No. 20-231

In The
Supreme Court of the United States

ALADDIN MANUFACTURING CORPORATION, MOHAWK CARPET, LLC, MOHAWK INDUSTRIES, INC., AND SHAW INDUSTRIES, INC.,

Petitioners,

v.

THE WATER WORKS & SEWER BOARD OF THE TOWN OF CENTRE AND THE WATER WORKS & SEWER BOARD OF THE CITY OF GADSDEN,

Respondents.

On Petition For A Writ Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Georgia carpet manufacturers are subject to specific jurisdiction in Alabama when they purposefully directed harmful chemicals at Alabama by discharging those chemicals over the course of years to a conventional wastewater treatment plant despite knowing they could not be removed and contaminated waters that flowed only into Alabama.

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INTRODUCTION

This case involves the straightforward application of this Court's precedent to a unique set of facts where a foreign polluter who continually causes harm in an adjoining state must be held to account in that state. Consistent with this Court's rulings in *Calder v. Jones*, 465 U.S. 783 (1984) and *Walden v. Fiore*, 571 U.S. 277 (2014), the Alabama Supreme Court held that Petitioners purposefully directed harmful chemicals at Alabama by improperly disposing of those chemicals knowing they contaminated waters that flow into only Alabama and impacted Respondents' water supply. This conduct, not any other intervening acts, purposefully connects Petitioners to Alabama. Every court that has analyzed jurisdiction over foreign polluters agree: If a foreign polluter improperly disposes of harmful chemicals in a water source directed at a particular state, and those chemicals contaminate that state's waterways, the foreign polluter is subject to jurisdiction there. Petitioners cannot identify a single case that has rejected personal jurisdiction under facts similar to this case.

Petitioners frame the issue before this Court in broad terms to manufacture a split in authority that does not exist and attempt to extrapolate the reasoning in the Alabama Supreme Court's plurality opinion to warn that its "expansive" theory of specific personal jurisdiction is virtually boundless. Petitioners' concerns, however, are premised on a misreading of the Alabama Supreme Court's plurality opinion which is based on the narrow facts of this case

and is binding on only the parties to this dispute. This case is not a proper vehicle for this Court to consider a narrow holding to a unique fact pattern. This Court should deny the petition.

STATEMENT OF THE CASE

II. Factual Background

Respondents are public water suppliers to residential and commercial customers located in Etowah County and Cherokee County in Alabama. Pet. App. 133a, 152a. Respondents withdraw their water from the Coosa River and operate conventional water treatment facilities to treat and deliver potable drinking water to their customers. *Id*. The Coosa River is located downstream of Dalton, Georgia, which is known as the "carpet capital of the world" and home to 150 carpet manufacturers which collectively produce over 90% of the world's carpet. Pet. App. 138a, 158a.

Since the 1940s, perfluorinated compounds ("PFCs") have been used by the carpet manufacturing industry to impart water, stain, soil, and grease resistance to carpet. Pet. App. 133a, 152a. PFCs are a family of more than 9,000 chemicals[1] that are chemically engineered to withstand degradation and

[1] EPA, *PFAS Master List of PFAS Substances*, CompTox Chemicals Dashboard, https://comptox.epa.gov/dashboard/chemical_lists/pfasmaster (last visited Dec. 4, 2020). PFCs are now commonly referred to as per- and polyfluoroalkyl substances or "PFAS."

ensure their resistant qualities are long-lasting. PFCs have been, and continue to be, supplied to and used by Dalton carpet manufacturers. Pet. App. 133a, 152a. Dalton chemical suppliers and carpet manufacturers discharge their post-manufacturing wastewater into Dalton Utilities' wastewater treatment system where it is subsequently applied onto a land application sprayfield ("LAS") bordered by the Conasauga River, a tributary to the Coosa River. Pet. App. 139a, 158. The Environmental Protection Agency concluded that the two most well-known PFCs, Perfluorooctanoic acid ("PFOA") and Perfluorooctanesulfonic acid ("PFOS"), are being released into the environment through Dalton Utilities' wastewater treatment system and identified the industrial wastewater from Dalton's carpet manufacturers as the source. Pet. App. 22a.

Since 2008, several studies have confirmed that concentrations of PFOA and PFOS downstream of the LAS exceeded the EPA's 2009 provisional lifetime health advisory levels of 0.4 parts per billion ("ppb") for PFOA and 0.2 ppb for PFOS. Pet. App. 86a. Since 2009, Dalton Utilities has tested its industrial users' wastewater for PFCs.[2] Georgia's Environmental Protection Division has also conducted intermittent PFC sampling and, earlier this year, announced that it will conduct additional sampling of public drinking

[2] An overview of the contamination of PFCs in Dalton is available at: *Release of Perflourochemicals (PFCs) from the Dalton Utilities Loopers Bend Wastewater Treatment Plant (Dalton Utilities) in Dalton, Georgia*, EPA (Feb. 20, 2016), https://archive.epa.gov/pesticides/region4/water/documents/web/html/pfcdaltonindex.html.

water systems in the Coosa watershed, which supplies the Coosa River, in 2021.

