCALIA: Of course. It's a
24 hypothetical.

25 MR. FERGENSON: Yes, sir. Yes, sir.

1 JUSTICE SCALIA: Hypotheticals are always
2 speculation.

3 MR. FERGENSON: I think that --

4 JUSTICE SCALIA: How do you speculate about
5 that?

6 MR. FERGENSON: Yes. Your Honor, I think
7 that, without Klaxon and with a reasonable choice of
8 venue, Congress could establish a uniform system to
9 bring -- to bring foreign defendants into this country.

10 JUSTICE KENNEDY: Would you say the same
11 thing if, hypothetically, since we're engaging in a
12 hypothetical, the distributor were in France -- machine
13 manufactured in England, distributor is in France, and
14 the distributor then selects the United States and then
15 the same facts, New Jersey? United States would be an
16 appropriate jurisdiction under the Due Process Clause,
17 but not New Jersey?

18 MR. FERGENSON: I think that, with that one
19 step --

20 JUSTICE KENNEDY: Assuming the statute that
21 Justice Scalia hypothesizes.

22 MR. FERGENSON: Yes, Your Honor. I think
23 that, with that one step beyond --

24 JUSTICE KENNEDY: It's a little odd that the
25 States, which have residual sovereignty, which are not

1 limited sovereigns, would not have jurisdiction, but the
2 United States, which is a limited sovereignty other than
3 in the foreign affairs area, which may be relevant here,
4 does have jurisdiction. That seems backwards.

5 MR. FERGENSON: Well, Your Honor, I think
6 that if one looks at this as part of the Congress's
7 power to control, let's say, imports, then as a
8 condition -- and this is what the proposed Foreign
9 Manufacturers Legal Accountability Act looks for.

10 JUSTICE SCALIA: Well, Congress has power to
11 control the jurisdiction of Federal courts, and Congress
12 says Federal courts have jurisdiction over this matter.

13 MR. FERGENSON: Yes, Your Honor.

14 JUSTICE KAGAN: Mr. Fergenson, could I try
15 another hypothetical?

16 JUSTICE KENNEDY: But the question is why
17 the State can't make the same choice that the Congress
18 does. The State lacks foreign affairs power, to be
19 sure. Is that the only distinction? That doesn't sound
20 to me like due process. What we're talking about is a
21 source of authority, not fairness to the defendant.

22 MR. FERGENSON: Well, Your Honor, I think --
23 and I go to two words in particular in Burger King, one
24 taken from Hanson, which is "essential": It is
25 essential in each case that there be a purposeful

1 availment of the privilege of conducting activities
2 within the forum. And then the other --

3 JUSTICE KAGAN: But, Mr. Fergenson, the
4 question is whether seeking to serve a market -- and
5 here you're seeking to serve a market in each of the 50
6 States -- is purposeful availment. So let me -- let me
7 just try a different hypothetical.

8 Suppose you had the same arrangement with
9 your distributor in Ohio, but the arrangement was not to
10 serve the entire United States market. Instead, the
11 arrangement was to serve only five States in the
12 Midwest. That's what you wanted, your client wanted,
13 the market to be. So it was going to be Ohio and
14 Indiana and Illinois and Michigan and Iowa, all right?
15 So now a machine blows up in Illinois. Is there
16 jurisdiction in Illinois?

17 MR. FERGENSON: Yes, Your Honor.

18 JUSTICE KAGAN: There is jurisdiction in
19 Illinois, even though your relationship with your
20 distributor was in Ohio. But there's jurisdiction in
21 Illinois because the machine blew up there and you were
22 seeking to serve the market; that's right?

23 MR. FERGENSON: Because there was a
24 direction of the distributor to go into the State where
25 the accident occurred.

1 JUSTICE KAGAN: Okay. Now we have -- now we
2 say this is working very well. Let's get another nine
3 distributors on board. We'll give each of them five
4 States, all right? Now, if I understand you correctly,
5 now you're liable all over the United States because
6 you've had this relationship with 10 different
7 distributors, each of whom are going to serve 5 States.
8 So there's personal jurisdiction in any State where a
9 machine blows up.

10 MR. FERGENSON: If the -- yes, Your Honor,
11 if the States are assigned by name.

12 JUSTICE KAGAN: And now I say: Let's forget
13 these 10 distributors. Who needs 10 distributors? I'll
14 just have one distributor.

15 Why is there any difference?

16 MR. FERGENSON: Because that distributor --
17 unless that distributor is told you must go -- like a
18 traveling salesperson, you must go into each State, you
19 must personally go into each State -- that's purposeful
20 availment.

21 JUSTICE KAGAN: Mr. Fergenson, with respect,
22 this distributor was told to sell as many products as it
23 could in as many States as it could.

24 MR. FERGENSON: No, it was not, Your Honor.
25 It was not told to do anything more than to sell

1 products, not in as many --

2 JUSTICE SOTOMAYOR: Excuse me, counselor --
3 counselor, going back to --

4 MR. FERGENSON: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: -- the relationship,
6 Justice Scalia asked you whether there was legal
7 control, and you said no. But there was coordination,
8 wasn't there? Isn't -- doesn't the record show that the
9 English company traveled to the trade shows with the
10 American company? Wasn't your president, your English
11 president, present at the Las Vegas show in which this
12 New Jersey company first saw the machine? Is that
13 correct?

14 MR. FERGENSON: Yes.

15 JUSTICE SOTOMAYOR: I know there's a --

16 MR. FERGENSON: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: All right. And you
18 approved all marketing efforts. You had to approve --
19 according to the findings of the court below, you
20 approved all the marketing materials that the American
21 company --

22 MR. FERGENSON: No, Your Honor. There is a
23 letter that's undated that speaks about we have
24 advertised under your direction and per your
25 suggestions.

1 That letter also states that we've spent
2 \$350,000 and we performed the -- we performed repairs
3 and warranty service without seeking reimbursement from
4 you, and that's consistent with the distant relationship
5 here.

6 Your Honor, we asked for the names of the
7 customers. We didn't get it. We didn't get -- we
8 didn't drop-ship. And that would obviously have been a
9 lot less expensive in cost rather than shipping it to
10 Ohio. They were the market maker. They controlled the
11 relationships with the individual customers.

12 JUSTICE SOTOMAYOR: Then why was your number
13 and name both printed on the machine and in the warranty
14 book? The American -- obviously, some customers had to
15 be reaching out you to because all the materials they
16 received directed them to the English company, not to
17 the American company.