While effective at imparting resistance, PFCs can degrade into PFOA and PFOS and do not readily breakdown in the environment but, instead, accumulate over years in soil, sediment, and water. Pet. App. 133a, 139a-140a, 152a, 158a-159a. PFCs are also readily absorbed into the body and increase in concentration with repeated exposure. *Id.* Numerous health risks are associated with exposure to PFOA and PFOS which is why, in 2002, the EPA moved to limit their future manufacture and use under the Toxic Substances Control Act.[3] Pet. App. 141a, 160a. In May 2016, the EPA issued a drinking water health advisory for PFOA and PFOS, warning that, in order to avoid potential health problems, the combined concentration of these chemicals in drinking water should not exceed 0.07 ppb. Pet. App. 141a, 161a.

Shortly thereafter, Respondents discovered that concentrations in their finished water exceeded this level, which prompted them to take remedial measures that include, but are not limited to, installing advanced filtration systems capable of reducing PFOA and PFOS concentrations to below the advisory level. Pet. App. 134a, 153a. To date, PFCs contaminate Respondents' water intakes. This contamination will not cease

[3] An overview of EPA actions concerning PFCs is available at: *Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) under TSCA*, EPA (Dec. 4, 2020), https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfas.

because Dalton-area manufacturers continue to use newer formulations of PFCs that, according to some experts, still pose human health concerns.[4]

II. Proceedings Below

In 2016 and 2017, Respondents sued numerous carpet manufacturers and chemical suppliers who used PFCs for contaminating their drinking water source. Pet. App. 130a, 149a. Both Respondents asserted claims of negligence, wantonness, nuisance, and trespass and sought injunctive relief and damages. Pet. App. 132a, 152a. The trial courts denied Petitioners' motions to dismiss for lack of personal jurisdiction, holding that Respondents' allegations established that Petitioners' "act of causing the chemicals to enter the Conasauga River is an act directed at Alabama." Pet. App. 60a, 87a. The trial courts also concluded that because Respondents alleged that Defendants did not properly dispose of PFCs by sending them to Dalton Utilities knowing they resisted treatment and degradation, the tortious

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[4] *See* Kabadi et al., *Characterizing biopersistence potential of the metabolite 5:3 fluorotelomer carboxylic acid after repeated oral exposure to the 6:2 fluorotelomer alcohol*, Toxicology & Applied Pharmacology, Feb. 2020, at 1, https://www.sciencedirect.com/science/article/abs/pii/S0041008X20300028?via%3Dihub; Rice et al., *Comparative analysis of the toxicological databases for 6:2 fluorotelomer alcohol (6:2 FTOH) and perfluorohexanoic acid (PFHxA)*, Food & Chemical Toxicology, Apr. 2020, at 1, https://www.sciencedirect.com/science/article/abs/pii/S0278691520300983?via%3Dihub; *see also* U.S. Dep't of Health & Human Servs., *Per- and Polyfluoroalkyl Substances (PFAS)*, Nat'l Toxicology Program (Sept. 2, 2020), https://ntp.niehs.nih.gov/whatwestudy/topics/pfas/index.html.

conduct was not the "unilateral activity of another party or a third person." Pet. App. 60a, 89a.

Petitioners challenged these rulings by filing petitions for writs of mandamus to the Alabama Supreme Court. Pet. App. 4a-5a. The Alabama Supreme Court denied the mandamus petitions on December 20, 2019, with a 4-3 plurality opinion where three Justices concurred in the opinion's reasoning and one Justice concurred in the result only without providing a concurring opinion. Pet. App. 45a. The plurality recognized this case was one of first impression and looked to three factually similar interstate water pollution cases finding specific jurisdiction over a foreign polluter of in-state waterways. Pet. App. 30a. The plurality found the analyses "persuasive and particularly applicable to the present case." Pet. App. 38a.

The plurality cited Alabama's long-arm statute, Ala. R. Civ. P. 4.2, and concluded that the Petitioners' out-of-state tort was committed in Alabama because the injury occurred in Alabama. Pet. App. 39a-40a. It referenced EPA reports and publicly available studies which established that Petitioners knew for years that PFCs they discharged were surviving treatment by Dalton Utilities and polluting the Conasauga River, which is a tributary to the Coosa River and flows only into Alabama. Pet. App. 41a. The plurality then examined the Petitioners' contacts with Alabama, citing that the purposeful availment prong could be satisfied by establishing that the Petitioners "purposefully directed" their actions at Alabama. Pet.

App. 40a. The plurality then analogized to the three interstate water pollution cases,[5] holding that

> [B]y virtue of knowingly discharging PFC-containing chemicals in their industrial wastewater, knowing that the PFCs would end up in the Coosa River, which flows into Alabama, the [Petitioners], according to [the Respondents'] allegations, purposefully directed their actions at Alabama. Such alleged conduct on the part of the [Petitioners] in relation to Alabama is not random, fortuitous, or attenuated, *Burger King*, 471 U.S. at 486, 105 S. Ct. at 2189, regardless of the distance the chemicals traveled to reach the sites in Alabama where the injuries occurred. Furthermore, as noted above, physical entry into the forum through "goods, mail, or some other means" is relevant to the specific-personal-jurisdiction analysis. *Walden*, 571 U.S. at 285, 134 S. Ct. at 1122. Under this factual scenario, the physical entry of the pollution into Alabama's water source creates the relationship among the [Petitioners], Alabama, and the actions.