18 MR. FERGENSON: And, Your Honor, the record
19 shows that we were sued in Kentucky, we were sued in
20 Massachusetts. The Kentucky dispute was settled -- was
21 resolved by dismissal under the statute of limitations,
22 but --

23 JUSTICE SOTOMAYOR: I think you've begged my
24 question.

25 MR. FERGENSON: I'm sorry, Your Honor.

1 JUSTICE SOTOMAYOR: You did travel to
2 certain of the trade shows --

3 MR. FERGENSON: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: -- with the America
5 company?

6 MR. FERGENSON: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: You did make suggestions
8 with respect to advertising? At least with -- at least
9 the once, but they did?

10 MR. FERGENSON: The -- the company that
11 distributed the products stated in a letter that we
12 conformed our advertising to what you suggested.

13 JUSTICE SOTOMAYOR: Okay. And you don't
14 believe that coordinating your actions with the
15 distributor and appointing that distributor to
16 distribute products wherever it can is not enough for
17 you to reasonably believe -- know that you're going to
18 be dragged into a State where that product has been
19 sold --

20 MR. FERGENSON: That's correct, Your Honor.

21 JUSTICE SOTOMAYOR: -- and has caused
22 injury?

23 MR. FERGENSON: That's correct, Your Honor.

24 And I would ask Your Honor to look at

25 Professor Kurland's University of Chicago Law Review
Alderson Reporting Company

1 article in 1958, very influential, and to look at
2 footnote 99, in which Professor Kurland quotes, all
3 quotes, from this Court's transcript of record in
4 International Shoe. And in international Shoe, the
5 salespeople were controlled by International Shoe.

6 JUSTICE BREYER: Right. Can I ask you --

7 MR. FERGENSON: Yes, Your Honor.

8 JUSTICE BREYER: Now, first, the word
9 "distributor" hurts you, so I'm going to take that out,
10 and I imagine a hypothetical -- I know your case differs
11 from that, but I'm going to ask them how it differs, not
12 you, okay?

13 Now, a person walks into a shop in either
14 West Virginia or the country of India where they make
15 pots. They're very nice pots made, actually, in West
16 Virginia. And the potter makes several thousand a year,
17 and this individual says: Mr. Potter, I want to sell
18 your pots; send me a thousand each year. Where are you
19 going to sell them? Everywhere. Great.

20 Okay? That's it. Now, suppose that the law
21 were, as it could be perhaps, that it is sufficient for
22 jurisdiction throughout the United States that the
23 distributor or independent buyer said good, I'm selling
24 them everywhere I can. And two or three end up in New
25 Mexico, but it doesn't matter where they end up.

1 Suppose that was sufficient to find jurisdiction.

2 You've prepared for this case. I want to
3 know in your opinion, if that were the rule -- that's
4 all that's necessary -- what cases in this Court in your
5 opinion would that conflict with? I mean, I'm thinking
6 of the facts. I'm not thinking of statements of law or
7 whatever, but you can bring those in, too. I want to
8 write those down because I want to read those cases, and
9 you know them better than me.

10 MR. FERGENSON: Your Honor, I believe that
11 the -- that the principles of law as stated, because
12 they're law and they're applied in each case, it could
13 -- which you apply to the facts, I believe that the
14 rejection of the convenience test by this Court in
15 World-Wide Volkswagen, Savchuk, and in Shaffer, where
16 Justice Brennan posited that there be a convenience
17 test, that those --

18 JUSTICE BREYER: I don't know what a
19 convenience test is. Assume I'm very ignorant, which
20 isn't too far from the truth. I would like you to tell
21 me, are there any cases which we would actually be
22 conflicting with were we to say all that's necessary to
23 assert jurisdiction in every State is that a buyer walks
24 into a shop where the manufacturer of pots makes pots
25 and tells the potter I'm going to sell everywhere I can,

1 and the potter says good, okay. Now -- and he buys the
2 pots.

3 Now, if that were the rule, can you find a
4 case that that actually conflicts with?

5 MR. FERGENSON: I believe that that
6 conflicts, Your Honor, with Asahi.

7 JUSTICE BREYER: Asahi, okay.

8 JUSTICE GINSBURG: Asahi -- Asahi,
9 Mr. Fergenson, was a litigation between a Japanese
10 component part manufacturer and a Taiwanese finished
11 product manufacturer. What -- how in the world could
12 you compare that case, which really has nothing at all
13 to do with the United States? It's -- it's a Japanese
14 valve manufacturer sells the valve to a tire maker in
15 Taiwan, and there should be -- that suit should go
16 forward in the United States?

17 I can see it going forward in -- in Japan,
18 but it has no connection with the United States. And
19 how can you possibly compare that with this case where
20 somebody was injured by a machine that malfunctions,
21 allegedly?

22 There was something very interesting you
23 said in your brief. And you said the U.K., which you --
24 you say -- now you've added Ohio, but you said U.K.
25 would be the place for Mr. Nicastro to go. It provides

1 a trusted legal system.

2 What would be your answer if the
3 manufacturer, same arrangement with a distributor, sell
4 anyplace in the United States you can, is from China?
5 Would you give the same answer?

6 MR. FERGENSON: Your Honor, I would have to
7 look at -- and -- and the answer would not be, off the
8 cuff, the same. It would not be flatly the same.
9 There's been a recent decision by Judge Chasanow on
10 melamine in which Chasanow applied the availability law
11 that this Court has set forth in Piper and Gulf Oil
12 and -- and the other cases that follow, and determined
13 that China was an available forum for the plaintiffs
14 suing for the harm to their children from tainted milk.

15 JUSTICE GINSBURG: You -- you made a point
16 about the trusted legal system. Well, let's say it was
17 Russia, Mexico -- you may pick any one. The machine is
18 manufactured in one of those countries where it's not so
19 certain that there's a trusted legal system.

20 MR. FERGENSON: That's correct, Your Honor.
21 And so under Piper, Gulf Oil -- and I can't remember the
22 name of the other case that Judge Chasanow relied
23 upon -- they are difficult cases, and the ability of the
24 court to determine whether the other forum is available
25 is quite cabined. And they are difficult, Your Honor.

1 JUSTICE GINSBURG: Those that -- the --

2 CHIEF JUSTICE ROBERTS: Perhaps you'd like
3 to reserve some of your time for rebuttal, counsel.

4 MR. FERGENSON: Yes, Your Honor. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Mr. Ross.

7 ORAL ARGUMENT OF ALEXANDER W. ROSS, JR.,

8 ON BEHALF OF THE RESPONDENTS

9 MR. ROSS: Mr. Chief Justice, and may it
10 please the Court:

11 "All we wish to do is sell our products in
12 the States and get paid." That's what the British
13 manufacturer said.

14 CHIEF JUSTICE ROBERTS: What if he said we
15 want to do that, but we don't like New Jersey, so don't
16 sell our products in New Jersey, and the Ohio company
17 nonetheless does so? Can you get them -- can you hale
18 them into court in New Jersey?

19 MR. ROSS: I would say under those
20 circumstances, yes, because the purpose that -- this
21 particular manufacturer purposefully availed themselves
22 of the entire U.S. market.

23 CHIEF JUSTICE ROBERTS: But he said: But I
24 have no intention of selling in New Jersey; I'm afraid I
25 might get sued there, and I don't want to get sued

1 there. He is not entering the stream of commerce in the
2 United States. He's entering a stream of commerce that
3 detours around New Jersey.

4 MR. ROSS: So every State with the exception
5 of New Jersey -- is that the hypothetical, Your Honor?

6 CHIEF JUSTICE ROBERTS: Yes.

7 MR. ROSS: Then I would say under those
8 circumstances, yes, New Jersey would be excluded.

9 CHIEF JUSTICE ROBERTS: Oh, it would be
10 excluded?

11 MR. ROSS: Yes. If the manufacturer --

12 CHIEF JUSTICE ROBERTS: So it depends on the
13 intent of the manufacturer?

14 MR. ROSS: I think it's the intent and the
15 additional conduct of the manufacturer, Your Honor. I
16 think, as Justice O'Connor said in the Asahi case -- she
17 gave several examples. I think we'd meet all those
18 examples under the circumstances of this case.

19 JUSTICE SCALIA: What if a manufacturer
20 tells a distributor: You have international
21 distribution authority; you can sell my machine anywhere
22 in the world, sell as many as you can anywhere in the
23 world -- that would include the United States, right?

24 MR. ROSS: That is correct, Your Honor.

25 JUSTICE SCALIA: And, therefore, it would

1 include New Jersey?

2 MR. ROSS: Under those circumstances, of
3 course, which are different from our case, it would seem
4 to me --

5 JUSTICE SCALIA: I know; it's a
6 hypothetical.

7 MR. ROSS: Of course, of course. But the
8 fact of the matter is if the manufacturer purposefully
9 availed itself of -- of the market which would include
10 the world and had a distributor for the entire world and
11 did --

12 JUSTICE SCALIA: It would include New
13 Jersey.

14 MR. ROSS: Yes, it would.

15 JUSTICE SCALIA: Purposeful availment of the
16 government of New Jersey?

17 MR. ROSS: I would say the manufacturer has
18 to take some additional conduct.

19 JUSTICE SCALIA: I mean, availment doesn't
20 mean much if that's all it means.

21 MR. ROSS: Well, if --

22 JUSTICE SCALIA: You tell somebody
23 distribute in the world and you are availing yourself of
24 the government of New Jersey?

25 MR. ROSS: If there is purposeful availment
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1 and additional conduct, Your Honor. In this case,
2 that's what we have here.

3 JUSTICE BREYER: Additional conduct?

4 MR. ROSS: Correct.

5 JUSTICE BREYER: What I have written down in
6 my notes, which you can add to --

7 MR. ROSS: Sure.

8 JUSTICE BREYER: -- is that there are three
9 things that happened. One -- it's the equivalent of the
10 potter. One thing that happened, we have to take it as,
11 I think, an independent company, whether you want to
12 call them a distributor or not. I didn't see a
13 difference there. An independent company goes to a firm
14 somewhere in the world and says: I will buy your
15 product and sell it in the United States. And the guy
16 says good. And that's true whether it's a woman's
17 cooperative in southern India or whether it's the
18 biggest company in the world, okay? That's the first
19 thing.

20 The second thing is that an executive of
21 that company went to seven trade shows in the United
22 States.

23 And the third thing is that two, three, or
24 four machines ended up in New Jersey.

25 Now, is there anything other than that? And
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1 there's a lot of rhetoric, and there are all kinds of
2 characterizations, but when I looked for facts, I found
3 those three, and I want to be sure I have them all.

4 MR. ROSS: You do, Your Honor.

5 JUSTICE BREYER: I do. Now, then my
6 question following from that, if I have those are the
7 three facts, what worries me is the exact opposite of
8 what the New -- the New Jersey Supreme Court said. It
9 said in worldwide markets this is a good thing. I think
10 I worry about it, because I'm worried about the woman's
11 cooperative in India, I'm worried about the Chinese
12 development, I'm worried about development everywhere.
13 We have a lot of small businesses. And I'd worry --
14 now, maybe the worry is legally irrelevant -- but I'd
15 worry about a rule of law that subjects every small
16 business in every developing company -- in every
17 developing country to have to be aware of the law in 50
18 States simply because they agreed to sell to an
19 independent company who is going to sell to America,
20 plus your two factors.

21 And really the third is none, because if it
22 hadn't ended up somewhere, there'd have been no
23 accident.

24 MR. ROSS: I would say --

25 JUSTICE BREYER: Now, that's my basic
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1 concern here.

2 MR. ROSS: I would say in -- in response to
3 your hypothetical question, that because there was
4 purposeful availment where they came to the United
5 States, attended trade shows in an effort to sell their
6 product to anyone who would come to that trade show
7 throughout the United States, and those sales were in
8 fact consummated, then in that case I think that the
9 manufacturer has done more than just intend to sell.
10 They have taken certain positive steps.

11 JUSTICE BREYER: Yes. Okay, but you see
12 what my -- my problem is a sort of policy problem that
13 may be irrelevant, but I -- I don't see how the world's
14 going to work or develop if in fact every small business
15 everywhere in the world has to know, you know, the law
16 of every 50 States and hire lawyers and come here,
17 rather than making the accident victim go there.

18 Now, it's tough on the accident victim, but
19 the other is also tough. So -- so that's -- that's sort
20 of the -- I'm sketching out my concerns here. You --

21 MR. ROSS: I understand.

22 JUSTICE BREYER: All right.

23 JUSTICE SOTOMAYOR: What is --

24 JUSTICE BREYER: What would you say?

25 CHIEF JUSTICE ROBERTS: Maybe you could
Alderson Reporting Company

1 respond to Justice Breyer's --

2 JUSTICE BREYER: Yes.

3 MR. ROSS: In -- in my judgment, it's not
4 enough to just have intent; it's not enough just to send
5 the product out on -- adrift on the stream of commerce.
6 There has to be some additional conduct, some concrete
7 steps taken. And I believe --

8 JUSTICE BREYER: Trade shows.

9 MR. ROSS: -- in your hypothetical,
10 attending the trade shows, perhaps hiring a distributor,
11 selling the products --

12 JUSTICE BREYER: Well, that's the same as
13 the first; that's a sale to the entity.

14 MR. ROSS: That's right. So I think those
15 are the additional concrete steps that were taken in
16 your hypothetical.