Pet. App. 41a-42a.

The plurality expressly rejected that "foreseeability alone" was sufficient to establish specific personal

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[5] *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018), *cert. denied sub nom. Teck Metals, Ltd. v. Confederated Tribes of the Colville Reservation*, 139 S. Ct. 2693 (2019); *Triad Hunter, LLC v. Eagle Natrium, LLC*, 132 N.E. 3d 1272 (Ohio 2019); *Horne v. Mobile Area Water & Sewer Sys.*, 897 So. 2d 972 (Miss. 2004).

jurisdiction and held that, pursuant to Respondents' allegations and based on publicly available evidence, the Petitioners "knowingly and directly aimed tortious actions at Alabama." Pet. App. 42a. The plurality found that Petitioners' continued discharge of PFCs to Dalton Utilities, despite knowing they survived treatment, was "expressly and directly aimed" not only at Dalton Utilities in Georgia, "but also at Alabama through the continuing flow of the polluted wastewater from the [Petitioners'] plants, into the Coosa River and its tributaries, and ultimately to the sites in Alabama where the injuries occurred." Pet. App. 42a. The plurality rejected Petitioners' argument that Dalton Utilities was an intervening cause because Respondents alleged that its inability to remove PFCs from Petitioners' wastewater was foreseeable to Petitioners. Pet. App. 29a.

The plurality then held that exercising jurisdiction in Alabama did not violate the due process clause because Petitioners would sustain no burden of litigating between 70 and 90 miles away in Alabama. Pet. App. 42a-43a. The plurality also noted that Alabama has a "significant and 'manifest interest' in providing its residents" with a forum to redress injuries caused by foreign entities. Pet. App. 43a. Recognizing the unique nature of interstate water pollution cases, it acknowledged that "there would be no fair play and no substantial justice if [Petitioners] could avoid suit in the place where [they are alleged to have] deliberately sent [their] toxic waste." Pet. App. 44a (citing *Pakootas*, 905 F.3d at 578).

On March 27, 2020, the Alabama Supreme Court denied Petitioners' application for rehearing. Pet. App. 126a, 128a.

THE PETITION SHOULD BE DENIED

I. No Conflict Exists for this Court to Resolve.

Petitioners claim the Alabama Supreme Court's decision deepens an existing split between courts as to whether mere knowledge that out-of-state conduct can cause in-state effects confers specific personal jurisdiction. No such split exists, however, because none of the courts in any of the cases cited by either Petitioners or the Alabama Supreme Court held that mere knowledge was sufficient. To the contrary, the courts expressly refuted that position and, with regard to all but one of Petitioners' cases, found that the foreign defendant did not engage in any purposeful conduct directed at the forum state to satisfy the "effects test" and warrant specific personal jurisdiction. The Alabama Supreme Court and the interstate water pollution cases it cited each premised their finding of specific personal jurisdiction on the foreign defendants' purposeful direction of continuing conduct towards the forum state despite knowing that conduct would cause injury there. That continuous foreign conduct constituted more than just "mere knowledge," thereby satisfying *Calder's* effects test and following *Walden's* requirement that the foreign defendants' conduct create the necessary contacts with

the forum state. Petitioners misconstrue the decision below and the interstate water pollution cases cited therein, then compare them to Petitioners' factually distinguishable cases to create the appearance of a conflict.

This lack of conflict is even more glaring because the facts of Petitioners' cases are distinguishable from Respondents' cases, which all involve a foreign polluter who discharged a substance into a body of water flowing one direction into only the adjoining forum. Tellingly, Petitioners failed to cite any factually similar interstate water pollution case that rejected specific personal jurisdiction under these unique facts because no such case exists. There is no proof that the courts in Petitioners' cases would rule any differently on an interstate water pollution case. Instead, Petitioners merely speculate as to the existence and deepening of a conflict to garner this Court's attention.

A. The Alabama Supreme Court correctly relied on factually similar interstate water pollution cases finding specific jurisdiction over foreign polluters who knowingly pollute in-state waterways.

Petitioners first attempt to create a conflict by citing cases involving completely different facts under which the courts found specific personal jurisdiction was improper. The unique facts of each case, however, drive the personal jurisdiction analysis. *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 92 (1978) ("the 'minimum

contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." (internal citation omitted)). The Alabama Supreme Court's ruling differs from the outcomes in the cases cited by Petitioners because the facts in this case are distinguishable, not because the Alabama Supreme Court ignored this Court's precedent.

The Alabama Supreme Court correctly noted the unique facts presented a case of first impression and reviewed other factually similar interstate water pollution cases involving personal jurisdiction. It first discussed one case where this Court agreed with the Seventh Circuit's holding that Illinois' long-arm statute authorized the exercise of personal jurisdiction over the City of Milwaukee, which was alleged to have discharged sewage into Lake Michigan that "sometimes carried into Illinois waters." *Illinois v. City of Milwaukee*, 599 F.2d 151, 156 (7th Cir. 1979), *vacated and remanded sub nom. City of Milwaukee v. Illinois*, 451 U.S. 304, n. 5 (1981).[6] The Mississippi Supreme Court (*Horne*), the Ninth Circuit (*Pakootas*), and the Ohio Supreme Court (*Triad Hunter*) each found that the foreign defendants' conduct was purposefully directed and/or expressly aimed at the forum state because they knew their conduct would cause injury in the forum state, yet engaged in that conduct anyway.