17 JUSTICE GINSBURG: Mr. Ross --

18 JUSTICE KAGAN: Mr. Ross, do you think if
19 there's a small business in the United States that sells
20 a product and that actively seeks to serve a foreign
21 market -- maybe it's Great Britain, maybe it's China --
22 and that product blows up in that foreign country --
23 Great Britain, China -- do you think that the
24 manufacturer, the American manufacturer, is subject to
25 jurisdiction there?

1 MR. ROSS: Yes. If they actively seek the
2 market there, they have purposefully availed themselves,
3 they have taken --

4 JUSTICE KAGAN: All -- all over the world
5 this is true; is that right?

6 MR. ROSS: Yes. Yes, Your Honor.

7 JUSTICE GINSBURG: And it is a
8 jurisdictional rule that civil law systems have always
9 had.

10 MR. ROSS: That's correct, Your Honor. I
11 believe --

12 JUSTICE SCALIA: But -- and I assume that if
13 we do this to a company in England, any country in the
14 world, and we say that this satisfies due process, we
15 would have to honor a judgment from Bangladesh based
16 upon -- against an American company, based upon a
17 similarly modest degree of -- of availment, right?

18 MR. ROSS: Well, Your Honor, it depends on
19 the extent of the availment, I would say, under those
20 circumstances.

21 JUSTICE SCALIA: Just as -- just as modest
22 as what you propose here, or as extensive. I don't mean
23 to demean the degree of it here.

24 MR. ROSS: It seems to me -- if there's --

25 JUSTICE SCALIA: But the same kind of
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1 contact in India, which has different -- different
2 States in India. And -- strike Bangladesh. Make it
3 Madras, okay?

4 MR. ROSS: All right.

5 JUSTICE SCALIA: And we would have to honor
6 a judgment by a court of Madras against an American
7 manufacturer who had as little contact with Madras as
8 exists here.

9 MR. ROSS: I would say under -- yes.

10 JUSTICE SCALIA: We would have to?

11 MR. ROSS: Yes, I would say.

12 JUSTICE KAGAN: Mr. Ross, we do that now;
13 isn't that right?

14 MR. ROSS: That's correct, Your Honor.

15 JUSTICE BREYER: We do? We do? So if
16 someone goes into a shop in West Virginia and buys a
17 thousand pots and says I'm going to sell them in Madras,
18 or I might sell them anywhere in the world --

19 MR. ROSS: That's a slightly --

20 JUSTICE BREYER: -- and then that
21 manufacturer, that potter in West Virginia, now has to
22 go to wherever he ends up -- wherever that pot ends up?

23 MR. ROSS: That's a slightly different
24 scenario in my judgment, Your Honor --

25 JUSTICE BREYER: Ah. Ah.

1 MR. ROSS: -- because the distributor came
2 to the manufacturer. In this case, the manufacturer
3 from Britain hired --

4 JUSTICE BREYER: We turn it on that? We
5 turn it on whether the independent buyer -- the
6 independent buyer walked into the shop or whether the
7 seller found that there was an independent buyer? Is
8 that what this case should turn on?

9 I mean, I'm nervous. I see a lot of rather
10 deep issues here, and I -- that's what are making me
11 nervous.

12 MR. ROSS: I understand, Your Honor.

13 JUSTICE BREYER: I want to --

14 MR. ROSS: I understand that.

15 JUSTICE BREYER: You've thought about it
16 more than I. So --

17 JUSTICE GINSBURG: Can we go back to Justice
18 Scalia's question? I mean, the United States has been
19 telling the rest of the world: We do recognize and
20 enforce your judgments --

21 MR. ROSS: I think --

22 JUSTICE GINSBURG: -- if there is a -- a
23 proper jurisdictional basis.

24 MR. ROSS: That's correct, Your Honor.

25 JUSTICE GINSBURG: We do, and we would like
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1 you to recognize ours. And we don't get that
2 reciprocity, but we still are trying to get it.

3 MR. ROSS: That's correct.

4 JUSTICE GINSBURG: But the United States has
5 taken a very neighborly view about recognizing and
6 enforcing foreign judgments.

7 MR. ROSS: Yes, Your Honor. I --

8 JUSTICE SCALIA: That's true when there's a
9 proper jurisdictional basis, which is what we're talking
10 about here: What does the United States mean when it
11 says there is a proper jurisdictional basis? Is all
12 that the court in Madras needs what existed here in
13 order to hold an -- an American manufacturer liable?
14 That's -- that's a little scary.

15 MR. ROSS: Well, Your Honor, if the
16 corporation, the manufacturer, is purposefully availing
17 itself of the Madras market and hires a distributor to
18 go to Madras and to sell its products, then indeed I
19 don't see why a court in Madras would not have -- and
20 the product explodes or causes some horrific --

21 JUSTICE SOTOMAYOR: So it really, to you --
22 are you saying that Justice Breyer's hypothetical
23 creates jurisdiction, that the mere sale to a
24 distributor anywhere creates jurisdiction, wherever that
25 distributor is marketing the manufacturer's product?

1 I thought because, in the hypothetical he
2 created, it was they were availing themselves of the
3 U.S. market because they were marketing. They went to
4 seven trade shows. They did merely -- they did
5 something more than the sale. So where's your -- what's
6 your position?

7 MR. ROSS: My position is exactly what Your
8 Honor has just stated. They have to do something more
9 than just sell. There has to be purposeful availment.
10 There has to be some concrete action, attending trade
11 shows, designing the product for the market.

12 JUSTICE ALITO: What -- what difference does
13 attending some trade shows in the United States mean --
14 make? Suppose they're -- they didn't attend any trade
15 shows. They just have a Web site that provides a
16 description of the product.

17 MR. ROSS: I think --

18 JUSTICE ALITO: Would there be no
19 jurisdiction then?

20 MR. ROSS: Well, it depends on the Web site.
21 But in my judgment, attending trade shows is a large
22 factor that is unique in this case. As I pointed out in
23 our briefs, they were -- they didn't just attend a trade
24 show; they attended trade shows throughout the United
25 States to sell this product.

1 JUSTICE ALITO: But not in New Jersey.

2 MR. ROSS: Not in the State of New Jersey,
3 but a lot of other places.

4 JUSTICE GINSBURG: Where did the New Jersey
5 company that bought this machine find out about it?

6 MR. ROSS: Well, Mr. Curcio, who was
7 Mr. Nicaastro's employer, went to one of these
8 conventions, trade shows, in Las Vegas, where he saw the
9 machine. And at that trade show the British
10 manufacturer shared a booth with the -- its American
11 distributor. And that's where Mr. Curcio, Mr.
12 Nicaastro's employer, saw the machine, and that's why he
13 decided to buy it there.

14 CHIEF JUSTICE ROBERTS: What difference does
15 it make that they go to a trade show somewhere other
16 than New Jersey? We have the notion that they're
17 availing themselves of the -- the entire United States
18 market. That's -- I'll accept that.

19 MR. ROSS: Right.

20 CHIEF JUSTICE ROBERTS: What does the trade
21 show in Nevada add to the jurisdictional ties to New
22 Jersey?

23 MR. ROSS: The difference for this case,
24 precisely this case, is that we feel that under those
25 circumstances there may have been minimum contacts, even

1 under a traditional sense here.

2 CHIEF JUSTICE ROBERTS: With Nevada?

3 MR. ROSS: With -- no, with New Jersey,
4 because the British manufacturer was there. He was in a
5 booth. A New Jersey person came to the booth and said
6 that's a great machine. There was some kind of
7 interaction. The record is unclear as to what it was,
8 but the result was the British manufacturer wound up
9 selling its product --

10 JUSTICE KAGAN: Mr. Ross --

11 JUSTICE SCALIA: If you interact with
12 somebody from New Jersey, you have --

13 MR. ROSS: It's more --

14 JUSTICE SCALIA: -- committed avilment of
15 the government of New Jersey?

16 MR. ROSS: It's more than that. It's much
17 more.

18 JUSTICE SCALIA: There are a lot of people
19 from New Jersey.

20 (Laughter.)

21 MR. ROSS: It's more than -- it's more than
22 that, Your Honor. It's more than that. It's the
23 distributor acting under the direction, guidance, and
24 control of the British manufacturer, and there are
25 records in the -- in the record, there's plenty of

1 reference to that.

2 JUSTICE SCALIA: He didn't tell them --

3 JUSTICE KAGAN: And, Mr. Ross, isn't --

4 JUSTICE SCALIA: -- to just seek out a
5 person from New Jersey.

6 MR. ROSS: He was --

7 JUSTICE SCALIA: He told them to talk to
8 people.

9 MR. ROSS: He was prepared to sell to
10 anyone. Whether it was from New Jersey or Massachusetts
11 or Connecticut, it didn't matter as long as the sale was
12 into the United States and the manufacturer got the
13 economic benefit of it.

14 JUSTICE KAGAN: And, Mr. Ross, isn't the
15 point that he was selling by using large convention
16 sites in the United States, expecting that people from
17 other States would show up to those large convention
18 sites?

19 I know that Justice Alito doesn't want to
20 hear this, but New Jersey doesn't have all that many
21 large convention sites like Las Vegas does. Newark --

22 (Laughter.)

23 JUSTICE KAGAN: Newark is not such a hot
24 place, but they're expecting people from Newark to go
25 and look at these machines and buy these machines.

1 That's the marketing system that's used for these
2 massive machines that they're trying to sell nationwide.

3 MR. ROSS: That's exactly correct, Your
4 Honor. The --

5 JUSTICE BREYER: What if --

6 CHIEF JUSTICE ROBERTS: What if there is no
7 scrap metal plant in Montana? Can Montana be a
8 jurisdiction in a case like this? You know, a Montana
9 worker is over in New Jersey and comes back to his home
10 in Montana, and he's been injured. Do they avail
11 themselves of the market in Montana when there's no
12 market for their products there?

13 MR. ROSS: Well, if someone from Montana
14 attends one of these trade shows and decides to purchase
15 one of these machines, that --

16 CHIEF JUSTICE ROBERTS: No, no. He's just
17 injured by one of the machines somewhere else, but he's
18 from Montana. Can he sue in Montana?

19 MR. ROSS: Under those circumstances, I
20 would say not.

21 JUSTICE GINSBURG: The -- the basis would
22 only be the plaintiff's residence?

23 MR. ROSS: That's correct.

24 JUSTICE GINSBURG: But we don't accept that
25 as a sufficient basis.

1 MR. ROSS: That's correct. That would not
2 be enough.

3 CHIEF JUSTICE ROBERTS: Well, I thought -- I
4 thought this was what the case was all about: whether
5 this is -- the stream of commerce is sufficient to add a
6 basis on top of the plaintiff's residence.

7 MR. ROSS: Right.

8 CHIEF JUSTICE ROBERTS: And I would have
9 thought -- to me, that's a significant limitation on
10 your theory to say that in areas where you don't expect
11 to be haled into court because your machine is not going
12 to be used, you can't be.

13 MR. ROSS: Well, it seems to me that if
14 the -- if the manufacturer has purposefully availed
15 itself of the entire United States market, which is
16 inclusive of Montana --

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. ROSS: -- and the machine somehow winds
19 up in Montana --

20 CHIEF JUSTICE ROBERTS: No, no. Not the
21 machine.

22 MR. ROSS: The individual.

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. ROSS: So the individual is in Montana;
25 the accident happened somewhere else?

1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. ROSS: Under those circumstances, I
3 would say that wherever that machine was sold into,
4 whether it was in an adjoining State, and the fellow
5 from Montana lived across the border, say --

6 CHIEF JUSTICE ROBERTS: Yes, exactly.

7 MR. ROSS: -- I would say that the
8 jurisdiction would better be put where the accident
9 occurred.

10 JUSTICE BREYER: Yes, well --

11 CHIEF JUSTICE ROBERTS: Could it be put
12 elsewhere? Could it be put in the other State?

13 MR. ROSS: I would say that if the -- if the
14 manufacturer has not purposefully availed itself of the
15 State of Montana --

16 CHIEF JUSTICE ROBERTS: Right.

17 MR. ROSS: -- and has taken no steps --

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. ROSS: -- to push into Montana, even
20 though it is seeking to sell to the entire United
21 States --

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. ROSS: -- I think the better location
24 for that lawsuit --

25 CHIEF JUSTICE ROBERTS: Well, better -- I
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1 know -- I know you think it's better, but can he be sued
2 in Montana?

3 What I'm trying to get at, obviously, is
4 we're talking about the stream of commerce in the United
5 States, but the stream doesn't wash over the United
6 States evenly. The manufacturer, as I asked earlier,
7 may decide I don't want to sell New Jersey.

8 MR. ROSS: Right.

9 CHIEF JUSTICE ROBERTS: The manufacturer may
10 reasonably assume his machines aren't going to be in
11 Montana because there's no scrap metal business in
12 Montana. So I'm just trying to see if there are
13 limitations to your theory about the stream of commerce
14 covers everything.