[6] Although this Court vacated this decision, it specifically recognized that "personal jurisdiction was properly exercised and venue is also proper." 451 U.S. 304, n. 5.

See Pakootas, 905 F.3d at 577-78; *Triad Hunter*, 132 N.E. 3d at 1272; *Horne*, 897 So. 2d at 979.

Although *Horne* was decided before *Walden*, the reasoning is still instructive, and the outcome would be the same today. The Mississippi Supreme Court held that it could exercise personal jurisdiction over an Alabama city and water board which opened its dam and released a significant amount of water from a reservoir that flooded property in Mississippi. *Horne*, 897 So. 2d at 979. Applying the state's long-arm statute, the Court concluded that a foreign tort causing injury in Mississippi was committed in the state because an injury is a necessary component of the tort which is where the property was harmed. *Id.* at 977. The court held that the foreign defendants purposefully directed their activities toward Mississippi because they knew that opening the dam would flood property owners in the state. *Id.* at 979. It also noted Mississippi's interest in adjudicating the dispute where its residents were injured, the damaged property was located, and the defendants' continual release of water would impact Mississippi residents in the future. *Id.* at 981.

In *Pakootas*, the plaintiff sued a Canadian smelter in federal court in Washington for disposing slag into the Columbia River in Canada that flowed into the State of Washington where the toxic chemicals contaminated the environment. Rejecting the defendant's claim that its waste disposal activities were aimed only at the Columbia River in Canada, the Ninth Circuit found that the defendant's continual

discharge of waste into the Columbia River for years was expressly aimed at the State of Washington. *Pakootas*, 905 F.3d at 577-78. Holding otherwise, the court reasoned, would allow the defendant to avoid suit which would result in "no fair play and no substantial justice." *Id.* at 578. Notably, this Court denied defendant Teck Cominco Metals, Ltd.'s petition for writ of certiorari, which asserted the same arguments that Petitioners now make regarding the Ninth Circuit's supposed departure from *Walden* and the existence of a circuit split by citing two of the cases Petitioners now claim illustrate a conflict (*Waldman* and *Ariel*). *See Teck Metals Ltd. v. The Confederated Tribes of the Colville Reservation*, 139 S. Ct. 2693 (2019); Petition for Writ of Certiorari, *Teck Metals Ltd. v. The Confederated Tribes of the Colville Reservation*, No. 18-1160, 2019 WL 1080892, at *1, *20-30 (U.S. Mar. 4, 2019). This Court should again reject these arguments which were made just last year.

The Ohio Supreme Court followed both the Mississippi Supreme Court's and the Ninth Circuit's reasoning and found that personal jurisdiction was proper over a chemical manufacturing plant that engaged in solution mining in West Virginia which damaged the plaintiff's infrastructure and subsurface located in Ohio. *Triad Hunter*, 132 N.E. 3d at 1285-86. The Court recognized the unique nature of interstate intentional torts including trespass, reasoning that "[c]ontinuing to release a substance while knowing it travels to a jurisdiction is considered purposeful

direction of efforts toward that jurisdiction." *Id.* at 1285.

The Alabama Supreme Court found these three cases "persuasive and particularly" applicable and similarly held that continually engaging in conduct known to cause injury in the forum state constitutes purposeful direction towards that forum thereby satisfying specific personal jurisdiction. Pet. App. 41a-42a.

B. The Alabama Supreme Court's rejection of a foreseeability standard is consistent with the holdings cited by Petitioners.

Petitioners also misconstrue the Alabama Supreme Court's holding, and the cases it relied upon, claiming they held that mere knowledge that foreign conduct would impact the forum is sufficient to confer specific personal jurisdiction which runs afoul of *Walden*. The decision below expressly rejected that position three times and correctly held that purposefully directing actions at Alabama was necessary to find personal jurisdiction. *See* Pet. App. 36a ("Like Alabama courts, the Ninth Circuit requires more than foreseeability."); Pet. App. 30a ("[Respondents] appear to argue that foreseeability alone is enough under this particular water-pollution scenario. Adopting such an approach, however, would start us on a slippery slope."); Pet. App. 42a ("We reiterate that foreseeability alone is insufficient to confer specific personal jurisdiction."). The Alabama Supreme Court found that Petitioners directed their

discharge of PFCs towards Alabama because they continued to discharge those chemicals despite knowing they survived treatment by Dalton Utilities, migrated from the LAS, and contaminated the Conasauga River which flows into the Coosa River into only Alabama.

Both *Pakootas* and *Triad Hunter* also rejected that foreseeability of in-state effects alone was sufficient to establish personal jurisdiction over a foreign defendant. *Pakootas*, 905 F.3d at 577 ("Express aiming is an ill-defined concept that we have taken to mean 'something more' than 'a foreign act with foreseeable effects in the forum state.'" (quoting *Bancroft Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)); *Triad Hunter*, 132 N.E. 3d at 1284 (citations omitted) (noting that "mere foreseeability of causing an injury is not sufficient to establish minimum contacts"). Both courts and *Horne* found that the foreign defendants engaged in purposeful conduct that created sufficient minimum contacts between the defendants and the forum:

> We have no difficulty concluding that Teck expressly aimed its waste at the State of Washington. The district court found ample evidence that Teck's leadership knew the Columbia River carried waste away from the smelter, and much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day.
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> *Pakootas*, 905 F.3d at 577-78.