15 MR. ROSS: Yes, Your Honor. The answer is
16 yes, there are limitations. There are those
17 limitations, and I think the best way of -- of stating
18 it would be if there is purposeful availment of entering
19 a market and you sell the product into that market, you
20 take these additional steps plus the intent, plus the
21 additional --

22 CHIEF JUSTICE ROBERTS: Right, but the
23 market cannot be simply the United States, because you
24 carve out New Jersey if the manufacturer does, you carve
25 out Montana if --

1 MR. ROSS: That is correct.

2 CHIEF JUSTICE ROBERTS: Okay.

3 MR. ROSS: That is correct, Your Honor.

4 JUSTICE BREYER: But what I'm thinking is
5 this -- this area of law has treated States as if
6 they're foreign countries, in a certain way analogous
7 to. If that -- and I'm trying to -- let me ask: What
8 you said at one point, that if an independent company
9 comes to a business, however small, in the United States
10 and says give us some of your product, we're going to
11 sell it everywhere in the world we can, fine. And they
12 do.

13 A couple go -- get into some very -- Burma
14 or whatever, Myanmar. And right now, it's the law that
15 consumers in all those countries sue in that country if
16 they're hurt. Is that really the law? Is there
17 something you can cite me to on that?

18 MR. ROSS: Well, there are conventions.
19 There's a Brussels convention and a Uganda convention.

20 JUSTICE BREYER: And what does it -- what
21 does it say?

22 MR. ROSS: They basically state, according
23 to my understanding, that where the -- where the tort
24 occurred to the signatories of that convention, which
25 includes the --

1 JUSTICE BREYER: Yes, and we're one?

2 MR. ROSS: The United Kingdom. Which
3 includes the United Kingdom.

4 JUSTICE BREYER: And are we one?

5 MR. ROSS: That -- then in those cases,
6 where the tort occurred there would be jurisdiction over
7 the foreign manufacturer. For example, if there's an
8 injury in Belgium and the machine is manufactured in
9 Britain, someone is hurt in Belgium, according to those
10 conventions, then the person in Belgium could sue the
11 British company in Belgium.

12 JUSTICE BREYER: Did you refer to that? Do
13 you have a citation to that in --

14 MR. ROSS: They're in our brief. Yes.

15 JUSTICE BREYER: -- in your brief?

16 MR. ROSS: Yes, Your Honor.

17 JUSTICE GINSBURG: It's the EEOC Convention
18 on Jurisdiction and Judgments? Because that operates
19 only within the Community.

20 MR. ROSS: That's correct. The United
21 States is not a signatory to that convention. But the
22 hypothetical was -- and I tried to answer the
23 hypothetical.

24 JUSTICE KENNEDY: Does your argument depend
25 on whether the manufacturer is the manufacturer of the

1 whole machine as opposed to a component part, like
2 Asahi? Suppose there was a little battery or lever that
3 was manufactured, I don't know, in France, and it was
4 sent over to this English manufacturer, and they were --
5 this part is incorporated in many different kinds of
6 machines, but the part then -- and then the facts are
7 the same: It goes to the Ohio distributor and New
8 Jersey, but the part is what causes the injury.

9 What results?

10 MR. ROSS: I would say no jurisdiction for a
11 component manufacturer under those circumstances, unless
12 the component manufacturer was deliberately
13 manufacturing a product for sale into a State in the
14 United States --

15 JUSTICE KENNEDY: Well, it's like Justice
16 Breyer's hypothetical. He wants to sell to the entire
17 universe if he can.

18 MR. ROSS: That's correct, but the
19 manufacturer in your hypothetical did not purposefully
20 avail itself of the United States market. He simply
21 sold a component part.

22 And this is, of course, not a component part
23 case we have here before us. So he may have known --
24 there might have been foreseeability that it was
25 possible that.... That's not enough.

1 CHIEF JUSTICE ROBERTS: Well, what if --

2 MR. ROSS: We're not saying that's enough.

3 CHIEF JUSTICE ROBERTS: Let's say he does
4 know, it's a component part for something that is sold,
5 widely sold, in the United States. Or it's a component
6 part of this machine.

7 MR. ROSS: Our position is that under those
8 circumstances, if the manufacturer did not purposefully
9 avail itself of the United States market by hiring a
10 distributor --

11 CHIEF JUSTICE ROBERTS: But why would it
12 be --

13 MR. ROSS: -- it wouldn't be targeting that
14 market.

15 CHIEF JUSTICE ROBERTS: So you have an
16 entirely different test.

17 MR. ROSS: As to components. I'm sorry.

18 CHIEF JUSTICE ROBERTS: You have -- you have
19 an entirely different test for a component manufacturer
20 than you do for the finished product manufacturer. The
21 component manufacturer may well know to a certainty that
22 his component is going to be used in a product that's
23 sold in the United States.

24 Let's say he makes a component for this
25 machine.

1 MR. ROSS: Right.

2 CHIEF JUSTICE ROBERTS: Why is that
3 different? Shouldn't it be the same test?

4 MR. ROSS: I think it's different. And
5 that's where the limitation of the Due Process Clause, I
6 think, comes into play because that manufacturer, making
7 a small component, a spring, a small part for a large
8 machine like in the Asahi case, he may not -- he may
9 have known. It's foreseeable that this product will go
10 there, but --

11 CHIEF JUSTICE ROBERTS: He makes -- let's
12 say he makes the 25-inch blade that only goes into this
13 machine. That's the only market for it. Does -- no
14 difference?

15 MR. ROSS: I would say there is a
16 difference, because that component --

17 CHIEF JUSTICE ROBERTS: I'm sorry. That was
18 poorly phrased. Is it the same test for the machine, or
19 is it a different test? Is it your component test?

20 MR. ROSS: I think it's -- I think it's the
21 same test, but it would come out differently for the
22 component manufacturer. That's the way I'd like to --

23 JUSTICE KAGAN: And, Mr. Fergenson, isn't
24 that what Justice O'Connor said in Asahi, that the
25 component manufacturer may have all the knowledge in the

1 world -- for Justice Brennan, that was enough; for
2 Justice O'Connor, it was not enough, that knowledge was
3 insufficient, that there had to be purposeful availment,
4 that there had to be an active decision, a choice to
5 seek the market. And -- and I understand that, on your
6 view, McIntyre made that choice.

7 MR. ROSS: Exactly.

8 CHIEF JUSTICE ROBERTS: How can there not --
9 how can there possibly not be purposeful availment if
10 the manufacturer of the 25-inch blade knows it's only
11 going to be used in McIntyre's machine and it knows that
12 McIntyre is trying to sell its machine in the United
13 States?

14 MR. ROSS: Because the manufacturer of that
15 blade did not specifically target the United States
16 market. He --

17 CHIEF JUSTICE ROBERTS: He put it in a
18 product that is only going to be -- that he knows is
19 going to be sold in the United States.

20 MR. ROSS: But it's not specifically
21 designed for them. And that -- that machine is not
22 specifically designed for the U.S. market. That
23 machine --

24 CHIEF JUSTICE ROBERTS: You have a
25 partnership. One of the partners makes the shell of the
Alderson Reporting Company

1 machine; the other partner makes the insides of the
2 machine. Are they, as individual companies -- are they
3 availing themselves of the United States market?

4 MR. ROSS: Now, under those circumstances, I
5 would think there would be a difference. I think there
6 would be a difference because they are combined in
7 joining to market into the United States. But if this
8 is a -- a manufacturer of blades in Birmingham, England,
9 and the manufacturer of blades in Birmingham, England,
10 sends it to Nottingham, England, and then something
11 happens in New Jersey, and all the facts are the same, I
12 would say Birmingham is off the hook.

13 JUSTICE SCALIA: Suppose the company in
14 Nottingham only sells to the United States. It's the
15 only place its machines are -- are marketed.

16 MR. ROSS: That would be different then.
17 Then there -- there is more than that. There --

18 JUSTICE SCALIA: Then the component
19 manufacturer would be liable in New Jersey?

20 MR. ROSS: Because he is basically
21 piggybacking on the actions of the manufacturer.

22 JUSTICE BREYER: All right. What about
23 today, is there any difference between the trade show --
24 and he did show up at seven trade shows. I -- I mean,
25 the manufacturer here had a representative at several

1 trade shows, you're right.

2 MR. ROSS: Twenty-six.

3 JUSTICE BREYER: That's right. Twenty --
4 no, well, the record said seven.

5 MR. ROSS: There were 26 trade shows.

6 JUSTICE BREYER: Is that in the record?

7 MR. ROSS: Yes, it is. Joint Appendix 114
8 to 117a.

9 JUSTICE BREYER: Okay. All right. Is there
10 a difference between that, do you think, and -- I just
11 read in the paper the other day there's some Ethiopian
12 or some foreign country -- it's a very poor country --
13 and they're selling goats, and they're sending some to
14 the United States for some kind of festival purpose or
15 something. Now, he said I have a site on the Internet.
16 All right.

17 Now, all of these people, however small, I
18 mean, many, many will have Internet sites, and some of
19 them might have an Internet site that's accessed by
20 American buyers, as this man did.

21 MR. ROSS: Right.

22 JUSTICE BREYER: All right. Is there any
23 difference between that and your trade shows?

24 MR. ROSS: And if the goat poisons someone
25 in the United States and the -- and the person who

1 raised the goat --

2 JUSTICE BREYER: Yes.

3 MR. ROSS: -- purposefully availed itself --

4 JUSTICE BREYER: No, no, don't use the
5 characterization. I mean, I'm -- see, I'm trying to
6 figure out does this count as purposefully availed?

7 MR. ROSS: If -- if they take steps,
8 concrete steps, additional conduct, then yes. The
9 answer is yes.

10 JUSTICE BREYER: Okay. So the answer is
11 going to be, in this case, if we say you win --

12 MR. ROSS: Sadly, even if --

13 JUSTICE BREYER: -- then everyone with a --
14 with a -- everyone with an Internet site who also sells
15 to a buyer who says anywhere in the world, perhaps -- I
16 don't know how far that reaches -- seems pretty filled
17 with implications.

18 MR. ROSS: Yes, it does. The Internet -- we
19 deliberately did not raise the Internet or any Web sites
20 in our briefs.

21 JUSTICE BREYER: But it's the same, you
22 think? It's the same -- I thought it might --

23 MR. ROSS: I think if there's purposeful
24 availment and if the Internet is being used to market
25 specifically into the United States and the product

1 causes harm to someone in the United States --

2 JUSTICE GINSBURG: Are there -- there are
3 some cases just beginning -- at the beginning stages,
4 aren't there, involving sales through the Internet?

5 MR. ROSS: Yes. Yes, Your Honor. I believe
6 that those cases say if there's an interactive Web site;
7 in other words, if the person sitting in the United
8 States can press several buttons on its computer and
9 interact and make -- consummate the transaction, if you
10 will, with the foreign manufacturer, then under those
11 circumstances, I believe, the trend of the cases seems
12 to be that there would be jurisdiction.

13 JUSTICE KENNEDY: But -- but you were cut
14 off before you finished your answer. I want to make
15 sure I understood it. I -- I make the inference that
16 you -- you would say that if there is an advertisement,
17 not a sale, just an advertisement on the Internet,
18 replacing the trade show, that that is a significant
19 availment -- a purposeful availment, and there can be
20 jurisdiction in New Jersey. Same factors here --
21 somebody who doesn't go to the U.S. trade shows, but he
22 does put it on the Internet, the same result?

23 MR. ROSS: That was one of the four examples
24 that Justice O'Connor gave us in Asahi, advertising
25 for --

1 JUSTICE KENNEDY: I want to know what your
2 position is.

3 MR. ROSS: Yes. My position is yes, because
4 they are -- they are attempting to sell into the United
5 States with advertising. But the trend of the decisions
6 has been that it has to be an interactive Web site.

7 CHIEF JUSTICE ROBERTS: Can -- maybe
8 everybody knows this except me. Do you -- are Web sites
9 targeted to the United States? Don't you -- you can --
10 let's say they put it on their Web site in England.
11 Can't you -- can't -- can't I access that from here?

12 MR. ROSS: Yes, you can.

13 CHIEF JUSTICE ROBERTS: So they don't even
14 have to send the Web site to the United States? They
15 just have to have a Web site?

16 MR. ROSS: If it's an interactive Web site
17 where you can sit in New Jersey, order a product, the
18 product is then delivered by the foreign manufacturer
19 into New Jersey, and the product then chops off four
20 fingers of someone's hand --

21 CHIEF JUSTICE ROBERTS: So it has to be
22 interactive?

23 MR. ROSS: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: If it's just -- what
25 if it says, here, we're McIntyre -- on a Web site -- we

1 make these machines; give us a call at this number if
2 you want to buy one?

3 MR. ROSS: Not enough.

4 CHIEF JUSTICE ROBERTS: Not enough?

5 MR. ROSS: That's like a billboard. That's
6 not enough. That's just a pure advertising; not enough.
7 But if the additional steps that I just mentioned are
8 taken and a sale occurs --

9 CHIEF JUSTICE ROBERTS: And this distinction
10 is somewhere in the Due Process Clause?

11 MR. ROSS: I believe that the Due Process
12 Clause requires the additional conduct. The purposeful
13 availment, which is what we have in your hypothetical,
14 and the actual transaction, the sale, then we have
15 jurisdiction.