> [T]he City and the Board 'purposefully directed' their activities toward Mississippi property owners, by opening the spillway to its maximum capacity, as shown by the following deposition testimony [of a Board employee]. . . . There is no question that the City and Board knew the water would flow into Mississippi [based on deposition testimony of an engineer].

Horne, 897 So. 2d at 979-80.

Citing *Pakootas* and *Horne*, the Ohio Supreme Court in *Triad Hunter* found that "[c]ontinuing to release a substance while knowing it travels to a jurisdiction is considered purposeful direction of efforts toward that jurisdiction." *Triad Hunter, LLC*, 132 N.E. 3d at 1285 (citations omitted). The courts in *Pakootas* and *Triad Hunter* also noted that the purposeful availment prong of the minimum contacts analysis can be satisfied if the foreign defendant "purposefully directed" its efforts to another state. *Pakootas*, 905 F.3d at 577, *Triad Hunter*, 132 N.E. 3d at 1283. Analogizing to the unique facts of these water pollution cases, the Alabama Supreme Court likewise held that the Petitioners purposefully directed their actions at Alabama. Pet. App. 41a.

Petitioners seize on the Alabama Supreme Court's use of the word "knowledge" to conflate it with foreseeability which, as discussed above, is insufficient to confer specific personal jurisdiction. The language used by the Alabama Supreme Court, Ohio Supreme Court, and the Ninth Circuit show that more than just

knowledge is required. Instead, continuing to engage in tortious conduct out-of-state despite knowing it would impact the forum state evinces a purposeful direction of tortious conduct to the forum state rather than mere untargeted negligence. This is a logical and fair result given that contaminated water flows in only one direction and, in all the above cases, to one state. Petitioners simply disagree with the outcomes reached by these courts under the unique facts.

Petitioners' cases from the Second, Seventh, and Tenth Circuits and Supreme Court of Texas likewise acknowledged that more than mere knowledge of an injury in the forum state was required. Notably, none of these cases involve interstate water pollution. Petitioners' cases held that the suit-related conduct committed outside the forum state (or the United States) was not aimed at the forum states and, consequently, did not satisfy *Calder's* "effects test." *See Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018) (alleged LIBOR manipulation of the U.S. Dollar in London was not aimed at California even if aimed at the United States as a whole); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 337-38 (2d Cir. 2016) (indiscriminate violent terror attacks committed in Israel were not aimed at the U.S. but at various religions and nationalities); *Ariel Invs., LLC v. Ariel Cap. Advisors, LLC*, 881 F.3d 520, 520-23 (7th Cir. 2018) (Florida-based start-up investment firm sued for trademark infringement by using the name of a well-known Illinois-based firm to allegedly poach customers did not aim its conduct at Illinois or

the plaintiff because the firm was named after the owner's daughter, not the plaintiff); *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 916-17 (10th Cir. 2017) (Alabama engine manufacturer's geographically-neutral website providing online access to engine manuals to all paying subscribers, and later to the public for free, did not purposefully direct its conduct at Colorado).[7]

The Texas Supreme Court's holding in *TV Azteca v. Ruiz* is slightly different from the other cases cited by Petitioners because it held that the Mexican-based broadcasters and television producer who were sued for defamation by a Texas resident were subject to personal jurisdiction in Texas. 490 S.W.3d 29, 49 (Tex. 2016). The court found that Mexican TV signals alone which "involuntarily strayed" into Texas as a result of "signal spill-over," which occurred naturally in Mexican broadcasts, did not establish that the defendants intended to serve the Texas market. *TV Azteca*, 490 S.W.3d at 49. But that intent was evidenced by the defendants' promotions, marketing, and distribution efforts in Texas which, the court concluded, established that the defendants purposefully availed themselves of the benefits of Texas laws. *Id.* at 52. The court required

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[7] Petitioners misleadingly attribute the plaintiff's ***allegations*** in *Old Republic* that the defendant "knowingly sold" its publications to the plaintiff and knew they would be used by the plaintiff "nowhere else but Colorado" to the Court's findings to support their argument that even that conduct did not establish purposeful direction under the *Calder* "effects test." The Court refuted that allegation based on the evidence before the court. *Old Republic*, 877 F.3d at 917-18.

evidence of intent because the nature of a defamation claim requires "an intent or purpose to serve the market in the forum State." *Id.* at 49 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.)). Respondents here asserted no such claim which makes this intent element irrelevant to the case before this Court.

Petitioners' contention that a plaintiff must also provide "evidence of additional conduct" to serve the market of the forum state is also irrelevant because the stream of commerce theory is inapplicable to the instant case. The Texas Supreme Court conducted this analysis to determine whether the defendants "purposefully availed themselves of the benefits of conducting activities ***in*** the state" to establish that they financially benefited from serving the Texas market. *Id.* at 42-43 (emphasis added). This analysis is not only irrelevant, it is impossible to conduct because Respondents cannot measure Petitioners' efforts in Alabama to market and financially benefit from the pollution of waters in the state. This is precisely why *Calder's* effects test looks at out-of-state conduct that impacts the forum state and, in the context of interstate water pollution, why the purposeful direction of pollutants to a forum state satisfies the purposeful availment prong.

The tortious conduct at issue in *Charles Schwab Corp.* and *Waldman* were not aimed at any particular forum state or country but, instead, were aimed at the world economy and the global body politic, respectively. The same holdings were reached in *Ariel* and *Old*

Republic, which ruled that the suit-related conduct was not directed at the forum state but, if anything, was directed at where plaintiff Ariel might have obtained customers due to its name change or anywhere defendant Continental Motors might have exploited the market and engaged in an ongoing course of dealing. These instances of out-of-state conduct aimed at nowhere in particular are drastically different than the facts before this Court where Petitioners continually discharged PFCs knowing they would migrate to tributaries of the Coosa River which flows only one direction into Alabama. This conduct is also more direct than inadvertently straying TV signals that spill over to the neighboring state.

Petitioners' cases are factually distinguishable from Respondents' cases and, consequently, must be considered in the jurisdictional analysis. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985) (rejecting "talismanic jurisdictional formulas"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (deciding the standard as "flexible"). No conflict exists because all the courts noted above agreed that more than mere knowledge of an in-state injury is required to confer jurisdiction. The differences in outcomes are due to different facts, not a misapplication of this Court's precedent. The Alabama Supreme Court's reasoning is consistent with every interstate water pollution case that has examined specific personal jurisdiction. Petitioners are asking this Court to overturn the decision below which will actually create a conflict. This Court should refuse this request.

II. This Case is not a Proper Vehicle.

This Court limits its review to petitions involving issues that are important "to the public as distinguished from that of the parties" involved. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923)). The petition involves no issue of national importance because the question before this Court is narrow and affects only Respondents and Petitioners. While Petitioners claim their broadly and incorrectly-posed question presented is recurring, the unique facts of this case, which drive the personal jurisdiction analysis, are not. The Alabama Supreme Court's plurality opinion, as well as those cited therein, followed this Court's precedent and simply reached a different conclusion due to the factual differences of interstate water pollution cases. Indeed, the fact that there are only a handful of decisions involving personal jurisdiction in this context, none of which found personal jurisdiction lacking, highlights how infrequently these unique cases arise and dampen any supposed "rippling" effect should this Court deny the petition. This Court should wait for a case that presents an actual split of authority involving similar facts.

First, as a plurality opinion, the decision below binds only the parties before it and is persuasive only to cases involving the same unique interstate water pollution facts. The Alabama Supreme Court reached a 4-3 plurality opinion, with three Justices concurring in the opinion and one Justice concurring in the result

only without providing a concurring opinion. Pet. App. 45a. Two of the Justices recused themselves, meaning that three of the nine Alabama Supreme Court Justices ultimately concurred in the reasoning underlying the plurality's decision finding personal jurisdiction was proper over the Petitioners.

This Court has long recognized that, while a plurality opinion is a conclusive determination as to the parties of the case, the precedential value of a plurality opinion is questionable in cases before both this Court and inferior courts. *See Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910); *United States v. Pink*, 315 U.S. 203, 216 (1942). This, coupled with the unique facts of this case which necessitate a "flexible" jurisdictional analysis, limits the applicability of the Alabama Supreme Court's decision to only the parties in this petition. There is no legitimate concern that the court's reasoning would be applied to cases nationwide, let alone Alabama. This Court recently denied a petition seeking review of a plurality opinion issued by the Alabama Supreme Court concerning specific personal jurisdiction. *See Hinrichs v. Gen. Motors of Can., Ltd.*, 137 S. Ct. 2291 (2017). The Alabama Supreme Court's plurality decision likewise does not warrant this Court's review.

Second, the applicability of the Alabama Supreme Court's plurality decision is further limited because it involves a state court's interpretation of a state statute, which this Court has long been reluctant to disturb absent "extreme circumstances" which are not present here. *See Bush v. Gore*, 531 U.S. 98, 112 (2000)

(Rehnquist, C.J., concurring) ("In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances.") (citations omitted); *Murdock v. City of Memphis*, 20 Wall. 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly."). The decision below is premised on Alabama state law. The Alabama Supreme Court analyzed and applied the state's long-arm statute to the unique facts in finding that personal jurisdiction existed. *See* Pet. App. 39a-40a. It examined the prior version of the state's long-arm statute, which contained a laundry-list of examples of conduct that would subject a foreign defendant to personal jurisdiction in Alabama, as well as the legislative history and committee comments before concluding that the current version of Ala. R. Civ. P. 4.2 includes out-of-state torts. Pet. App. 39a. This analysis

is unique to only a certain subset of cases arising in Alabama.

Similarly, the decisions issued by the Mississippi Supreme Court, Ohio Supreme Court, and the Seventh Circuit (applying Illinois law) all applied their respective long-arm statutes in determining whether the forum state could exercise jurisdiction over the out-of-state polluting defendant. *See Horne*, 897 So.2d at 976-81; *Triad Hunter*, 132 N.E. 3d at 1281; *Illinois*, 599 F.2d at 155-56. Although application of a state's long-arm statute must comport with the due process requirements of the United States Constitution, each state's long-arm statute is different, and courts must take the facts of each particular case into account. This should further dissuade this Court from granting the petition.