16 JUSTICE KENNEDY: But was the sale here
17 negotiated in -- or part of the sale negotiated in
18 Nevada or the person just -- the New Jersey manufacturer
19 just was interested in the machine and then later
20 contacted the Ohio distributor?

21 MR. ROSS: In this case, the manufacturer
22 said that they own the machines until they're paid for
23 in full. The machine was not paid for in full.

24 JUSTICE KENNEDY: No, I'm -- I'm trying to
25 relate what happened here to the Internet hypothetical.

1 I have the --

2 MR. ROSS: Right.

3 JUSTICE KENNEDY: -- Internet hypothetical
4 where there's just an advertisement.

5 MR. ROSS: Right.

6 JUSTICE KENNEDY: And, at first, I thought
7 you were saying that's sufficient. Now you say no,
8 because they have to be part of the contract. I'm
9 trying to make the Internet equivalent to the trade
10 show.

11 MR. ROSS: If the Internet Web site is
12 interactive, so you can sit in New Jersey, order the
13 product, complete the transaction, send money, and in
14 response to the money coming, you get a product --

15 JUSTICE KENNEDY: Okay. But not just an
16 advertisement?

17 MR. ROSS: Not just an advertisement.

18 JUSTICE KENNEDY: Even though that's the
19 cause for the buyer's interest in it and he pursues --
20 pursues his -- his transaction after finding out all the
21 information on the Internet, but he phones the Ohio
22 distributor?

23 MR. ROSS: It's not enough, in my judgment,
24 if -- under the Internet example that you just gave. If
25 there's an interactive Web site where the person in New

1 Jersey can press buttons on his computer and complete
2 the transaction with the result that the product comes
3 to New Jersey, under those circumstances, I would say
4 there is jurisdiction.

5 CHIEF JUSTICE ROBERTS: Complete? He's got
6 to complete the transaction?

7 MR. ROSS: That's correct.

8 CHIEF JUSTICE ROBERTS: What if it's --

9 MR. ROSS: I don't --

10 CHIEF JUSTICE ROBERTS: -- you know, punch
11 these numbers, and we will send you an application for a
12 machine? Is that not enough, because he's got to
13 complete the transaction?

14 MR. ROSS: I would say, under those
15 circumstances, that that's part of what the manufacturer
16 requires, but the end result is that the machine winds
17 up in New Jersey through this contact between the person
18 and the manufacturer. Then I would say that would be
19 enough for jurisdiction.

20 CHIEF JUSTICE ROBERTS: So that if they say
21 fill this out, and contact this person, McIntyre,
22 whatever, in Ohio, that's where you can get one of our
23 machines -- that's enough?

24 MR. ROSS: I would say, in that case, they
25 have deliberately targeted the entire United States

1 market, but they want you to go through their
2 distributor, which they have hired --

3 CHIEF JUSTICE ROBERTS: Would their --

4 MR. ROSS: -- in Ohio, and he sends it.
5 It's the same situation.

6 Well, if there's no further questions, I
7 would simply like to ask this Court to affirm the
8 judgement of the Supreme Court of New Jersey in this
9 case.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr. Ross.

11 MR. ROSS: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Fergenson, you
13 have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF ARTHUR F. FERGENSON

15 ON BEHALF OF THE PETITIONER

16 MR. FERGENSON: Thank you, Your Honor.

17 Justice Breyer, I would -- in response to
18 your concern, I would ask you to look at page 29 of the
19 States' amicus brief: "Ignorance of the fact that New
20 Jersey is a State within our union, or of the specifics
21 of New Jersey products liability law, should not allow
22 Petitioner to avoid jurisdiction. Its own lack of
23 research prior to embarking on a nationwide marketing
24 campaign is no defense." I think that --

25 JUSTICE KAGAN: Mr. Fergenson --

1 JUSTICE SOTOMAYOR: Could you answer --

2 JUSTICE KAGAN: -- could I ask you a
3 question?

4 JUSTICE SOTOMAYOR: I'm sorry. Could you --
5 just one quick point of clarification.

6 MR. FERGENSON: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: It's a point that your
8 adversary raised in passing. I'm not quite sure, do you
9 sell outright to the American company? Do you ship a
10 product and they pay you, or they only pay you when they
11 receive the money from their customer? There appears to
12 be some suggestion of the latter.

13 MR. FERGENSON: And the New Jersey Supreme
14 Court said that there was a suggestion that some trades
15 could have been by consignment. I believe that that is
16 outside of this -- taken out of this case by an
17 admission in the brief -- at least for this sale -- in
18 the brief in opposition to defendant's motion to
19 dismiss, at 19-20, filed October 11th, 2006, where they
20 state -- where Respondent states it was sold by us to
21 MMA, and it was sold by MMA to Curcio Scrap Metal.

22 So, there is no consignment. There's no
23 consignment under 9-102, which Ohio has adopted.

24 JUSTICE SOTOMAYOR: But that's a different
25 question than I asked. There was no consignment on this

1 machine?

2 MR. FERGENSON: Yes.

3 JUSTICE SOTOMAYOR: But you're not claiming
4 that there might not be on others?

5 MR. FERGENSON: The evidence in the record
6 under 9-102, which Ohio has adopted, I think can only be
7 reasonably viewed -- and this Court obviously treats it
8 as de novo, on a jurisdictional review -- can only be
9 viewed as not a consignment because MMA was in the
10 business of selling the products to others.

11 Let me say that for the -- there was no
12 interaction in the record with anyone from New Jersey by
13 MMA or by J. McIntyre. It was the booth, and then there
14 was an order. And if you look at the invoice, it says
15 verbal order. There was an order by the son of the
16 owner of Curcio Metal Works, and that's it. The order
17 was fulfilled.

18 JUSTICE KAGAN: Mr. Fergenson, Toyota,
19 Honda, Volkswagen -- pick your car company -- sells many
20 millions of cars to the United States. They start
21 blowing up here. They operate through independent
22 distributors only. Can they be subject to jurisdiction
23 in any of the States?

24 MR. FERGENSON: I think that most
25 sophisticated distribution networks -- and this one was

1 not -- I -- the defense takes it as a -- takes on the
2 issue of this as a scheme. Most sophisticated
3 distribution networks, such as the manufacturers you're
4 talking about, there is -- there is recourse to remedies
5 throughout the United States, whether against the
6 distributor or against the manufacturer.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. FERGENSON: Thank you.

9 CHIEF JUSTICE ROBERTS: The case is
10 submitted.

11 (Whereupon, at 11:13 a.m., the case in the
12 above-entitled matter was submitted.)
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