Third, just as the decision below did not create an "expansive" theory of personal jurisdiction or contribute to an illusory split of authority, it also will not result in a slippery slope of unpredictability over due process limits. Finding personal jurisdiction over a foreign polluter for continually engaging in conduct that contaminates the water of a river flowing in one direction into one state does not "open up the flood gates" of litigation to anywhere a plaintiff may wish to file suit. The directional flow of a waterway is one of, if not the, most predictable (and untamable) metrics used to illustrate one's intent to impact a downstream forum. Fortune 500 manufacturers, like Petitioners, who use persistent and toxic chemicals cannot feign ignorance as to where those chemicals may impact the

environment and potentially give rise to litigation. Plaintiffs cannot artfully plead around mother nature.

Finally, Alabama courts adjudicating these cases do not present any "acute federalism concerns" that could interfere with Georgia's sovereignty. Courts commonly apply the law of another state to determine liability and afford a remedy for a forum state resident that was injured by out-of-state conduct. *Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it . . . [including] maintenance of a nuisance. . . ."). A forum state's application of its own law to remedy multistate activity that impacts the state is neither arbitrary nor fundamentally unfair. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Such rank speculation should not be entertained by this Court.

III. The Alabama Supreme Court Correctly Applied *Walden* and *Calder*

Petitioners mainly disagree with the result reached in the decision below which allegedly "ignored" this Court's precedent that specific personal jurisdiction must be premised on a defendant's actions, not those of a third party. They urge this Court to summarily reverse the decision because Petitioners' contacts with Alabama (the discharge of PFC-laden wastewater to Dalton Utilities) were premised solely on Dalton Utilities' acceptance and disposal of the

wastewater on the LAS. Petitioners dispute that their alleged knowledge that PFCs discharged to Dalton Utilities in Georgia would impact Alabama sufficiently connects them to Alabama because they did not intend or consciously desire that result and, consequently, did not "expressly aim" their conduct at Alabama.

Petitioners misconstrue the holding of the decision below which alone rebuts their contentions. Petitioners also overlook the similarities between this case and *Calder* and *Walden*, which further bolsters the Alabama Supreme Court's proper application of the "effects test." The decision below properly analyzed the unique facts of this case and held that, under Alabama's long-arm statute, Petitioners' conduct constituted a purposeful direction of tortious activities towards Alabama, which satisfied both the purposeful availment requirement of the minimum contacts analysis and the "effects test" used in *Calder* and later refined in *Walden*. Pet. App. 40a-42a.

In *Calder*, a professional entertainer who lived in California sued a Florida-based journalist and editor in California state court for publishing a libelous article in the *National Enquirer* which had its largest circulation in California. *Calder v. Jones*, 465 U.S. 783 (1983). This Court found that personal jurisdiction in California was proper because California was the focal point of both the story and the harm suffered from the "effects" of the defendants' conduct in Florida. *Id.* at 789. It reasoned that the defendants' use of California sources and the circulation of the article in California sufficiently connected the defendants to California, not

just the plaintiff, which is where the "brunt" of the reputational impact occurred. *Id.*

This Court elaborated on the *Calder* "effects test" in *Walden* where a Nevada resident airline passenger sued a Georgia police officer who seized his cash at an airport in Atlanta during a return trip to Nevada. *Walden v. Fiore*, 571 U.S. 277 (2014). The plaintiff filed suit in Nevada and alleged that the defendant helped draft a false and misleading affidavit to justify the seizure. This Court reversed the Ninth Circuit's conclusion that jurisdiction was proper because the defendant "expressly aimed" his submission of the affidavit at Nevada with knowledge that it would affect the plaintiff there. *Id.* at 282. While a physical presence in the forum is not required, this Court acknowledged the minimum contacts analysis looks at a defendant's contacts with the forum state itself and requires that those contacts not be "random, fortuitous, or attenuated." *Id.* at 284-85. This Court emphasized *Calder*'s holding that the "mere injury" to a forum resident is insufficient; instead, the key analysis is whether a defendant's actions "form[ ] a contact with the forum State . . . [that] connects him to the forum in a meaningful way." *Id.* at 290. Those connections were lacking because the defendant in *Walden* "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." *Id.* at 289.

The decision below complies with *Walden* and *Calder*. As discussed above, the Alabama Supreme Court, recognizing that more than knowledge of an in-state injury is required, held that Petitioners

"knowingly and directly aimed tortious actions at Alabama." Pet. App. 42a. The Court found that Petitioners' alleged continual discharge of PFC-laden wastewater to Dalton Utilities, despite knowing they would persist treatment, was "expressly and directly aimed . . . not only at Dalton Utilities or the LAS in Georgia but also at Alabama."[8] *Id.* The physical entry of Petitioners' pollution, the Court reasoned, created the "relationship among the [Petitioners], Alabama, and the actions", *id.*, and is not "random, fortuitous, or attenuated . . . regardless of the distance the chemicals traveled to reach the sites in Alabama where the injuries occurred." Pet. App. 41a-42a. Petitioners' conduct was intentional[9] and further cements their

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[8] Notably, other courts have found jurisdiction based on a foreign defendant's own contacts despite the actions of third parties. *See In re Gold King Mine Release in San Juan Cty., Colo., on Aug. 5, 2015*, No. 1:18-MD-02824-WJ, 2019 WL 1369349, at *1-2 (D.N.M. Mar. 26, 2019) (finding personal jurisdiction over Colorado mine owners which, pursuant to an EPA consent decree, impounded water in Colorado that eventually escaped due to the EPA and its contractors' conduct and contaminated water and land in New Mexico); *Violet v. Picillo*, 613 F.Supp. 1563 (D. R.I. 1985) (nonresident generators of hazardous waste which placed that waste in hands of an intermediary with no reasonable expectation as to where those materials were destined for disposal and with no attempt to specify the location or even the state in which any wastes were disposed, had sufficient minimum contacts with Rhode Island to subject them to personal jurisdiction to recover costs incurred by the state under CERCLA).

[9] "Invasions resulting from the pollution of streams, lakes or surface waters, especially if the pollution is continued for any length of time, are ordinarily intentional since the actor usually knows to a substantial certainty that they will result from the pollution." Restatement (Second) of Torts § 832 (Am. Law. Inst.

connections to Alabama. These findings are in complete agreement with both *Walden* and *Calder*.

Expounding on *Calder*, the *Walden* decision also noted the strength of the connection between the defendant and the effects of the plaintiff's reputational harm felt in California was largely due to the nature of the libel tort. *Walden*, 571 U.S. at 287-88. It reasoned that "because publication to third parties is a necessary element of libel . . . the defendants' intentional tort actually occurred ***in*** California." *Id.* at 288 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984)) ("[t]he tort of libel is generally held to occur wherever the offending material is circulated. Restatement (Second) of Torts § 577A, Comment a (1977))." A similar conclusion was reached in *TV Azteca* where the Texas Supreme Court concluded that the actionable conduct (defamatory broadcasts) which originated in Mexico actually occurred in Texas where they were received, viewed, and caused harm. *TV Azteca*, 490 S.W.3d at 54.

Contrary to Petitioners' claim that the alleged tort in this case occurred in Georgia, the Alabama Supreme Court held that, under Alabama's long-arm statute, Petitioners' tort was committed where the injury occurred – Alabama. Pet. App. 39a-40a. This makes sense given the essence of a nuisance or trespass claim involving polluted water presupposes that an injury will occur some distance away from where the

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1979). Respondents need not show that Petitioners subjectively "intended or consciously desired that result."

polluting activity occurred and does not become actionable until property is impacted. Indeed, liability for nuisance and trespass does not arise when the polluting activity occurs, but only upon the interference with the plaintiff's property interest. *See Borland v. Sanders Lead Co*., 369 So. 2d 523, 529 (Ala. 1979) ("If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies."). Consequently, the interference with or intrusion upon one's land is an indispensable element of both Respondents' nuisance and trespass claims and occurs where the subject property is located. *See* Restatement (Second) of Torts §§ 821B, 821D (Am. Law Inst. 1979) (public nuisance, private nuisance); Restatement (Second) of Torts § 158 (Am. Law Inst. 1965) (trespass). Similar to this Court's conclusion in *Calder* that the tort of libel occurred in California, Petitioners' trespass and nuisance occurred and became actionable in Alabama.

The Alabama Supreme Court followed this Court's precedent and correctly found that Petitioners' continual discharge of PFCs and contamination of the waterways downstream of the LAS into Alabama were sufficient contacts with Alabama.

IV. Staying a Decision on the Petition for Resolution in *Ford* is Unnecessary.

This Court should not stay a decision on this petition until it rules on the petition in *Ford Motor Co.*

v. Montana Eighth Judicial District Court, No. 19-368, which was argued on October 7, 2020. The issue in *Ford*, whether the "arise out of or relate to" prong contains a causation requirement, is not at issue in this petition. *Ford's* impact on this case is further strained because the stream of commerce theory, a central tenet of specific personal jurisdiction in the context of products liability, is also inapplicable because the suit-related activity does not involve the sale of a product. The Alabama Supreme Court correctly noted this key distinction and found the reasoning in the interstate water pollution cases more persuasive under the unique facts of this case. *See* Pet. App. 33a. *Ford* simply has no bearing on this petition.

Even if this Court does agree with Ford and concludes a causation element is required in the minimum contacts analysis, the Alabama Supreme Court already ruled that causation was sufficiently pled in Respondents' complaints. First, Petitioners acknowledged that the Alabama Supreme Court found that Petitioners were the "but-for" cause of Respondents' injuries. Pet. App. 40a, n. 12. The decision below did not dismiss the proximate cause analysis, but instead, stated that the ***cases*** cited by Petitioners were "inapplicable here" because Respondents' allegations are to be construed as true at this stage in the litigation. Pet. App. 29a. The Alabama Supreme Court concluded that, based on Respondents' allegations, Dalton Utilities' inability to remove PFCs was foreseeable to Petitioners and, consequently, was not an intervening cause that breaks the chain of

causation. *Id.* Conduct that foreseeably causes harm is the proximate cause of that harm. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1548-49 (2017). The Alabama Supreme Court found that Petitioners were both the "but-for" and proximate cause of the alleged harm. Any ruling in *Ford* will not impact the underlying decision.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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